The CDPP provides the following responses to the questions taken on notice at the hearing.

Page 13:

The document referred to was tabled by Mr Carter at the end of the hearing (see page 19 of the transcript, Mr Carter: Senator I mentioned earlier that I had some further information in relation to those earlier sentences. I am happy to table a document in that regard if that would be of assistance to the committee.”). A further copy of that document is attached.

Page 15-16

The CDPP is aware of the following judgments since 1 January 2011 where comments critical of mandatory minimums have been made by judicial officers in the course of the judgment:

R V KARIM NSW DISTRICT COURT 27 07 2011
Per Conlon J: “Section 233C of the Migration Act provides for a mandatory penalty in respect of the present offence. It provides that he Court must impose a sentence of imprisonment of at least five years for a first offence and must set a non-parole period of at least three years. Accordingly the Court’s usual sentencing discretion has been significantly diminished. In my view the present case provides a glaring example of how mandatory penalties can sometimes prohibit a court in delivering a fair and just result and a sentence, ‘that is of severity appropriate in all the circumstances of the case’. If I was to apply the usual sentencing principles to the present balancing exercise, I would have imposed a non-parole period (minimum term) of about eighteen months. However, the provisions of s233C make it unnecessary to further consider the matter. Of course the courts could be faced with factual circumstances requiring the imposition of the mandatory minimum term or indeed, longer. It is simply my considered view that in respect of this offender, this is not the case … I have little doubt that had mandatory minimum sentence provisions not applied, the present matter would most likely to have resolved by way of a plea saving much time and expense.”

R V AMBO [2011] NSWDC 182 (25 11 2011)
Per Knox J: “It is difficult to see what meaning should be given to the word 'mandatory' specifically inserted into the legislation other than that no sentencing discretion is contemplated by the mandatory provisions of the Parliament to impose a sentence below the minimum of three years imprisonment. I am clearly bound to apply the clear and customary intention the word 'mandatory' in the Migration Act. How a sentence can be reduced below that and still be consistent with the legislation is unclear to me - nor how judicial sentencing discretion can be exercised to reach any different minimum penalty. It is difficult to see how that mandatory minimum requirement can be reconciled with the duty imposed by the Crimes Act to deliver a sentence which is 'of a severity appropriate in all the circumstances of the offence': section 16A(2) Crimes Act (Cth) 1914.
What value there is in having judges determine matters when there is a pre-determined legislatively imposed mandatory minimum penalty is for others to determine. I agree with respect with the comments of Mildren J of the Northern Territory Supreme Court in Trenerry v Bradley referred to by Kelly J in R v Dokeng that ‘...prescribed minimum mandatory sentencing provisions are the very antithesis of just sentencing.' Nevertheless, I am obliged to follow the law as it is. In this case, given the structure of the legislation and the provisions of section 16A of the Crimes Act , the appropriate sentence is the minimum contemplated in the legislation, namely, one of three years imprisonment. “

R V NAFI - NT SUPREME COURT 19 05 2011
Per Kelly J: " … taking into account all of those matters which are set out in s 16A(2), I would not consider it appropriate to hand down a sentence anywhere near as severe as the mandatory minimum sentence of eight years imprisonment nor would I consider it appropriate to fix a non-parole period as long as five years. Such a sentence is completely out of kilter with sentences handed down in this Court for offences of the same or higher maximum sentences involving far greater moral culpability including violence causing serious harm to victims.

As his Honour, Mildren J, said in Trenerry v Bradley (1997) 6 NTLR 175 at 187:

> "Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a Court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case."

This is such a case. I am compelled by the legislation to hand down a sentence which is harsher than a just sentence arrived at on the application of longstanding sentencing principles applied by the Courts and which have been applied by those Courts for the protection of society and of the individual. I have no choice.

You will be convicted and sentenced to imprisonment for eight years commencing on 15 June 2010. I fix a non-parole period of five years. Had it not been for the mandatory minimum sentencing regime, taking into account the maximum penalty prescribed for this offence and the factors I have already set out I would have considered an appropriate penalty to have been a term of imprisonment for three years with a non-parole period of 18 months. I therefore recommend that the Commonwealth Attorney-General exercise his prerogative to extend mercy to you, Mr Nafi, after you have served 18 months in prison. "

R V MAHENDRA – NT SUPREME COURT 01 09 2011

Per Blokland J: "While the minimum sentence may well be appropriate for those who organise these voyages and obtain significant sums of money from asylum seekers, and exploit the poverty and vulnerability of subsistence fishermen such as Mr Mahendra, the circumstances of people like Mr Mahendra who themselves are, to a degree, victims of exploitation and a degree of trickery, in my view are disproportionately punished by virtue of the five year sentence … In my view, a sentence proportionate to the criminality would have been, consistent with general sentencing practice, approximately one year to 18 months imprisonment. I am unable to make such an order. Around one year to 18 months would be deserved, and necessary to meet the deterrent ends of sentencing. I acknowledge, also, that Mr Mahendra, although at a lower end offender, this last leg of any voyage between Indonesia and Australia is a vital part of the operation. I fully acknowledge the need for general deterrence, however deterring of poor, uneducated fishermen in Indonesia has not been achieved by mandatory sentences, and at the same time has removed judicial discretion to pass proportionate sentences. Other members of this court have made similar observations. It is important people be deterred from committing this offence, particularly because of the safety issues to all persons, and the understandable concern in the community about that. Unfortunately, the five year sentence I am obliged to impose has an arbitrary element to it, as does most forms of mandatory imprisonment. Australia is a party to the international covenant on civil and political rights.

Article 9.1, in part states that no-one shall be subjected to arbitrary arrest or detention. Assigning a five year sentence of imprisonment, without judicial consideration of the gravity of the offence, in terms of the circumstances of the offending and the offender may, in my view, amount to arbitrary detention. In the usual sense it is understood, it must be arbitrary because it is not a sentence that is a proportional sentence. The court is deprived of the usual function to assess the gravity and, therefore, be able to pass a proportionate sentence. In this particular case it is particularly so because there is a failure to differentiate people in the circumstances of Mr Mahendra, which I have just described, from those who actually orchestrate the offence on a grand scale. Perhaps unlike other cases, in this particular case the court has heard evidence about those persons, and about the money that has changed hands. It is of concern, the sentence that I am about to pass in this case may amount to a contravention of some of the most fundamental and widely accepted principles of international justice. In relation to this particular accused, because I am unable to pass a proportional sentence, but rather am forced to sentence on the arbitrary term of five years, I do request the Federal Minister for Justice and Home Affairs to review this sentence in the light of well accepted sentencing principles and international principles, and consider Mr Mahendra for release in exercise of the prerogative of mercy. I note her Honour Kelly J requested similar action in relation to another offender."

R V FAECK & WARKOR - QLD DISTRICT COURT 08 06 2011

Per Farr AJ: " … I am also of the view that this is a less serious example of such offending than many of the cases that have come before the Courts. Were it not for the statutory minimum period, I have no doubt that a sentence less than five years imprisonment would have been imposed in each of your cases. Taking all those relevant considerations into account has allowed me to arrive at that conclusion but unfortunately for yourselves, the statutory minimum does apply and I must sentence you accordingly. So the order of the Court is, I sentence you to - each of you to five years imprisonment and fix a non-parole period of three years."

R V NASIR & JUFRI – QLD SUPREME COURT 02 12 2011
Per Atkinson J: "233C of the Migration Act, as in force at the time of the offending, imposed a statutory minimum sentence of five years' imprisonment with a non-parole period of three years. A judge sentencing offenders under the Commonwealth law must take account of the matters set out in section 16A of the Crimes Act 1914 (Cth). However, that is qualified in this case by the requirement to impose a statutory minimum sentence because there can be little doubt that were it not for that requirement, the sentence I am obliged to pass upon you would not be in accordance with the requirements of section 16A of
the Crimes Act … … … The serious offenders at whom section 232A of the Migration Act must surely be aimed are those who profit from people smuggling and do it for the purpose of making money rather than people like yourselves who they must know are certain to be caught and who live in such impoverished
circumstances that the small amount of money that you would make from a journey such as this makes it worth taking the risk."

R V HASIM QLD DISTRICT COURT 11 01 2012
Per Martin J: "It has been submitted that penalties for offenders involved in people smuggling must reflect the strong need for general deterrence. The legislature clearly agrees and hence the minimum mandatory penalty. However, there can be no point in imposing heavy penalties if there is not widespread publicity of the penalties in the relevant areas of Indonesia. Commonly, savage penalties are being imposed upon the ignorant who have been simply exploited by organisers. You are one such person. It is obvious that the legislation imposing a minimum mandatory penalty deprives a Court from exercising a full and proper sentencing discretion in cases such as this.:

R V MULYONO - QLD DISTRICT COURT 03 02 2012
Per Martin J: "I have on previous occasions remarked about the inappropriateness of mandatory minimum penalties. Most recently the remarks were made in the matter of the Queen v Hasim. It is unnecessary for me to here repeat those remarks and, indeed, even if I did, it seems to achieve little. Of course, these penalties which are designed to be a deterrent to others have little or no effect unless the fact of these penalties is published to the persons who may bring boatloads to Australia."

A copy of these transcripts are attached.

We are also aware that comments were made about the mandatory minimum penalties by Madgwick A/DCJ in the course of sentencing in the matters of R v Jaru & Sunada (23 September 2011) and R v Koli (1 December 2011), however we have not yet received these transcripts.

We have also attached a copy report from The Australian today concerning remarks made by Judge Griffin in the Brisbane Supreme Court this week.

Page 17

At the Senate Estimates hearing on 14 February 2012, Mr Craigie provided the following answers to questions from Senators in relation to the CDPP's expenditure in respect to people smuggling matters:

Senator BRANDIS: Going back to the other topic, people-smuggling, are you able to identify, in your annual report or otherwise tell us, in each of the years to which we have referred, what has been the cost to the Commonwealth of those prosecutions? I was not able to find it disaggregated in the financial statements appended to your annual report, I must say—not that I am saying it should have been.
Mr Craigie: I think the closest I can come for the time being to answering your question is that we forecast for the full year, this year—
Senator BRANDIS: That is, the financial year?
Mr Craigie: Yes.
Senator BRANDIS: The 2011-12 financial year?
Mr Craigie: Yes—that we will, as far as we can judge these things, having spent $7.64 million, come to something just a shade under $14 million. It looks like $13.99 million at present.
Senator BRANDIS: So the $7.64 million is the outlay so far this financial year since 1 July 2011?
Mr Craigie: Yes—in fact, to 31 January.
Senator BRANDIS: So that is seven months worth of prosecutions. And the figure of $13.99 million is an extrapolation of that figure?
Mr Craigie: That is where we think we are headed—yes.
Senator BRANDIS: Can you give me the end-of-financial-year figure, please, for each year: 2011, 2010 and 2009?
Mr Craigie: I can tell you that for 2010-11 our actual spend was $6,240,519.
Senator BRANDIS: $6.24 million in round figures.
Mr Craigie: For 2009-10, our actual spend was just over $1½ million.
Senator BRANDIS: Please give me the figure more precisely.
Mr Craigie: It was $1,518,199.
Senator BRANDIS: Do we have the 2008-09 figures?
Mr Craigie: No, I am afraid I cannot give you those now.
Senator BRANDIS: As we would expect, the number of prosecutions has increased tenfold and the outlays have increased almost tenfold, from $1.5 million to $14 million over two years.
Mr Craigie: Yes.
Senator BRANDIS: Those figures include all costs to the Commonwealth, including your internal costs, do they?
Mr Craigie: Yes, they do.
Senator BRANDIS: That is the time of your staff and any outlays in disbursements as well?
Mr Craigie: Yes.
Senator HANSON-YOUNG: I have some questions in relation to minors being kept who have either been charged with or suspected of people-smuggling offences which I asked the Department of Immigration and Citizenship last night. They told me there were 28 minors being held in various immigration detention facilities. As they are minors, why are they still in detention? Why have they not been deported to Indonesia?
Mr Craigie: I am sure there are more appropriate people to answer that question. The time at which my office becomes involved is after people are charged.

