Federal Court  Cour fédérale

Date: 20130604

Docket: IMM-6392-12

Citation: 2013 FC 491

Ottawa, Ontario, June 4, 2013

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

S. C.

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

PUBLIC REASONS FOR JUDGMENT AND JUDGMENT
(Identical to Confidential Reasons for Judgment and Judgment Issued May 10, 2013)

I. Introduction

[1] This is an application for judicial of review of a decision by the Immigration Appeal Division [IAD] of the Immigration and Refugee Board dated May 24, 2012, finding that S. C. (the Applicant) is inadmissible to Canada on grounds of engaging in the activity of people smuggling in the context of transnational crime pursuant to paragraph 37(1)(*b*) of the *Immigration and refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] For the following reasons, this application for judicial review is dismissed.

II. Facts

[3] The Applicant is a citizen of Sri Lanka.

[4] On August 13, 2010, an unregistered ship bearing the name "MV Sun Sea" (the "Ship") carrying 492 migrants (the "Migrants") was intercepted by the Royal Canadian Mounted Police [RCMP] in Canadian waters off the coast of British Columbia. The Ship left Thailand on July 5, 2010. None of the foreign nationals on board had the requisite documents for lawful entry to Canada and all expressed an intention to remain in Canada permanently and file refugee claims. The Applicant was one of the persons on board the Ship.

[5] Following an investigation, the Canada Border Services Agency [CBSA] prepared a report entitled "Sun Sea Human Smuggling Operation" (the "Report"). The Report concluded that the Ship was part of an organized human smuggling operation that involved significant planning and preparation by numerous agents (approximately 45), based in several countries, who received payment from the Migrants to board the Ship for passage to Canada. The majority of the Migrants interviewed by the CBSA reported being charged any amount between $20 000,00 and $35 000,00 Canadian for their passage. The agents reportedly took the Migrants' passports and identifying documents before they boarded the Ship. The Migrants had to make an initial deposit ranging

between 25 to 50% of their full passage fee before boarding the ship and execute a written promise to pay the remaining balance upon their arrival in Canada.

[6] The conditions for the passengers on the Ship were reported as poor due to food and water shortages, overcrowded sleeping space and inadequate bathing and toilet facilities. The passenger Migrants also reported abuse of power by crew members via food and water.

[7] The CBSA investigation revealed that the Applicant was one of the Ship's twelve crew members who boarded first (i.e. before the passengers) to replace nine Thai crew members that were already on the Ship. The details surrounding the Applicant's arrival in Thailand and his securing a position on the ship are not clear. What is known is that the Applicant made his way to Thailand from Sri Lanka in 2008 and applied for refugee status with the Office of the United Nations High Commissioner for Refugees [UNHCR] in Bangkok a day after his arrival. His application was accepted and he therefore received a monthly settlement allowance from the UNHCR. The Applicant testified at the IAD that he heard about the Ship from word of mouth in Thailand and secured a position through arrangements with different agents including the principal agent, Prabha. The Applicant testified that he did not pay anything before boarding the Ship. He had agreed to work as a cook on the Ship and had negotiated an agreement whereby his father would pay a post-voyage fare that would be assessed based on the value of his work. The Applicant cooked for the eleven other crew members and assisted the Ship's chief engineer in the engine room.

[8] The CBSA investigation further revealed that the Ship belonged to the Applicant's brother. His brother had purchased the Ship in March 2010, for $175 000,00, through a company he controlled and was one of the smuggling venture's organizers. At the IAD hearing, the Applicant testified that he had no knowledge that his brother was in Thailand until he happened to bump into him by chance at a temple there. He also claimed to be unaware that his brother and sister-in-law planned to board the Ship and suggested that it was just a coincidence. He testified that he only discovered that his brother was going to board the Ship when he saw him getting on board just before the Ship left Thailand. He further stated that he and his brother had little contact on board and only exchanged pleasantries when they did see each other. The Applicant denied having any knowledge of his brother's involvement in the organization and ownership of the Ship.