Senator HANSON-YOUNG: The budget that you have to manage these cases.
Mr Craigie: It is not specifically funded. That has been the subject of discussion over a number of these hearings.
Senator HANSON-YOUNG: What is your estimate, then, for how much Commonwealth money is spent through the DPP on these cases? If there has been much discussion, I am sure you have some idea.
Mr Craigie: We have given those figures as far as our expenditure is concerned, in answer to some questions from Senator Brandis earlier.
Senator HANSON-YOUNG: What are those?
Mr Craigie: We estimate that by the end of this financial year we will spend, on this financial year, a shade under $14 million—$13.099 million. In this financial year our spend on this program has been $7.64 million.
Senator HANSON-YOUNG: That is all from me.

As advised at that hearing, from 1 July 2011 to 31 January 2012, the CDPP has spent $7.64 million in relation to its work involving the prosecution of people smuggling offences. The CDPP estimates that it will spend for the 2011-2012 financial year $13.099 million on its work involving the prosecution of people smuggling offences. The CDPP's work is not limited to the prosecution of people smuggling offences and includes the following :

- the prosecution of people smuggling offences in each State and Territory (with matters introduced into the ACT in March 2012);
- liaison with the various Commonwealth agencies involved, State and Territory Courts and the Legal Aid Commissions;
- national and regional coordination of the Office's people smuggling work; and
- the provision of law reform assistance and involvement in inquiries in relation to people smuggling issues, including the current inquiry by the Australian Human Rights Commission.

As at 8 February 2012, the CDPP had dealt with 151 defendants for people smuggling offences this financial year, which includes defendants who have been convicted following a plea of guilty, convicted following a trial, acquitted after a trial, have had matters discontinued or some other outcome. The CDPP also had 208 defendants before the courts as at 8 February 2012. Due to the progression of these current matters through the court processes, some will be completed this financial year and some will not be completed until subsequent financial years.

Given that the work by the office in relation to people smuggling is not limited to the presentation of individual cases before the courts, the differences between cases prosecuted by the CDPP (i.e. some go to trial, some do not, some have fast track committals, some have early pleas of guilty , some are taken on appeal) and the fact that these cases span financial years, it is not appropriate to give an average cost of a case.

INFORMATION ON PENALTIES HANDED DOWN TO PSM DEFENDANTS PRIOR TO MANDATORY SENTENCING

(Data extracted from the CDPP's Prosecutions Database on 13.03.2012.)

DEFENDANTS CONVICTED OF PEOPLE SMUGGLING MARITIME OFFENCES PRIOR TO MANDATORY SENTENCING

Maximum Term of Imprisonment	Number of Defendants	Proportion of Defendants
Released forthwith	47	9.1%
Less than 1 year	97	18.8%
1 year	13	2.5%
2 years	98	19.0%
3 years	133	25.8%
4 years	88(a)	17.1%
5 years	16(b)	3.1%
6 years	16(c)	3.1%
7 years	6(d)	1.2%
8 years	1(e)	0.2%
TOTAL	**515**	**100.0%**

(a) 2 of those 88 defendants were recidivist offenders.
(b) 4 of those 16 defendants were recidivist offenders.
(c) 3 of those 16 defendants were recidivist offenders.
(d) None of those 6 defendants were recidivist offenders.
(e) This 1 defendant was not a recidivist offender.

DEFENDANTS CONVICTED OF PEOPLE SMUGGLING MARITIME OFFENCES PRIOR TO MANDATORY SENTENCING

Non-Parole Period	Number of Defendants	Proportion of Defendants
Released forthwith	47	9.1%
Less than 1 year	93	18.1%
1 year	173	33.6%
2 years	168	32.6%
3 years	28(f)	5.4%
4 years	6(g)	1.2%
TOTAL	**515**	**100.0%**

(f) 6 of those 28 defendants were recidivist offenders.
(g) None of those 6 defendants were recidivist offenders.

DEFENDANTS CONVICTED OF PEOPLE SMUGGLING MARITIME OFFENCES PRIOR TO MANDATORY SENTENCING

Defendant dealt with	Number of Defendants	Proportion of Defendants
On Indictment	390	75.7%
Summarily	125	24.3%
TOTAL	**515**	**100.0%**

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THE NATION

Smuggling laws in the dock

A BRISBANE District Court judge yesterday directed a not guilty verdict during a jury trial of an alleged Indonesian asylum-seeker crewman before issuing a scathing indictment of the government's people-smuggling legislation.

After ordering 23-year-old Albah Ruliilmi be set free, judge Milton Griffin blasted the lack of discretionary sentencing powers available to judges and magistrates hearing people-smuggling cases.

His criticism followed two not guilty verdicts on Wednesday in the Brisbane Supreme Court during jury trials of two other alleged people-smugglers.

Before deciding the case, Judge Griffin told the jury it was important to note that Mr Ruliilmi, a cook/crewman from eastern Java, had already served more than two years in jail.

"In this legislation, the judges are deprived of the right to pass any particular sentence.

"Judges are directed by the law so there is a minimum sentence of three years.

"So for someone in the defendant's position, he would have been required to spend three years in jail had there been proof.

"So the lowliest of the crew members or the most money-grabbing of sea captains who direct the voyage — they're all rather lumped by the legislation into the same boat," he said.

Judge Griffin told the jury they could "draw their own conclusions" on what the legislation did for the right of judges to make discretionary decisions on the roles of individual crewmen involved in people-smuggling offences.

The commonwealth had failed to prove that any of the crew had prior knowledge they were shipping to Australia, he said in his summing up.

The Migration Act 1958 contains a range of serious people-smuggling offences with mandatory minimum penalties applying to ventures coming to Australia.

The District Court ruling by Judge Griffin is part of a wave of acquittals of alleged people-smugglers.

It comes as lawyers from across the country prepare to meet in Melbourne in April for a major conference to discuss defence strategy ahead of 27 pending criminal trials involving people-smuggling.

MARK DODD

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SUPREME COURT OF QUEENSLAND

CRIMINAL JURISDICTION

ATKINSON J

Indictment No 300 of 2011
Indictment No 419 of 2011

THE QUEEN

v.

NASIR and JUFRI

BRISBANE

..DATE 02/12/2011

SENTENCE

HER HONOUR: Jufri and Nasir, you have been found guilty by the jury that between 28 February and 10 March 2010 at Indonesia and on the seas between Indonesia and Ashmore Islands, Australia, you facilitated the bringing to Australia of a group of five or more people, namely a group of 46 people, who were non-citizens and who travelled to Australia without visas and did so reckless as to whether those people had the lawful right to come to Australia.

The conviction is pursuant to section 232A of the *Migration Act* 1958 (Cth) which carries a maximum penalty of 20 years' imprisonment or a fine of $220,000 or both.

Section 233C of the *Migration Act*, as in force at the time of the offending, imposed a statutory minimum sentence of five years' imprisonment with a non-parole period of three years.

A judge sentencing offenders under the Commonwealth law must take account of the matters set out in section 16A of the *Crimes Act* 1914 (Cth). However, that is qualified in this case by the requirement to impose a statutory minimum sentence because there can be little doubt that were it not for that requirement, the sentence I am obliged to pass upon you would not be in accordance with the requirements of section 16A of the *Crimes Act*.

May I first mention the nature and circumstances of the offence. You were respectively the mechanic or deckhand in the case of you Jufri, and the cook in the case of you Nasir.

You both worked as fishermen prior to being engaged to undertake this trip. It is clear that you both looked after the refugees and other passengers on the boat well and you performed your duties on the boat as you were supposed to. You were not in charge of the boat and were performing relatively menial roles on the boat.

The serious offenders at whom section 232A of the *Migration Act* must surely be aimed are those who profit from people smuggling and do it for the purpose of making money rather than people like yourselves who they must know are certain to be caught and who live in such impoverished circumstances that the small amount of money that you would make from a journey such as this makes it worth taking the risk.

The second factor I am obliged to take into account is any other offences that I am required or permitted to take into account. There are no other offences involved. I am also obliged to take into account the personal circumstances of any victim of the offence. That is not relevant in this case.

So far as any damage done by the offence, the submissions by Ms Bain talk about the potential damage in general done by offences of this type but no particular damage has been shown from this particular offence.

I am obliged to take into account the degree to which you have shown contrition for the offence. While normally that might

be shown by a plea of guilty, in this case you did not put the Crown to proof on a number of matters and so assisted with the running of the trial and your manner has been respectful and even penitent during the trial.

The next matter is the extent to which you have failed to comply with any of the pretrial matters and, as I have said, you cooperated to the maximum extent with all the pretrial matters. The next two matters are not relevant.

So far as the deterrent effect of any sentence upon you, deterrence in this case is served by your being arrested and imprisoned. You have already been imprisoned for some 632 days during which your families have been left destitute. The sentence of imprisonment is not, therefore, necessary to deter you any more than that has already done.

The next is the need to ensure the person is adequately punished for the offence. As will be obvious from my remarks, I regard you as already having been adequately punished. However, I am obliged to impose further imprisonment upon you so I will comply with the obligation I have at law.

The next requires me to have regard to your character, antecedents, age, means and physical or mental condition. You Jufri are a man of 41 years old who is married with two children aged 11 and three years old. You were the sole income earner for your family and you come from a village in Indonesia which is very poor. You and your family live in a

hut with a dirt floor with the dimensions of three by six metres. Because of the cost of calling by telephone to your village, you have only been able to speak to your wife once every few months. She has been able to get some work but she earns the equivalent of one and a half cents an hour shelling crabs, and your 11-year-old son has had to leave school because of the lack of support for the family. You have no criminal history.

Nasir, you are 42 years old. You are separated from your first wife and your two children aged 17 and eight live with your mother. Prior to this offence you worked as a fisherman and, as Mr Mumford said, on a good day would earn $2 Australian. You used the money you earned half to support your present wife and half for the upkeep of your children. Since you have been in custody in Australia, there has been no financial support for your children, although you have saved whatever money you have been paid in prison, which is usually used to buy things like soap and toothpaste, to send whatever you can to your present wife. Mr Mumford tendered photographs taken by his instructing solicitor of your living conditions in your village which show the conditions of extreme poverty in your village.

The next factor that I am required to take into account is the prospect of rehabilitation. Given that neither of you have any criminal history and that you will go back to the villages where you came from where you engage in useful work and support your families, your prospects of rehabilitation are

obviously good.

I am also obliged to take into account the probable effect of any sentence under consideration on your family or dependants. Obviously the effect of any sentence on your families and dependants is appalling. Unlike prisoners of Australian citizenship, your families will not be supported by the State. There are no social services available to support them so they will suffer dreadfully from your sentence.

Ms Bain's written submissions also refer to the need for general deterrence but it is clear that those people who employ men like you will just move to another village because they regard you as completely expendable and people in small villages without newspapers or the means of modern communication are most unlikely to hear of a sentence imposed in an Australian court, although I expect people in your own village will, of course, know.

Given that the captain was sentenced to the minimum mandatory sentence for an offence of this type, Ms Bain conceded quite properly that no higher sentence should be imposed upon you.

I sentence each of you to the minimum sentence required by law of five years' imprisonment.

I fix a non-parole period of three years which, as I said, is the minimum I am required to impose upon you by law.

I declare the period you have already spent in custody, pursuant to section 159A of the *Penalties and Sentences Act* 1992 (Qld), of 632 days from 10 March 2010 until 2 December 2011 as time spent under this sentence.

When you have finished your sentence, it is very likely that you will be deported and then you will be able to rejoin your families who are dependent upon you. You should not despair. It is not very far in the future that you will go home and I hope that you are able to resume your former lives and that your wives and children have not suffered too much as a result of these events.

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REVISED

IN THE DISTRICT COURT
OF NEW SOUTH WALES
CRIMINAL JURISDICTION

JUDGE CONLON

CAMPBELLTOWN: WEDNESDAY 27 JULY 2011

2010/00402476 - R v Mursid KARIM

SENTENCE

HIS HONOUR: The offender Mursid Karim appears for sentence following trial where he was found guilty by jury of facilitating the bringing or coming to Australia of a group of five or more non-citizens. The charge is commonly referred to as "people smuggling" and is contrary to s 232A(1) of the **Migration Act** 1958. It carries a maximum penalty of twenty years imprisonment.

Consistent with the jury verdict I am satisfied of the following facts beyond reasonable doubt. About 6pm on 22 April 2010 HMAS Maitland was contacted by Coastwatch UHF radio to report a Suspected Irregular Entry Vessel (SIEV 136) approximately four nautical miles to the north of Ashmore Reef and making its way towards the lagoon entrance.

HMAS Maitland visually located the vessel about one nautical mile to its north. A four man boarding party was despatched. The Royal Australian Navy officers boarded the vessel at approximately 6.16pm. There were twelve (12) individuals on board, consisting of three Indonesian males (being the crew members, including the offender) and nine passengers (made up of two Afghan males, five Somali females and two Somali males).

The vessel was no more than eight metres in length. There was an upper deck over which a tattered red tarp had been erected. Royal Australian Navy officers noted that the vessel was rolling heavily and taking on water.

I am satisfied that the vessel departed Rote Island, Indonesia, at about 2.00am on 21 April 2010. It had been travelling for about forty hours at the time it was intercepted.

All twelve persons were ultimately transferred to HMAS Albany and taken to Christmas Island, arriving there on 26 April 2010. After quarantine and Customs procedures they were transferred to the Christmas Island Immigration Reception and Processing Centre.

None of the twelve persons had a valid visa permitting them to travel to, enter or stay in Australia. Between 26 April and 2 December 2010, the offender and his two co-offenders being Haria Joe and Nurarga Kadir were detained under the **Migration Act** at the Christmas Island Detention Centre and Northern Immigration Detention Centre, Darwin, Northern Territory. Thereafter they were detained in various correctional facilities within Australia.

The trial of all three offenders was set down for hearing on 11 July 2011. Following the completion of preliminary evidentiary issues the Court was advised that the Commonwealth Director of Public Prosecutions had no billed the charges again Haria Joe and Nurarga Kadir. It is the Court's understanding that the reason for this was connected with the probability that both co-offenders are likely to have been under eighteen years of age at the time of the commission of the offence.

At trial the Crown called evidence from five of the passengers. The first Afghan male "B" paid a "smuggler" US$8,000. That person organised for him to fly on a false passport to Malaysia and then to travel to Indonesia. His first attempt to travel to Australia by boat failed as the boat was detected and he found himself in a detention centre in Indonesia. Mr "B" gave evidence that he was released from detention after about nine months and a "smuggler"

organised for him to travel by ferry to Rote Island. He arrived there at night and the early hours of the following morning (21 April 2010) was directed to the beach. He walked into the water and he boarded SIEV 136. Crew members then directed him to go below deck. He said there was plenty of water, food and fruit, although by the time they reached Ashmore Reef the food and water had run out.

The second Afghan male "H" had also initially flown from Pakistan to Malaysia on a false passport. He paid the smuggler US$3,000. He then travelled to Indonesia where he paid another US$4,000 for his trip to Australia. His first attempt also failed as the vessel was detected and he too ended up in an Indonesian detention centre. He spent ten months in detention before being released on 12 April 2010. He stated that while in detention he had access to "a lot of numbers for different smugglers" and he made contact with a smuggler named, "Andy" who arranged for his second attempt for another US$3,000. He also was placed on a ferry which took him to Rote Island (although he was unsure of that location). There he was met by an Indonesian person who took him by motor bike to a small house.

Later that evening he was taken to a beach where he said, "an agent of the smuggler" directed him onto the offender's vessel. He said it was mostly the offender (the older man) steering the vessel, while the two younger crew members were checking the engine and pumping out water. He said all the passengers were directed below deck; that this came about by words and gestures of all three crew members. He felt that most of the time it seemed that the offender was the person in charge.

A Somali male "M" gave evidence that he and his three daughters (fifteen, twelve and ten) and a female neighbour (eighteen years) flew from

Somalia to Malaysia via Dubai. They then travelled to Indonesia where a first attempt to travel by boat to Australia failed and they too ended up in a detention centre. While in detention he organised a second attempt for he and his family with another smuggler, Andy. He said Andy was paid US$12,500. He and his family ended up on this beach and they were directed to the offender's vessel.

Another Somali male, "H" left Somalia in 2009, flying via Dubai to Malaysia on a false passport. He spent four to five months in Malaysia. He then made his way to Indonesia where he arranged with Smuggler "Reggie" for his first attempt. Following detection he ended up in a detention centre. It became clear in the course of the evidence of "H" that what one needed to be released from such detention centres was an ability to pay a bribe. He did this and organised with Andy for another boat trip upon his release. He then travelled by ferry to Rote Island. He said he was met by persons, "working for Andy" and taken to a house. He was later taken to the beach and boarded the offender's boat SIEV 136.

I am satisfied that the offender and co-offenders were paid money from the "smugglers" or "agents of the smugglers" to take the nine passengers to the vicinity of Ashmore Reef. The only navigational instrument on the boat was a compass (exhibit F).

When dealing with an evidentiary issue before the commencement of the trial, the Court heard that the offender is from the remote island of Ternata which is part of Alor in the south east of Indonesia. His primary language is Retta, a local language. At the time of the offence he was not fluent in what has been described as Bahasa Indonesian. He has had little or no education and was a fisherman and farmer.

Following his arrest and detention, the offender informed the Australian Federal Police that he had been fishing around the areas of Rote Island for about a month and as he had run out of provisions, he called into Rote. He said it was then that he was approached to take some passengers to Ashmore Reef. He said he was told all he had to do was drop them off at Ashmore, then he could go back to Indonesia. He said he understood he had done the wrong thing.

I accept that version on the balance of probabilities. It is clear that I am not here dealing with "smugglers" who are the principal protagonists in this lucrative and insidious trade. True it is that the "smugglers" require willing participants to take those without a valid visa to Australian waters in order to conduct their illegal business. When amending legislation was introduced into the parliament in 1999 increasing penalties for these offences, it was stated that the need for deterrent penalties was manifest given the difficulties of the detection and the exposure of Australia through its vast coastline. That of course is true. But each case must be determined upon an assessment of the objective seriousness as applying to the particular circumstances.

The sentencing process has been described as a balancing exercise. A court has to make an assessment of the objective seriousness of the offending conduct and, having regard to all the purposes of sentencing, balance it against the offender's subjective circumstances.

Apart from the matters already referred to, the Court has been advised that the offender is fifty-five years of age. He is married and he and his wife had nine children, two of whom are deceased. The youngest is eight and the eldest twenty-three. Ternata is small village and when initially speaking to Australian Federal Police, he described his home as very simple and

constructed of natural ingredients such as coconut palms and it has a dirt floor. When giving evidence in these sentence proceedings the offender confirmed all these matters. In addition he stated that his home had no electricity, no television and no radio.

He indicated to the Australian Federal Police that he did have some apprehension about what he was doing, stating, "I was thinking what would happen if I get apprehended. I've got to look after my wife and children. They said not to worry about it, it doesn't matter, you'll be all right." He has now been absent from his family for fifteen months.

The offender also stated in evidence that he was given a compass by an apparent agent of the smuggler with directions to travel for three hours at a bearing of 180 degrees and thereafter to alter the bearing to one of 170 degrees. He said he had never before been to "Pulau Pasir" (that is Ashmore Reef).

I am satisfied that as far as the offender was concerned his involvement came about opportunistically. It was a spur of the moment decision. There was no plan. There is nothing before the Court to indicate the offender has any prior criminal record in Indonesia. At fifty-five years of age this is the first time that he has been in custody.

Section 233C of the **Migration Act** provides for a mandatory penalty in respect of the present offence. It provides that the Court must impose a sentence of imprisonment of at least five years for a first offence and must set a non-parole period of at least three years. Accordingly the Court's usual sentencing discretion has been significantly diminished.

In my view the present case provides a glaring example of how mandatory penalties can sometimes prohibit a court in delivering a fair and just

result and a sentence, "that is of severity appropriate in all the circumstances of the offence." If I was to apply the usual sentencing principles to the present balancing exercise, I would have imposed a non-parole period (minimum term) of about eighteen months. However, the provisions of s 233C make it unnecessary to further consider the matter.

Of course the courts could be faced with factual circumstances requiring the imposition of the mandatory minimum term or indeed, longer. It is simply my considered view that in respect of this offender, this is not such a case. Nevertheless I must do what is commanded by the legislation. Accordingly, the offender will be sentenced to a period of imprisonment of five years and that will date from 22 April 2010. He is also sentenced to a non-parole period of three years to date from 22 April 2010 and to expire on 21 April 2013.

I should also comment that I am aware that there are a very large number of Commonwealth people smuggling cases to be tried in the various State Courts over the next couple of years. I have little doubt that had mandatory minimum sentence provisions not applied, the present matter would most likely have resolved by way of a plea saving much time and expense. There is simply no incentive for an offender to plea. Under the circumstances it is easy to understand why an accused person would "chance his arm" hoping to get a sympathetic jury, feeling that he has little to lose.

The trial that preceded the present one involved three accused persons who I understand were fishermen. That resulted in a jury not being able to agree and that trial will now have to be heard again.

This offender Mr Karim no doubt will be sent back to his family in Indonesia once he is released following the expiration of his minimum parole on 21 April 2013. A sentence appropriate to the circumstances could have

seen him being returned to his country in about October 2011. However, he will now be our guest for a lot longer.

Mr Evenden hopefully with the use of the interpreter you will be able to convey, if he doesn't already appreciate, all of what has happened. The bottom line I will tell him through the interpreter. Ms Interpreter can you explain to him that the law as it now is prevents me from giving him any less sentence than what I have given him. So I have given him the minimum that I am able to, which is a minimum term of three years and that will date back from when he was first arrested and taken into custody on 22 April last year. I expect that once he becomes eligible for parole and is released, he will be returned to Indonesia. Thank you, I'll adjourn.