[9] The Applicant made a refugee claim soon after his arrival in Canada. On or around December 16, 2010, an immigration officer prepared a report under subsection 44(1) of the *IRPA* indicating that the Applicant was a foreign national inadmissible to Canada under paragraph 37(1)(*b*) of the *IRPA* on the grounds of engaging in people smuggling. The Minister found the report to be well-founded and, pursuant to subsection 44(2) of the *IRPA*, referred it to the Immigration Division [ID] for an admissibility hearing.

III. The ID and IAD Decisions

[10] The ID decided that the Minister had failed to adduce sufficient evidence that the Applicant engaged in people smuggling as described in paragraph 37(1)(*b*) of the *IRPA*. The ID found that the four elements required to prove people smuggling under paragraph 37(1)(*b*) were the same as those

required to establish a violation of subsection 117(1) of the *IRPA*, namely, (i) the person being smuggled did not have the required documents to enter Canada; (ii) the person was coming into Canada; (iii) the accused was organizing, inducing, aiding or abetting the person to enter Canada; and (iv) the accused had knowledge of the lack of required documents.

[11] While the ID found the Minister had established elements (ii) and (iii), he failed to prove elements (i) and (iv). On the first element, the ID concluded that the Minister failed to adduce evidence that the Migrants arrived without the required documents. On the fourth element, the ID found that the Minister omitted to either file evidence or make submissions that the Applicant knew or was wilfully blind as to whether the Migrants had proper documentation. The ID did not agree that profit was an additional element necessary to establish people smuggling under paragraph 37(1)(*b*), but nevertheless found that the Applicant had received one in engaging in the smuggling activity. The ID reasoned that the Applicant aided in the Ship's efforts in order to receive a reduced fare and, thereby, received a material benefit.

[12] The Minister appealed the ID's decision and, on May 24, 2012, the IAD decided to allow the appeal, set aside the ID's decision and make a deportation order against the Applicant. The IAD found that the Minister had established all four elements cited above, necessary to find the Applicant inadmissible under paragraph 37(1)(*b*) for people smuggling. The IAD noted that the Minister had filed documentary evidence establishing that the Migrants came to Canada without the requisite documents. Regarding the Applicant's knowledge of whether the Migrants had proper documentation, the IAD found that:

> "[T]here are reasonable grounds to believe that the [Applicant] had such knowledge. The [Applicant] testified that he surrendered his

> own passport to the agent prior to boarding the ship but testified generally that he was not aware of whether others had done so and did not know what documents they may have possessed or what would be needed. The jurisprudence supports a 'wilful blindness' analysis rather than a need to find 'actual knowledge', and that analysis may include consideration of a failure to make reasonable enquiries. I find that it would be reasonably apparent to an observer, including the [Applicant] that a group of migrants who paid handsomely for passage in the high risk venture of traveling on the MV Sun Sea were not in a position to use lawful, cheaper and less life-threatening options for entry to Canada. One could reasonably infer that the reason the migrants did not simply buy airplane tickets to Canada for a fraction of the cost is because they did not have the proper documentation to do so" (IAD reasons at para 35).

[13] The IAD confirmed the ID's finding that a profit or financial benefit was not an element necessary to establish people smuggling under paragraph 37(1)(*b*). The IAD also made a number of credibility findings. The IAD found both the Applicant's claim that he had no knowledge of his brother's involvement in the venture and his explanation as to how or whether he paid for passage on the Ship to be not credible.

IV. Legislation

[14] The applicable sections of the *Immigration and refugee Protection Act*, SC 2001, c 27, of the *Protocol against the Smuggling of Migrants by Land, Sea and Air* and of the *Convention Relating to the Status of Refugees*, are appended to this decision.