District Court
New South Wales

Medium Neutral Citation:	**R v AMBO [2011] NSWDC 182**
Hearing Dates:	Trial: 20-23 September 2011, 26-30 September 2011; Sentence: 25 November 2011
Decision Date:	25/11/2011
Jurisdiction:	Criminal
Before:	Knox SC DCJ
Decision:	Sentence: 5 years imprisonment commencing 8 February 2011 and expiring on 7 February 2016. 3 years non-parole period commencing 8 February 2011 and expiring on 7 February 2014.
Catchwords:	People smuggling. Sentence.
Legislation Cited:	S 233C Migration Act (Cth) 1958 S 236B Migration Act (Cth) 1958 S 16A Crimes Act (Cth) 1914 S 19AB Crimes Act (Cth) 1914 S 19AK Crimes Act (Cth) 1914
Cases Cited:	R v Olbrich [1999] HCA 54 Tyler v R; R v Chalmers [2007] NSWCCA 247 R v Muanchukingkan (1990) 52 A Crim R 354 Bahar & Ors v The Queen [2011] WASCA 249 R v Pot, Wetangky and Lande (Supreme Court of the Northern Territory, unreported, 18 January 2011) Wong v R (2001) 207 CLR 586 R v Sailing & Maley (Supreme Court of the Northern Territory, unreported, 11 February 2011) R v Dokeng (Supreme Court of the Northern Territory, unreported, 2 December 2010) Trenerry v Bradley (Supreme Court of the Northern Territory, unreported, referred to in R v Dokeng) R v Karim (District Court of New South Wales, unreported, July 2011 per Conlon SC DCJ)
Category:	Sentence
Parties:	Commonwealth DPP v Asse AMBO
Representation:	Director of Public Prosecutions (Cth) O'Brien Hudson Law Mr D Lee for the Commonwealth DPP Mr E Kerkyasharian for Mr Asse Ambo
File Number(s):	2011 / 148339

JUDGMENT

Indictment and procedural history

1 On 30 September 2011, the accused was convicted by a jury on the following count on an indictment:

> *Between about 5 February 2011 and about 8 February 2011 in the waters between the Republic of Indonesia and the Territory of Christmas Island, Australia, facilitated the bringing or coming to Australia of a group of five or more people, namely a group of fifty-three people who were non-citizens and travelled to Australia and who had, or have, no lawful right to come to Australia, and he did so reckless as to whether those people had or have a lawful right to come to Australia.*

2 That charge was brought pursuant to **section 233C** of the **Migration Act** (Cth) 1958 . The maximum penalty for this offence is 20 years imprisonment or 2 000 penalty units or both. **Section 236B** of the **Migration Act** applies to this offence. That section provides that for an offence under this section, the Court must impose a sentence of imprisonment of at least 5 years (**section 236B(3)(c)**). Further, **section 236B(4)(b)** states that the Court must impose a non-parole period of at least 3 years.

Facts

3 Based on the evidence given in the trial and on subsequent proceedings the facts are that on 8 February 2011 a SIEV (Suspected Illegal Entry Vessel) was intercepted in Australian waters off Christmas Island, with 55 persons on board. Two of them (the accused and his nephew) were said to be the crew of the vessel. The remaining 53 were said to be stateless or from either Iran or Iraq.

4 Those who had passports from other countries or who had false passports gave them to various persons immediately prior to their embarkation onto the SIEV. Those passports were either destroyed or not returned to them. All seven of those passengers who gave evidence said that they did not have Australian visas at all relevant times. All had boarded that vessel in Indonesia. They travelled to Australia in a journey that lasted about sixty hours - at least three days and nights.

5 The SIEV was boarded by a Royal Australian Navy boarding party from HMAS Maitland. The SIEV was taken to Christmas Island where those on the vessel were off-loaded, processed and detained, initially in the Christmas Island detention centre and then, for some of them, subsequently in other centres on Christmas Island. Evidence was given from seven of those passengers, all of whom are in immigration detention.

Offender's participation

6 The offender met a person called 'Abdul' in a coffee shop near his home town. That person asked him if he wanted to work for a period of about a month. He was to receive just under 1.9 million Indonesian Rupiah (about A$217). After the initial meeting, the offender travelled by bus to another port area and located a vessel which was the vessel used on the trip to Christmas Island. Thereafter the offender stayed with the vessel. He was present when the 53 passengers were loaded onto the vessel from another vessel, it would seem off a part of the Indonesian shoreline. The offender had recruited his younger nephew - who was originally a co-accused with the offender - to travel with him.

7 The vessel had travelled for some 60 hours from Indonesia to a point about 2000 yards inside Australian territorial waters off Christmas Island where it was apprehended. The condition of the vessel was evident from photographs tendered during the course of the trial. In accordance with what is apparently standard Naval practice, the SIEV was subsequently towed out to sea off Christmas Island and incinerated. The authority for that action is unclear but is said to be based on quarantine requirements. There was no evidence as to the ownership of the vessel. The offender's evidence was to the effect that he travelled to a marina or port in Indonesia where he was shown the vessel.

8 During the trip, the vessel either broke down or suffered mechanical defects and was repaired by two people from an accompanying vessel - one of them was the individual referred to as Younes. The offender's evidence was that Younes told him to continue following an arrow marked in the wheelhouse in the direction of Australia.

Offender's activities

9 There was evidence from some of the passengers that they observed a GPS and phone on the SIEV. The offender gave evidence that he used the phone and GPS equipment and threw it overboard immediately prior to the vessel being boarded by the RAN party. Evidence was also given during the trial as to the offender's other involvement in the trip and the provision of facilities (including food, water and rudimentary shelter) for the passengers.

10 The statements of seven of the passengers on the SIEV who gave evidence were to the effect that they had made payments - which varied between A$8,000 and A$10, 000 - to the organisers in either Iran or Iraq and subsequently in Indonesia. Following those payments, they travelled from Iran, Iraq, or other locations to either Malaysia or Jakarta, Indonesia. Thereafter, they travelled around Indonesia in buses and stayed in various kinds of accommodation. Ultimately, they were all located together on a beach in Indonesia and embarked under cover of darkness onto, successively, two boats. The offender was paid, on his evidence, about A$220 which, given the overall amounts paid by the various passengers, is relatively insignificant.

Role and criminality

11 I find that the offender's role was that of the person in charge of the vessel, if not from the commencement of the trip, then certainly once Younes had departed from the vessel. Not only did he navigate the vessel and steer it, but he also made arrangements for the welfare of the passengers on board the vessel and was effectively in charge. Moreover, his actions in throwing overboard those pieces of communication equipment which could possibly provide a link to those involved in the overall organisation, the provision of the vessel and the giving of directions is inexplicable other

than in terms of an awareness of the criminality of his actions.

Policy of legislation: people smuggling operations

12 The evidence in this trial demonstrated that there are a number of stages involved in this people smuggling operation which appear to be generic in the cases currently before the courts. Those include (at least);

- The engagement of the people smugglers by those wanting to come to Australia. That frequently takes place in centres such as, in this case, Tehran, Baghdad or Kurdistan where those involved are known to be desperate to leave the country. None of those wanting to come appeared to have any real difficulty in contacting the organisers;
- The arrangement of travel and associated travel documents for those individuals to various other centres - generally in the Middle East;
- The manipulation (and possibly bribery) of authorities in those other centres to enable their passage without necessary visas or other travel documents to centres such as Malaysia or Indonesia;
- The arrangements for such persons at those centres to be processed and released, again, in the absence of documentation;
- The transport of the persons - once they have been either processed in the countries or released from various forms of detention - to various parts of Indonesia. In this case, that involved the transport and isolation of the individuals in villas to which they were transported by bus;
- The organisation of boats from centres in Indonesia which were outside the normal purview of intelligence and surveillance agencies. In this case illegal immigrants were transported by two smaller vessels under the cover of darkness to the SIEV ultimately used;
- The transport of people on those boats to other larger vessels which would ultimately transport the applicants to Australia;
- The provision of facilities such as food, water and cover for people on the boats during the course of the trip;
- The actual sailing of the vessel to Australian waters. That involves the location and employment of sailors who are prepared to undertake the risks of such travel.

13 Those stages all require and involve, individually and together, a sophisticated organisation by a number of individuals having extensive contacts with a variety of agencies in a number of countries. The evidence was that there was extensive mobile phone and coded contact in a variety of places and countries. The offender came into the operation at the last two stages.

14 The principles of sentencing normally require an assessment of the role of the offender which can be a matter of mitigation - for example, the role of a courier in drug trafficking matters is different from that of a principal with the consequent difference in the sentence imposed - see **R v Olbrich** (1999) 199 CLR 270; [1999] HCA 54. In that case, the High Court said that that should not obscure an assessment of what the offender did. See also **Tyler v R** ; **R v Chalmers** (2007) 173 A Crim R 458; [2007] NSWCCA 247 in the context of conspiracy cases.

15 The provision that this offender has been charged under - the provision which attracts the mandatory penalty - uses the phrase "organises or facilitates". Whilst the indictment on which Mr Ambo was tried only referred to 'facilitated' - appropriately given his acts of participation - the phrase 'organises' usually pre-supposes a higher degree of criminality than 'facilitates'. The mandatory penalty applies in both situations and makes no differentiation as to the stages involved.

Offender's specific role

16 The evidence in this case indicates that this offender was involved in the last stage only. Clearly the offence of facilitating 'people smuggling' can involve any one or a number of these functions or stages as set out. People being brought before the courts in Australia are generally only those involved in the last stage of the operation. The amount the offender said he received from this operation was in the order of hundreds of dollars compared to the fees paid by each of the applicants - which seems to have been of the order of $8, 000 - $10, 000.

17 By analogy with the sentencing principles in drug importation/trafficking cases, this offender is in the role of a courier rather than an organiser or administrator. His criminality is a lot less than that of a principal involved in the overall administration of the operation. Normal sentencing principles would suggest that couriers should be treated a lot more leniently than principals - **R v Muanchukingkan** (1990) 52 A Crim R 354 per Wood J - although substantial penalties should still apply.

18 Nevertheless, I am required under the provisions of the Act to impose the mandatory penalty which applies to the range of activities which can be covered by the generic offence of 'people smuggling'. That does not allow a distinction in sentencing offenders such as Mr Ambo and those involved in the overall scheme and the other stages of the operation I have outlined above.

Authorities

19 There are a series of decisions which have considered the mandatory penalty established. In a recent Western Australian Supreme Court decision of **Bahar & Ors v The Queen** [2011] WASCA 249, McLure P referred to the statutory minimum and maximum penalties as the:

> "...floor and ceiling respectively within which the sentencing judge has a sentencing discretion to which the generally sentencing principles are to be applied." [54]

and also:

> "Where there is a minimum mandatory sentence of imprisonment the question for the sentencing judge is where, having regard to all relevant sentencing factors, the offending falls in the range between the least serious category of offending for which the minimum is appropriate and the worst category of offending for which the maximum is appropriate." [58]

20 The exercise of the discretion in these circumstances was also examined in **R v Pot, Wetangky and Lande** (Supreme Court of the Northern Territory, unreported, 18 January 2011) per Riley CJ who held that there was no requirement to determine the appropriate severity of a sentence by reference to a pre-determined base. His Honour the Chief Justice said that:

> "...the section provides the minimum sentence that can be imposed in the identified circumstances but does not go so far as to reserve that mandatory minimum sentence only for cases at the lowest end of seriousness for relevant offending..."