V. Issues and standard of review

A. Issues

[15] This application raises the following issues:

1. Did the IAD err in its interpretation of the term 'people smuggling' found in paragraph 37(1)(b) of the IRPA?

2. Did the IAD err in its understanding or application of the concept of wilful blindness?

3. Did the IAD err in its credibility findings?

B. Standard of review

[16] What is the appropriate standard of review for the IAD's (or ID's) interpretation of paragraph 37(1)(*b*) of the *IRPA*? This question was recently answered by the Federal Court of Appeal in *B010 v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 87 at para 66 [*B010* (FCA)]. The Court of Appeal restated the principle that reasonableness is the standard of review when a tribunal is interpreting its home statute and found that none of the exceptions to that principle were applicable to this question.

> [66] Members of the Board function in a discrete and special administrative regime. They have expertise with respect to the

> interpretation and application of the Act. The nature of the question of law is the interpretation of the phrase "people smuggling". This question of statutory interpretation of the Board's home statute raises neither a constitutional question, nor a question of law of general importance to the legal system as a whole. Neither does it involve a question regarding jurisdictional lines between competing specialized tribunals nor a true question of jurisdiction (to the extent such questions continue to exist; see, *Alberta Teachers'* at paragraphs 33 to 43).

[17] The Court will therefore apply the standard of reasonableness to this question.

[18] Justice Noël addressed the appropriate standard of review to be applied to the second issue at paragraph 32 of *B010 v Canada (Minister of Citizenship and Immigration),* 2012 FC 569 [*B010* (FC)]:

> [32] I agree that the issue the applicant has raised with respect to the ID's understanding of the concept of wilful blindness and whether it failed to correctly address elements of the legal test is a question of law that should be decided on the standard of correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 44, [2009] SCJ 12 [*Khosa*]; *Mugesera*, above, at para 37; *Belalcazar v Canada (Minister of Public Safety and Emergency Preparedness),* , 2011 FC 1013 at para 14, [2011] FCJ 1332). However, the ID's application of wilful blindness to the facts remains subject to the reasonableness standard of review (*Onyenwe v Canada (Minister of Citizenship and Immigration)*, 2011 FC 604 at paras 9-10, [2011] FCJ 807).

[19] The Court agrees with Justice Noël's analysis on this issue and will therefore review the IAD's understanding of the correct legal test for wilful blindness on the correctness standard and assess its application of that concept on the reasonableness standard.

[20] Finally, on the third issue, it is well established in the case law that credibility finding is a question of fact that is reviewable on a reasonableness standard (see *Lawal v Canada (Minister of Citizenship and Immigration)*, 2010 FC 558 at para 11).

VI. Parties' positions

[21] The Applicant argues that the IAD incorrectly interpreted the meaning of the term "people smuggling" in paragraph 37(1)(*b*) of the *IRPA* and confounded the activity with the crime of "organizing entry into Canada" found under section 117 of the *IRPA*. The Applicant contends that when applying the general principles of statutory interpretation and considering 1) the plain meaning of the French version of section 37(1)(*b*) including "smuggling" (and of the expression in the French version (i.e. "se livrer" "le passage des clandestins")); 2) the objectives of the *IRPA*; and 3) Canada's obligations under international law, the expression "people smuggling" necessarily entails bringing illegal aliens into Canada clandestinely for financial or material profit. Because the Applicant did not receive a profit or material benefit and the Ship and its passengers did not enter Canada clandestinely, the IAD erred in finding him inadmissible for "people smuggling" under paragraph 37(1)(*b*).

[22] The Respondent submits that the IAD correctly relied on the crime of "human smuggling" under section 117 of the *IRPA* in determining the constituent elements of "people smuggling" under paragraph 37(1)(*b*). A more narrow definition of "people smuggling" would, according to the Respondent, lead to an absurd result. The Respondent also claims that the ordinary and legal definitions of "smuggling" do not require clandestine entry but insists that even if they did, the facts

in this case indicate that the Ship and the Migrants entered Canada both illegally and clandestinely. On the profit or material benefit element, the Respondent maintains that it is not a required aspect of people smuggling but notes that even if it was, the Applicant himself admitted to receiving a benefit, before the IAD, in the form of a reduction of his passage fare on the Ship.