After considering **Wong v R** (2001) 207 CLR 586 at 611, His Honour went on to say:

> "Where the appropriate sentence so determined is less than the mandatory minimum, the Court must then impose the mandatory minimum in accordance with the requirements of the Migration Act."

21 That aspect was further referred to by His Honour in **R v Sailing and Maley** (Supreme Court of the Northern Territory, unreported, 11 February 2011) , where Riley CJ remarked:

> "In my view the Court should apply the sentencing principles set out in the Crimes Act and those applicable at common law and, taking into account all of the relevant factors, determine an appropriate sentence. Where the appropriate sentence so determined is less than the mandatory minimum the Court must then impose the mandatory minimum in accordance with the requirements of the Migration Act."

22 Riley CJ in **R v Dokeng** (Supreme Court of the Northern Territory, unreported, 2 December 2010) also examined a case where the offending fell in the least serious end of the scale for offences of this nature. It was accepted that the offender was poor and paid 'a pittance' for his role. He played no role in organising the operation. The sentencing judge said:

> "Given the maximum penalty for the present offence; namely 20 years imprisonment, the circumstances of the offence, your own personal circumstances, and taking into account ordinary sentencing principles; namely the need for general deterrence, however effective or ineffective that may be, and the other usual sentencing principles, I would consider that the justice of this case required a sentence of considerably less than five years imprisonment. However, given the minimum fixed by the legislature, I have no choice but to impose a sentence of at least 5 years imprisonment with a non-parole period of at least 3 years. It would be plainly unjust in your case to impose more than the minimum."

Consideration

23 It is difficult to see what meaning should be given to the word 'mandatory' specifically inserted into the legislation other than that no sentencing discretion is contemplated by the mandatory provisions of the Parliament to impose a sentence below the minimum of three years imprisonment. I am clearly bound to apply the clear and customary intention the word 'mandatory' in the Migration Act. How a sentence can be reduced below that and still be consistent with the legislation is unclear to me - nor how judicial sentencing discretion can be exercised to reach any different minimum penalty. It is difficult to see how that mandatory minimum requirement can be reconciled with the duty imposed by the Crimes Act to deliver a sentence which is 'of a severity appropriate in all the circumstances of the offence': **section 16A(2) Crimes Act** (Cth) 1914.

24 What value there is in having judges determine matters when there is a pre-determined legislatively imposed mandatory minimum penalty is for others to determine. I agree with respect with the comments of Mildren J of the Northern Territory Supreme Court in **Trenerry v Bradley** referred to by Kelly J in **R v Dokeng** that '...prescribed minimum mandatory sentencing provisions are the very antithesis of just sentencing.' Nevertheless, I am obliged to follow the law as it is. In this case, given the structure of the legislation and the provisions of **section 16A** of the

Crimes Act , the appropriate sentence is the minimum contemplated in the legislation, namely, one of three years imprisonment.

Specific aspects of the offender's criminality

25 Although there is no evidence nor suggestion that the offender was involved in any of the other more substantial aspects of 'organisation and facilitation' as is referred to in the section, his was a fundamental role at the last stage of the overall people smuggling operation. Given the jury's verdict on the evidence, it clearly involved the facilitation of the unlawful citizens journey towards Australia at the most dangerous part of the trip. That included travelling on the open seas in a vessel which had - at least - some mechanical problems. His travel to the ship-yard or marina where he joined the vessel he ultimately navigated indicates a degree of planning and premeditation. I do not accept the submission that he was unaware of what he was doing until 'the very last moment' - Defence submissions: [3]. The submission that he had no responsibility for organising the trip - Defence submissions [9] - are inconsistent, for example, with his role in organising his nephew to be on the vessel.

26 The vessel was ultimately destroyed in accordance with the RAN / quarantine procedures. This practice of incinerating the vessels is presumably well known to those involved in the people smuggling trade. It is unsurprising then that cheap or older vessels with limited navigational and safety equipment are used for this portion of the journey on the open sea. Few of the passengers were wearing life-jackets. There was no evidence in the photographs tendered during the trial of life-rafts sufficient to accommodate those numbers of adults and children who were present on the open seas.

Failure of provide safe arrangements

27 Obviously those kind of arrangements increase the danger to those travelling in precisely the sort of vessels of which the accused was in charge. That danger, in turn, is something which the unlawful non-citizens, as well as those in the position of the offender, are prepared to accept in the (often desperate) circumstances they were in as outlined in the statements tendered during the trial. A subsidiary aspect of the policy in this legislation is to prevent travel in such dangerous conditions. Failure to comply with those requirements inevitably involves risk to those travelling who (and whose children) are capable of being exploited precisely because of their desperation. The deadly consequences of those risks has already been evident in events occurring in the waters surrounding Christmas Island earlier this year. That is in addition to other risks run when, for example, food and water run out or an ill-equipped vessel is blown off-course.

Subjective circumstances

28 The offender is aged 46. He is an unemployed fisherman from Sulawesi in Indonesia. He has been unemployed for three years. His evidence was that he is illiterate and has received minimal education. He was married - although he may have been separated from his wife at the time of undertaking this trip. His evidence was that the funds he received for the journey were used to pay for his only daughter's education. He is very close to that daughter. There is no evidence to suggest any other criminal involvement.

29 Given those factors, his isolation and his inability to communicate in English, a sentence of full-time imprisonment will weigh heavily on him.

Deterrence

30 The penalties provided under the legislation provide a maximum penalty of 20 years imprisonment, a mandatory period of imprisonment of 5 years and a mandatory non-parole period of 3 years. Clearly, that reflects a specific intention by Parliament to ensure that the principle of general deterrence is reflected in the sentences imposed. The deterrence is necessarily visited on those at the bottom or final stage of the chain of organisational stages involved in people smuggling offences. In this case the financial and other circumstances of the offender were of the same order of desperation of those whose travel he was facilitating. The courts in cases of other offenders have referred to the 'pittance' being paid to offenders at the same stage of the overall offences.

31 The policy of general deterrence needs to be considered in the context of illiterate and poor fishermen from remote islands of the Indonesian archipelago where there is no electricity, no television and no radio.

Cost to the State justice system and the Commonwealth

32 The administrative and legal arrangements which are in force in relation to this issue, involve significant Commonwealth expenses, not only in terms of the RAN coverage of the relevant territorial waters but also the off-loading and processing of unlawful non-citizens, their accommodation in the various detention centres and the interviewing and identification procedures which are adopted under Australian law. Those costs are in addition to the demands on the justice system including the Courts throughout Australia, the DPP, the AFP and the Immigration Department as well as legal aid for the accused. That is in addition to the costs of, and demands placed on, witnesses including police, naval officers, translators as well as those passengers on the SIEV vessels who are usually in detention and need to be brought to court.

33 Again I reiterate and endorse the comments made by Judge Conlon in **R v Karim** (District Court of New South Wales, unreported, July 2011) and others that there is no incentive at all for pleas to be entered and the costs and expenses of such trials given the way the legislation is drafted. Indeed, **R v Dokeng** was a sentence which was delivered in the context of a plea of guilty at the first available opportunity. The enormous costs to the State justice systems and Commonwealth agencies flows directly from the way the legislation has been drafted and remains in place.

Proportionality

34 Those costs are of course in addition to the costs of imprisonment of an offender for the term contemplated by the mandatory provisions of the Act. The published *daily* costs of imprisonment for an offender in the NSW correctional system are of the order of $200. That is the amount Mr Ambo was to receive for his involvement in this activity - he was found on the vessel with A$217 which is what he said he received. That is apparently of the same order of payment to others similarly sentenced. He will now be in prison for three years.

Sentencing options

35 I do not consider that this is an appropriate case for a recognizance release order as provided in **19AB** of the **Crimes Act**.

Commencement date

36 The offender has been in detention and in custody since his apprehension on 8 February 2011. In my view, his sentence should commence with effect from that date.

Parole

37 It is clear that the offender will be deported immediately upon completion of his custodial term of imprisonment. Nevertheless, in accordance with **section 19AK** of the **Crimes Act**, the Court is not precluded from fixing a non-parole period in respect to the offence.

Sentence

38 On the evidence presented to me and the matters I have outlined, I see no reason why I should - nor can - depart from the sentence set out, namely, one of 5 years imprisonment, to be served by way of a non-parole period of 3 years imprisonment, backdated to commence on 8 February 2011 and to expire on 7 February 2014.

Forfeiture order

39 The Commonwealth has sought a forfeiture order in relation to the monies found on the boat and the offender. I make an order in relation to the Riyals found - which clearly related to the passengers - but not in relation to the Indonesian rupiahs found on the offender. I am not satisfied that it has been shown that those monies were part of the proceeds of crime.

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THE SUPREME COURT OF

THE NORTHERN TERRITORY

SCC 21102367

THE QUEEN

and

EDWARD NAFI

(Sentence)

KELLY J

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON THURSDAY 19 MAY 2011

Transcribed by:
Merrill Corporation

HER HONOUR: Since the last mention of this matter, I have considered the construction point. The issue is whether the offence of which Mr Nafi was convicted on 3 October 2001 was a repeat offence within the meaning of the Migration Act 1958. The term 'repeat offence' is defined in s 236B(5) and the relevant portion of that section is subsection 5(b)(i):

> A person's conviction for an offence is for a repeat offence if, in proceedings after the commencement of the Border Protection (Validation and Enforcement Powers) Act 2001 whether in the same proceedings as the proceedings relating to the offence or in previous proceedings, a court has convicted the person of another offence being an offence against s 232A or 233A of this Act as in force before the commencement of this section.

Mr Nafi was convicted of an offence against s 232A as in force before the commencement of the section. The anomaly in his case is that the proceedings were arguably, at least, commenced before the commencement of the Act but the conviction occurred after the commencement of that Act. The construction problem therefore is to ascertain the meaning of the phrase 'in proceedings after the commencement of' the nominated Act'.

The defence contends that there cannot have been a conviction in proceedings after the commencement of the Act if part of those proceedings occurred before the commencement of the Act. The Crown, on the other hand, contends that the question to be asked is: 'Were there proceedings on foot after the commencement of the nominated Act and, if so, was the accused convicted of a relevant offence in those proceedings?' and if the answer to both questions is 'yes', then there is a repeat offence.

The Crown also contends that to construe the definition of repeat offence in the way contended for by the defence would be to impermissibly insert the word 'commenced' into the definition, that is to say, to read the words: 'In proceedings after the commencement of the Act' as 'In proceedings commenced after the commencement of the Act'. It is accepted, I think, by both parties that if there is any ambiguity, then the section ought to be construed in favour of the liberty of the subject.

Unfortunately, I can find no relevant ambiguity. It seems to me that if there are proceedings on foot after the commencement of the Act and the accused was convicted of a relevant offence in those proceedings, then there is a repeat offence within the meaning of the Act. To construe the section in the manner contended for by the defence would be to impermissibly add the word 'commenced' into the phrase 'proceedings after the commencement of the Act'. It would be to read it 'in proceedings commenced after the commencement of the Act'.

If proceedings were in existence partially before and partially after the commencement of the Act, I can see no way that you can say that they were not proceedings after the commencement of the Act. They are both proceedings before the commencement of the Act and proceedings after the commencement of the Act

and fall squarely within that definition. I have to say, I come to that construction with great reluctance in the circumstances but I feel I have no choice because that, it seems to me, is the plain meaning of the section.

I therefore find that the offence of which Mr Nafi was convicted on 3 October 2001 is a repeat offence for the purposes of the Act.

I now come to sentence Mr Nafi.

Edward Nafi, you have pleaded guilty to an offence against s 233C of the Migration Act 1958. The maximum penalty for this offence is 20 years imprisonment and/or a fine of $220,000. However, the fine is not available in the circumstances of the mandatory minimum sentencing provisions of the Act.

The facts of the offending are as follows:

On the afternoon of 15 June 2010, members from HMAS Armidale boarded and secured a vessel about 19 nautical miles south-west of Ashmore Islands and that is approximately 5.3 nautical miles inside the Australian Contiguous Zone. The Australian Contiguous Zone extends to a maximum of 24 nautical miles from the low water line. In this zone Australia is able to enforce its customs, fiscal immigration and sanitary laws and regulations.

There were a total of 36 people on board the vessel. There were 3 Indonesian crew on board, you, and 2 other people who were under the age of 18 and have been sent home. Also on board were 6 Iraqi men, 12 Iranian men, 7 Iranian women and 8 Iranian children. All passengers and crew were transferred onto an Australian Customs vessel and taken to Christmas Island to the Immigration Reception and Processing Centre. You were later transferred to the Northern Immigration Detention Centre in Darwin.

The passengers have provided evidence and it is an agreed fact that most of those passengers say that they travelled from their country of residence to Indonesia, that they paid between US$10,000 and US$20,000 before boarding the vessel for their passage, and in one case the passage of their whole family, to Australia. This was not paid to you or the other crew. They were taken from various places to a place on the coast in Indonesia at night where they boarded a small boat which took them out to a larger boat. They say you and two crew were aboard the larger boat.

You appeared to be the captain of the boat and were in charge and were seen steering the boat during the voyage. You were also seen navigating the boat with the assistance of a compass. The two other crew members refuelled the boat, tended to the engine and steered it when you were resting. The vessel started taking on water at one stage and the crew took steps to remove it. The voyage took about ten days.

During the voyage, they were not asked for any travel documents including passports or visas. There was food and water on the boat and some passengers saw a small number of lifejackets but they were not distributed. One passenger said some passengers had brought their own lifejackets. Five of the passengers identified you as the captain of the vessel.

Department of Immigration and Citizenship records indicate that all of the passengers on board were non-citizens and had no lawful right to come to Australia on the date the vessel was intercepted.

On 9 September 2010, you participated in a taped record of interview and exercised your right not to answer any questions in relation to the offence.

So far as your prior criminal record is concerned, you have a prior conviction under s 232A of the Migration Act for facilitating the bringing into Australia of 108 people in 2001 being reckless as to whether the people had a lawful right to come to Australia. You have two prior convictions for using a foreign boat for commercial fishing in the Australian Fishing Zone without a licence.

So far as your personal circumstances are concerned, I am informed that you are 58 years old and you are from Roti in Indonesia. You are married with four children. Three of the children are adults and your two sons are married. Your youngest daughter is 17 and in Year 10 at school. Your wife and youngest daughter are dependent up on you financially and you are extremely anxious about their welfare while you are in custody in Australia. I am told that you own a modest house in Roti made of bamboo.

Most of the men in Roti work as fishermen as it is a small island and there is little other employment available. You have always worked as a fisherman and have no other skill or trade. You usually fish for sharks fin. I am told you earn a maximum of 500,000 rupiah per fishing trip per month which is approximately AU$60. You do not earn that every month and if a trip is unsuccessful you can earn nothing. You do not have any other employment opportunities.

I am told you are aware that the offence for which you are before the Court carries a penalty of imprisonment and I am told that your earlier offending and the present offending has all been motivated by extreme poverty. In the words of your counsel, you committed the offence out of financial desperation.

I am told that the circumstances of the offending are that you were approached by a man in Roti and offered ten million rupiah to take on the job. That is about $1200 which is, in your financial circumstances, an extremely large amount of money but a very modest sum in comparison with the sums of money paid by the people for passage on board the boat.

The prosecutor concedes that you have indicated a willingness to plead guilty at an early opportunity which is indicative of your willingness to facilitate the course of justice. Of course, it might also be seen as a recognition of the inevitable.

Nevertheless, you would be entitled to a discount on your sentence as a result of your early plea, but the mandatory sentencing regime in the Migration Act renders any such discount of no effect. I am unable to give such a discount.

The prosecutor contends that despite your guilty plea you show no real remorse. One would not expect you to display shame or remorse.

By committing the offence to which you have pleaded guilty, you have broken Australian law and must suffer the consequences. However it 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. The same might be said of your earlier convictions of facilitating the bringing of people into Australia and commercial fishing in Australian waters.

So far as sentencing principles are concerned, I am required to take into account such of the matters set out in s 16A(2) of the Crimes Act as are relevant and known to me. Having done so, I am required by s 16A(1) of that Act to impose a sentence which is 'of a severity appropriate in all the circumstances of the offence'. However, I am prevented from doing this by the mandatory sentencing regime in s 236B of the Migration Act. That section provides that for the offence to which you have pleaded guilty, the Court must impose a minimum sentence of five years imprisonment with a minimum non-parole period of three years. In the case of a repeat offence, the mandatory minimum sentence is eight years imprisonment with a minimum non-parole period of five years.

Unfortunately, as I have already ruled, in my view the prosecutor is correct in saying that because of your earlier conviction for facilitating the bringing of people into Australia in 2001, the present offence is a repeat offence. Having regard to the matters in s 16A(2) of the Crimes Act and in particular to the following matters:

(a) the nature and circumstances of the offence and the fact that it is not suggested that you played a principal or high level role in the operation whereby your passengers paid money and it was organised that they be brought into Australia;

(b) your personal circumstances, antecedents, age and means, in particular your extreme poverty and your need to provide for your family which was a motivating factor in the offending;

(c) the probable extreme effect that any lengthy sentence of imprisonment would have on your wife and daughter;

(d) the fact that you have pleaded guilty;

(e) the need to ensure that you are adequately punished for the offence;

(f) paying special attention to the need for both personal deterrence given your prior relevant offending, and general deterrence, both of which must play an important role in any sentence I hand down.

As I say, taking into account all of those matters which are set out in s 16A(2), I would not consider it appropriate to hand down a sentence anywhere near as severe as the mandatory minimum sentence of eight years imprisonment nor would I consider it appropriate to fix a non-parole period as long as five years. Such a sentence is completely out of kilter with sentences handed down in this Court for offences of the same or higher maximum sentences involving far greater moral culpability including violence causing serious harm to victims.

As his Honour, Mildren J, said in Trenerry v Bradley (1997) 6 NTLR 175 at 187:

> Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a Court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.

This is such a case. I am compelled by the legislation to hand down a sentence which is harsher than a just sentence arrived at on the application of longstanding sentencing principles applied by the Courts and which have been applied by those Courts for the protection of society and of the individual. I have no choice.

You will be convicted and sentenced to imprisonment for eight years commencing on 15 June 2010. I fix a non-parole period of five years.

Had it not been for the mandatory minimum sentencing regime, taking into account the maximum penalty prescribed for this offence and the factors I have already set out I would have considered an appropriate penalty to have been a term of imprisonment for three years with a non-parole period of 18 months.

I therefore recommend that the Commonwealth Attorney-General exercise his prerogative to extend mercy to you, Mr Nafi, after you have served 18 months in prison. There is no guarantee that this will occur. It is a matter for the Attorney-General whether this recommendation is accepted.

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THE SUPREME COURT OF

THE NORTHERN TERRITORY

SCC 21041400

THE QUEEN

and

MAHENDRA

(Sentence)

BLOKLAND J

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON THURSDAY 1 SEPTEMBER 2011

Transcribed by:
Merrill Corporation Australia

HER HONOUR: By jury verdict, Mr Mahendra has been found guilty of one count against section 233(C) of the Migration Act, namely facilitating the bringing to Australia of a group of not less than five persons who were non-citizens, and at least five had no lawful right to enter Australia, being reckless as to that, fact of having no lawful right to enter.

During the sentencing process Mr Mahendra acknowledged guilt for two other offences; namely damaging Commonwealth property contrary to section 29(1) of the Crimes Act, and possession of a weapon by a detainee, being a chain, contrary to section 197B(1) of the Migration Act. These are admitted and they are taken into account. They are unrelated to the people smuggling charge, and relate to a disturbance at the detention centre.

For sentencing purposes I find beyond reasonable doubt that Mr Mahendra, along with Mr Suwandi, who has already been dealt with for this offence, were working as fishermen in Lombok, Indonesia. They were approached by two strangers, Abdullah and Wan Chu, to take people to Australia. I find Mr Suwandi was primarily involved in the negotiation, but Mr Mahendra was present and understood he would be involved in legal activity, namely bringing people to Australia, but was not fully aware of the consequences to himself.

I find Mr Mahendra, like Mr Suwandi, agreed to take the non-citizens to Australia, being reckless as to their lawful right to come to Australia. I find no checks were done to ascertain whether any of the passengers had a lawful right to enter Australia. I find it unlikely Mr Mahendra was fully aware of the technical requirements for entry into Australia, but he was aware of a risk that some form of permission needed to be given to enter Australia, and he was, as the jury found, reckless as to whether the passengers had a lawful right to come to Australia.

I find Mr Mahendra agreed on a sum of 5,000,000 Indonesian rupiah, of which he received 500,000 rupiah, but not more. Five million rupiah equates, as I understand it, to around $600 Australian. I agree it is a significant sum in his circumstances, but it is nowhere near the sums received by Abdullah and Wan Chu, persons that we heard about in evidence in this trial, who appear to be the organisers. The evidence of what the various passengers, who were witnesses in this trial, paid to organisers was that it was in the many thousands of dollars.

I find Mr Mahendra's involvement was as a crew member. In particular, he was engaged in, at times, steering the boat in the waters between Indonesia and Australia. I find there were 36 passengers on board SIEVI57, and none had a lawful right to enter Australia. I find the SIEVI57 was spotted on 7 June 2010 by an Australian surveillance plane, and once it became clear it was necessary to transfer passengers to the Australian Customs boat, those passengers were transferred. It was Australian authorities, through Customs, who physically brought the passengers to Australia and completed the last part of the voyage.

For the reasons which have previously been published to the parties, in my view the offence was committed, notwithstanding the passengers did not actually arrive at

or in Australia. As is well known, from cases before this court, the maximum penalty is 20 years imprisonment, with a mandatory minimum sentence of five years imprisonment, with a mandatory three year non-parole period for this offence.

As has been shown in the evidence in this trial, it is not clear to vulnerable subsistence, fishermen in Lombok, such as Mr Suwandi and Mr Mahendra, that this fate awaits them, that is the sentence available under the statute. In a sense, Mr Suwandi and Mr Mahendra were tricked about the legal consequences of taking the passengers, and Mr Suwandi alluded to this during his evidence.

The talk from the persons who were strangers to him, Abdullah and Wan Chu, was that he would be deported on reaching Australia. The talk was that essentially gaol was for people who had done it before. While the minimum sentence may well be appropriate for those who organise these voyages and obtain significant sums of money from asylum seekers, and exploit the poverty and vulnerability of subsistence fishermen such as Mr Mahendra, the circumstances of people like Mr Mahendra who themselves are, to a degree, victims of exploitation and a degree of trickery, in my view are disproportionately punished by virtue of the five year sentence.

During the course of the trial we heard evidence about Abdullah, Wan Chu and others who were paid large sums of money. We heard evidence from the asylum seekers about paying sums of around $10,000. Mr Mahendra, who was recruited at the very end of the process, needless to say, was not a party to that sort of money. So, in my view Mr Mahendra is not in the same category as those who organise and receive significant financial benefit; yet, the current laws do not allow differentiation between different types of offenders.

Aside from the objective seriousness of the offending, the personal circumstances of Mr Mahendra are as follows. Mr Mahendra is 27 years of age. His father passed away and he lived with an aunty when he was younger. His two daughters are five and three years of age. Their mother, Mr Mahendra's former wife, is now a maid in the Middle East where exploitative conditions, and worse, are well known. It is unlikely, I would suggest, if not for living a life of severe circumstances that such a path of employment would be chosen.

I note Mahendra and his wife separated due to their partnership not receiving family approval. Mr Mahendra's mother looks after their daughters. They have contacted Mr Mahendra from time to time while he has been in detention, and are distressed. His mother collects stones and sells them for income. Their circumstances are poor. Mr Mahendra has received little education. He has been a fisherman for 14 years. In a good month he might receive 3,000,000 rupiah.

He has never left Indonesia before this voyage; he has no passport and no detailed knowledge of travel and what is required officially. The furthest he has travelled is Palau Sumbawa in Indonesia. He regrets what he has done. He has never been in trouble with police in Indonesia. He comes before the court with no previous convictions, and I note that that is obviously a matter that is usually taken into account in relation to passing sentences in an Australian court.

Although he was to obtain some money as significant motivation, he also thought he was helping the passengers. Provisions were made for the passengers albeit, going from the evidence, in quite a rudimentary way. Prison time will be hard on him, given his language is Bahasa Indonesia, and there are few Bahasa Indonesian speaking people in Berrimah Prison. Counsel advises that prison would be worse than detention, primarily for that reason of language.

In my view, a sentence proportionate to the criminality would have been, consistent with general sentencing practice, approximately one year to 18 months imprisonment. I am unable to make such an order. Around one year to 18 months would be deserved, and necessary to meet the deterrent ends of sentencing. I acknowledge, also, that Mr Mahendra, although at a lower end offender, this last leg of any voyage between Indonesia and Australia is a vital part of the operation.

I fully acknowledge the need for general deterrence, however deterring of poor, uneducated fishermen in Indonesia has not been achieved by mandatory sentences, and at the same time has removed judicial discretion to pass proportionate sentences. Other members of this court have made similar observations. It is important people be deterred from committing this offence, particularly because of the safety issues to all persons, and the understandable concern in the community about that. Unfortunately, the five year sentence I am obliged to impose has an arbitrary element to it, as does most forms of mandatory imprisonment.

Australia is a party to the international covenant on civil and political rights. Article 9.1, in part states that no-one shall be subjected to arbitrary arrest or detention. Assigning a five year sentence of imprisonment, without judicial consideration of the gravity of the offence, in terms of the circumstances of the offending and the offender may, in my view, amount to arbitrary detention. In the usual sense it is understood, it must be arbitrary because it is not a sentence that is a proportional sentence. The court is deprived of the usual function to assess the gravity and, therefore, be able to pass a proportionate sentence.

In this particular case it is particularly so because there is a failure to differentiate people in the circumstances of Mr Mahendra, which I have just described, from those who actually orchestrate the offence on a grand scale. Perhaps unlike other cases, in this particular case the court has heard evidence about those persons, and about the money that has changed hands.

It is of concern, the sentence that I am about to pass in this case may amount to a contravention of some of the most fundamental and widely accepted principles of international justice. In relation to this particular accused, because I am unable to pass a proportional sentence, but rather am forced to sentence on the arbitrary term of five years, I do request the Federal Minister for Justice and Home Affairs to review this sentence in the light of well accepted sentencing principles and international principles, and consider Mr Mahendra for release in exercise of the prerogative of mercy. I note her Honour Kelly J requested similar action in relation to another offender.

The Crown acknowledges that given the mandatory sentence I must impose, the further offences admitted and taken into account need not add to the sentence and, in my view, that is a most fair concession that has been given by the Crown. So, Mr Mahendra is sentenced to five years imprisonment, commencing on 8 June 2010.

State Reporting Bureau

Queensland Government
Department of Justice and Attorney-General

Transcript of Proceedings

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DISTRICT COURT

CRIMINAL JURISDICTION

ACTING JUDGE FARR SC

THE QUEEN

v.

LHOLI FAECK

AND

RONNY WARKOR

BRISBANE

..DATE 08/06/2011

SENTENCE

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HIS HONOUR: Stand up, both, please. Lholi Faeck and Ronny Warkor, you have both pleaded guilty to one count of facilitating bringing a group of non-citizens to Australia.

Mr Faeck, you are 21 years of age with no prior convictions in this country.

Mr Warkor, you are 28 years of age with no prior convictions in Australia.

You're both Indonesian nationals, and usually employed as fishermen.

The facts in relation to this charge are as follows: A small boat was observed in the Timor Sea near a gas platform. Australian Customs and Border Protection Service were notified. They, in turn, contacted the Royal Australian Navy. A patrol boat then set course to shadow this particular vessel, which was labelled Siev, S-I-E-V, 114.

Whilst it followed the Siev 114, the naval vessel observed a southerly direction of travel at about eight knots. At about 8.30 that evening an inflatable vessel was launched by the Navy. The Siev was boarded within the Australian Economic Zone. A request to board was granted. The passengers and crew were cooperative with the boarding party. There were eight Sri Lankan passengers; four Indonesian crew members.

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The Siev 114 was a wooden fishing boat about 10 metres long and about three metres wide, the wooden cabin in the middle covered with some plastic sheets. The passengers have given statements indicating that they have left Sri Lanka and travelled to various intermediate destinations before ariving in Indonesia.

On reaching Indonesia they were driven for eight hours to an unknown location. They stayed there for somewhere between eight to 15 days, then taken through a jungle area to a beach, directed to wade into the water, and to get onto a boat that was moored just off the shore. That was the Siev 114. They were directed to climb down into a manhole and stay below the deck until after dark.

The vessel had no cabin, just a raised platform in the middle of the boat, and it was steered by ropes. There appeared to be no mobile phones, or radars, or radios on the boat; no life jackets. It appears there may have been a GPS device, however.

The journey from Indonesia to interception took about a day. None of the passengers had Visa's, and the passengers and crew were subsequently transported to the detention centre at Christmas Island arriving on the 17th of March 2011.

Both of you were on the Siev 114 when the passengers were boarding. You both assisted the passengers to get on board the boat. Mr Faeck provided - you provided passengers with

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food and tea throughout the journey, assisted to bail water from the boat, and with maintenance of the engine. Mr Warkor was observed to be using the GPS, or what we think is the GPS device. You steered the vessel. Passengers assessed that you were in charge of the ship, but that's not an allegations that's maintained here, and there's little evidence in that regard.

You have both been in custody, either in migration detention, or pre-sentence custody, since the 11th of March 2010, which is a total period of 454 days, and I will declare that time at the appropriate stage.

This offence carries a maximum penalty of 20 year's imprisonment, or a fine of $220,000, or both.

It also, under the provisions of section 233C, subsections 2 and 3, imposes minimum periods of imprisonment that must be imposed. In each of your cases, the minimum period is five year's imprisonment, with a three year non-parole period.

In assessing the appropriate penalties to be imposed in each of your cases, I will approach the sentencing assessment process in the usual way, applying the considerations set out in part 1B of the Crimes Act 1914, and specifically the factors outlined in section 16A.

By way of that process, if the notional sentence that I arrived at, absent the statutory regime, is less than the

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statutory minimum, I will of course have no option other than to impose the statutory minimum.

Now, I note that the Migration Act is to regulate the national interest of the coming into and presence in Australia of non-citizens. The Courts have recognised the unlawful entry of non-citizens into Australia is a serious violation of this country's sovereignty.

General deterrence is a particularly important consideration when determining the appropriate sentence. In fact, it is the paramount consideration. That is not to say that a consideration such as rehabilitation is of no relevance, but it is necessarily of much less importance in a case of this nature.

It has been submitted on your - on both of your behalf's that neither of you had any idea as to the potential consequences of your unlawful behaviour in this country. Given the circumstances in which you live, I accept those submissions. That, in and of itself, does not reduce the significance of general deterrence as a sentencing consideration, but it goes to explaining your involvement in this enterprise.

How these types of offences are treated in Australia is conveyed to people in your living circumstances in Indonesia is a matter for the authorities. The Courts can do no more than the justice and or the legislation requires.

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There are other considerations relevant in a charge of this nature. They have been identified in other cases as including a - the frustration of Australia's legislative and administrative system for seeking to deal in a fair and orderly way with non citizens wish - wishing to enter and remain here including refugees. The administrative burden and expense includes the cost of detection, interception, boarding of suspected illegal-entry vessels, transfer, detention, processing of offenders and passengers, conduct of investigations, the prosecution of suspects and incarceration of offenders.

That administrative burden is a relevant consideration. Other such considerations include the diversion of funds from dealing with the needs of others who have not found the opportunity or money to effect a clandestine entry into Australia, the significant health and quarantine risks associated with people trafficking, the effect - and the effect upon the exploitation of non citizens attempting to enter Australia illegally.

The need for sentences to send a strong message of deterrence to others who are considering engaging in such an enterprise can be seen from the statistic that between January 2010 and April 2011 there have been 152 boats carrying unlawful-non citizens arrive in Australia. As I say, however, how that message is conveyed is a question for the authorities.

Now in mitigation - I take into account the fact that you have

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both pleaded guilty after indicating that you would do so at an early stage. There are no prior convictions alleged against either of you. You are both still young men, Mr Faeck being only 21 years of age. You are both crew members of the vessel and I infer from that, that you both fall very much at the bottom of the hierarchy involved in this enterprise. I infer only the lowest on the totem pole and probably the most desperate would put your - their own lives at risk.

I note that you both come from poor backgrounds and that you were enticed into playing a role in this enterprise by way of offer of financial reward. The amount offered for instance, the sum of five hundred and - well the equivalent of $550 whilst a relatively small amount in Australia, I accept would be considered to be a large amount of money for persons in your position in Indonesia when your weekly income varies between thirty to $50. I have no doubt that those further up the chain of command have preyed upon your financial vulnerability.

I accept that you both have family responsibilities and through your pleas of guilty and your cooperation, you have both evidenced the existence of remorse. And I note that there were only eight passengers on board this vessel, as best I can see, less than any other case that I have been referred to and at times significantly less. There is absolutely no reason for me to think that either of you do not have good rehabilitative prospects.

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Despite the fact that you each fall at the low end of the hierarchy involved in this enterprise, it must be said that your roles were nevertheless vital to the overall operation. Without people such as yourselves, this type of activity could not occur. There is no doubt that these are serious - this is a serious offence. Having said that I am also of the view that this is a less serious example of such offending than many of the cases that have come before the Courts.

Were it not for the statutory minimum period, I have no doubt that a sentence less than five years imprisonment would have been imposed in each of your cases. Taking all those relevant considerations into account has allowed me to arrive at that conclusion but unfortunately for yourselves, the statutory minimum does apply and I must sentence you accordingly. So the order of the Court is, I sentence you to - each of you to five years imprisonment and fix a non-parole period of three years.

Pursuant to section 159A3 of the Penalties and Sentences Act, I declare the period of 454 days spent in presentence custody from 11 March 2010 until 7 June 2011 to be imprisonment already served under the sentence. Now the law requires that I try and explain that sentence to you. I've just sentenced each of you to five years imprisonment but have fixed the non-parole period at three years. That means that you will be released from prison after you have served three years and you have served the - the first 454 days of that period.

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The likelihood is that after you're released, you will be deported and returned to Indonesia. But if you are not deported you will serve the balance of the sentence in the community subject to the conditions of a parole order. Your parole, if that occurs, will be subject to the condition that you be of good behaviour and not violate any law. The Attorney General may impose other conditions if appropriate. If you commit another offence or fail to comply with the conditions of parole may be revoked and you could be required to return to prison to serve out the balance of your sentence.

Are there any other orders that are required?

MR ALLEN: No, that covers everything, your Honour.

HIS HONOUR: Thank you for your help Adjourn the Court.

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DISTRICT COURT

CRIMINAL JURISDICTION

JUDGE MARTIN SC

Indictment No 1196 of 2011

THE QUEEN

v.

HASIM

BRISBANE

..DATE 11/01/2012

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SENTENCE

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HIS HONOUR: Stand up, please. You have pleaded guilty to one count of aggravated people smuggling. This offence was committed in August 2010. You were the sole crew member piloting a type III shark boat from Kupang to within Australia's contiguous zone, where the vessel was intercepted by the HMAS Bundaberg. This voyage took four or five days.

You had 20 passengers aboard the vessel. The vessel was overcrowded, unseaworthy and ill-provisioned for the voyage all the way to Australia. There were no life jackets aboard. Passengers assisted in bailing water from the boat and, from what has been said by Ms Morgan, also assisted in steering the vessel.

It was submitted on behalf of the Commonwealth that that voyage was undertaken in circumstances in which it posed a risk to the safety of those onboard. It was also emphasised in written submissions that you profited from this offence and that, obviously enough, your role in the offence was vital.

You are now 29 years of age. You were 27 years of age at the time of this offence. There is no criminal history alleged against you. The profit that you seem to have received for this offence amounts to approximately $A480.

Whilst the passengers displayed desperation in embarking upon this voyage, much the same can be said of you. The reward for the passengers was some chance of living in Australia. Your reward for this risky voyage was, it seems, approximately

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$480. Further, it must be the case that you had no understanding of how seriously your conduct would be regarded. There seems to be little, if any, apprehension of the extent of the criminality in this conduct.

It is also blindingly obvious that you had no understanding of the true consequences of your conduct. A successful voyage to Australia meant that the vessel would be destroyed, as it was, the money you had been paid would be forfeited, as it has been, and you would be gaoled for a minimum of three years. Clearly, you could not have known that a successful voyage to Australia was a one-way trip to imprisonment.

It is true to say that organisers of these smuggling operations exploit the passengers, desperate to attempt to make a better life in Australia. However, it is equally true that the organisers exploit uninformed persons such as you. Indeed, such exploitation may be of a higher order.

It has been submitted that penalties for offenders involved in people smuggling must reflect the strong need for general deterrence. The legislature clearly agrees and hence the minimum mandatory penalty.

However, there can be no point in imposing heavy penalties if there is not widespread publicity of the penalties in the relevant areas of Indonesia. Commonly, savage penalties are being imposed upon the ignorant who have been simply exploited by organisers. You are one such person. It is obvious that

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the legislation imposing a minimum mandatory penalty deprives a Court from exercising a full and proper sentencing discretion in cases such as this.

I have had regard to the proper approach to sentencing as set out in the decision in Bahar v. The Queen [2011] WASCA 249. I have also had regard to the other decisions referred to by counsel. As I indicated earlier, you were 27 years of age at the time of the commission of this offence and you appear before me without any criminal history alleged against you. You have very limited education, having left school at grade five. You are an unsophisticated man.

I accept that you did not know the consequences of your offending and it seems to me that you could not have known the seriousness of your conduct. You have pleaded guilty to this offence at an early time and thereby facilitated the administration of justice.

Your detention and imprisonment in Australia, of course, will mean that you are away from your family for that time. Your absence from Indonesia means that you will be unable to support your family, as you have been doing for many years. That will impose a hardship upon your family.

Having had regard to all relevant sentencing factors, I am of the view that your offending falls within the least serious category. I sentence you to five years' imprisonment and fix a non-parole period of three years. I find that you have been

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in presentence custody in relation to this offence and only this offence from the 22nd of August 2010 until the 11th of January 2012. I calculate that period to be a period of 507 days. I declare that period of 507 days as time served under the sentence which I have just imposed.

I have sentenced you to five years' imprisonment but I have fixed a non-parole period of three years. That means that you will be released from prison after three years. Of course, you have already served 507 days of that period. It is likely that, upon release, you will then be deported and returned to Indonesia.

If you are not deported, you will serve the balance of sentence in the community, subject to the conditions of a parole order. Your parole would be subject to the condition that you be of good behaviour and not violate any law. The Attorney-General may impose other conditions if appropriate. If you commit another offence or fail to comply with the conditions of parole, your parole may be revoked and you could be required to return to prison to serve out the balance of your sentence. Do you understand that?

INTERPRETER: Yes.

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DISTRICT COURT

CRIMINAL JURISDICTION

JUDGE MARTIN SC

THE QUEEN

v.

RUDY MULYONO

BRISBANE

..DATE 03/02/2012

SENTENCE

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WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act* 1999, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: Stand up, please. You have pleaded guilty to one count of facilitating bringing a group of non-citizens to Australia. This offence was committed in February 2010.

You are 28 years of age and a single man. You are an Indonesian national and usually employed as a fisherman. You were the captain of a fishing vessel carrying 41 male Afghan passengers and four male Indonesian crew members. The vessel, whilst in a poor condition, was not unseaworthy. The vessel was adequately provisioned and had a kitchen and a toilet. All passengers had lifejackets and the vessel had navigational aids, including a functioning GPS.

Whilst your role was more significant than that of the crew, the difference in roles is not substantial. It seems that each crew member's role involved navigating as well as taking turns in organising food for the passengers. It is noted that you did more of the navigating than others. It is clear from the statement of facts that the other crew took turns in steering the vessel. It seems to me that each crew member's role was necessary for the success of the journey.

Your plea of guilty has facilitated the administration of justice.

You were rewarded for this venture. It seems that you received approximately $1,500 Australian for this journey. In relation to the 41 million rupiah which was found in your possession by the authorities, I accept that you did not seek

REVISED

that money from the passengers, but rather, for whatever reason, they decided to have you take it when it looked as if the vessel was to be boarded by naval personnel. For all one knows, the passengers may have been told by the organisers to hand over the money at that stage.

In any event, as has been submitted by Mr Crofton, that you thought at the time that you and the other crew members could share that money, reflects your lack of understanding of the seriousness of this conduct. It seems to me to be inevitable that you had no idea of how seriously this conduct is regarded in Australia and certainly you could not have had any sensible idea of the consequences which follow such a journey.

You, it seems, were clearly unaware that this would be a one-way trip to Australia. The upshot is, of course, that you will spend a lengthy period of incarceration in Australia and the only reward for you and the family is the small amount of money which you left behind with the family when you embarked upon the journey. Everything else, of course, is forfeited.

I have on previous occasions remarked about the inappropriateness of mandatory minimum penalties. Most recently the remarks were made in the matter of the Queen v Hasim. It is unnecessary for me to here repeat those remarks and, indeed, even if I did, it seems to achieve little.

REVISED

Of course, these penalties which are designed to be a deterrent to others have little or no effect unless the fact of these penalties is published to the persons who may bring boatloads to Australia. I accept that the approach in the decision of Bahar v The Queen [2011] WASCA 249 is the correct approach. I note at paragraph 60 of that decision the Court said this, "The primary statutory purpose of section 233C is to create certainty as to the type and minimum length of sentence for the offence of people smuggling in order to maximise its deterrent effect, both in and outside Australia. Of course, its effectiveness as a deterrent depends on securing widespread knowledge of its existence, particularly outside Australia."

In dealing with the approach for sentencing set out in that decision I refer, in particular, to paragraph 55 of the decision, "The suggestion by the Crown to the sentencing Judge that the mandatory minimum is for a low level offence in which all mitigating factors are present reflects a lack of understanding of the sentencing process. First, the minimum penalty is for offences within the least serious category of offending and the maximum penalty is for offences within the worst category of offending. I emphasise 'category' of offending. There is no single instance at either extreme. Secondly, whether an offence falls within the least serious category is to be determined by reference to all relevant sentencing considerations, including matters personal to the offender..."

REVISED

Mr Rice of Senior Counsel on behalf of the Commonwealth has set out in a schedule a number of single Judge decisions. Some of those decisions involve offenders who were the captains of vessels. Whilst, of course, each case turns upon its own particular facts, it is noted that it has been only when a captain has gone to trial and, therefore, does not have the mitigation which results from a timely plea of guilty, that such an offender has attracted a sentence beyond the mandatory minimum.

Particular emphasis has been given by both Mr Rice and Mr Crofton to the decision of Judge Shanahan in the matter of Basuk. I accept that in your case this offence was committed by reason of a financial imperative. You and your brother were supporting your father and mother. This was an opportunity to obtain, effectively, a year's salary for about six days work, as you thought it to be.

REVISED

Because of the consequences of which you were unaware you will now be detained in Australia for a minimum of three years and you will serve your detention away from your family. It seems likely that, since the support for your parents will now rest upon only your brother, your family will suffer further hardship.

Having had regard to all relevant sentencing factors I am of the view that your offending falls within the least serious category. I sentence you to five years' imprisonment and fix a non-parole period of three years. I find that you have been

in presentence custody in relation to this offence and only this offence from the 19th of February 2010 to the 3rd of February 2012. I calculate that period to be a period of 714 days. I declare that period of 714 days as time served under the sentence which I have just imposed.

I have sentenced you to five years' imprisonment but I have fixed a non-parole period of three years. That means that you will be released from prison after three years. Of course, you have already served 714 days of that period. It is likely that upon release you will then be deported and returned to Indonesia. If you are not deported you will serve the balance of the sentence in the community subject to the conditions of a parole order.

Your parole would be subject to the condition that you be of good behaviour and not violate any law. The Attorney-General may impose other conditions, if appropriate. If you commit another offence or fail to comply with the conditions of parole your parole may be revoked and you could be required to return to prison to serve out the balance of your sentence. Do you understand that?

DEFENDANT: Yes, your Honour.

HIS HONOUR: Is there anything further, Mr Rice?

MR RICE: No, your Honour.

HIS HONOUR: Mr Crofton?

MR CROFTON: No, thank you, your Honour.

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