[23] On the second issue raised by this application, the Applicant insists the IAD misunderstood the law of wilful blindness by equating it to a mere suspicion rather than considering if he truly had knowledge of a need to make an enquiry as to whether the other Migrants had proper documentation. The Applicant insists that he had no reason to ask other Migrants about their documentation because he did not see himself as affecting or aiding their voyage to Canada in any way.

[24] The Respondent submits that the IAD properly found that there were reasonable grounds to believe the Applicant knew or was wilfully blind to the fact that other Migrants lacked proper documentation. The Respondent notes the Applicant testified knowing he needed at least a passport to enter Canada, and having given his up before boarding the Ship. The Applicant, according to the Respondent, also acknowledged having chosen to come to Canada this way because he wasn't able to enter lawfully. Given these circumstances, the Respondent submits that:

> "[I]t belies credulity for the Applicant now to assert that it was unreasonable for the [IAD] to make a finding of fact that the Applicant knew or ought to have known that, like the Applicant himself, the other Migrants came to Canada by means of an expensive, surreptitious, hazardous smuggling venture because they did not have the proper documentation to come to Canada lawfully" (Respondent's Memorandum of argument at para 55).

[25] Finally, on the third issue, the Applicant contends the IAD failed to provide the details required to verify its credibility findings in its reasons. For example, while the IAD claimed that the Applicant's descriptions at the hearing were inconsistent with the CBSA Report, it did not indicate what those descriptions were. Similarly, while the IAD claimed information the Applicant provided was inconsistent with his testimony, it failed to describe precisely what that information was. The Applicant also claims that the IAD's statement that the Applicant's testimony, at the hearing, was not more reliable than on previous occasions, ignores the fact that the ID found the Applicant's testimony not to be unreliable. The Applicant concludes that no evidence was adduced to directly link him in any way to his brother's involvement with the Ship.

[26] The Respondent insists that the IAD's credibility findings were reasonable, well-explained and supported by the evidence. Furthermore, the Applicant's claim that the ID found him to be credible is contrary to that tribunal's reasons. The only finding the ID made about the reliability of the Applicant's evidence in its reasons was that it was vague.

VII. Analysis

1. Did the IAD err in its interpretation of the term 'people smuggling' found in paragraph 37(1)(b) of the IRPA?

[27] As we have previously indicated, there is no definition of "people smuggling" in the *IRPA* or any of its related regulations. Both the ID and IAD chose to equate the term with the offence of "organizing entry into Canada" described at subsection 117(1) of the *IRPA*. The tribunals were

undoubtedly influenced by the term located in the heading above section 117, namely, "human smuggling". A close reading of section 117 makes it clear that "human smuggling" refers to the offence described in subsection 117(1). The Court finds the IAD's conclusion that subsection 117(1) serves to criminalize the activity that renders anyone who engaged in it inadmissible for 'people smuggling' under para 37(1)(*b*) to be reasonable and in line with principles of statutory interpretation. In attempting to interpret the meaning of an expression, one should "turn up other provisions that may have some significant relation to the provision to be interpreted. By reading related provisions together, the court uncovers aspects of what the legislature intended" (Ruth Sullivan, *Statutory Interpretation*, 2d ed (Toronto: Irwin Law Inc, 2007) at 132 [*Statutory Interpretation*]).

[28] While the terms "people smuggling" and "human smuggling" are not identical,, the Court is conscious of the textual analysis technique under which different words appearing in the same statute should be assigned different meanings, the Court agrees with Justice Noël in *B010* (FC) cited above, that there is "no meaningful or plausible reason in this case to distinguish between the act of 'people smuggling' and that of 'human smuggling'" (*B010* (FC) at para 40). Both terms obviously address the same criminal activity-the smuggling of human beings.

[29] The Applicant argues that profit or material benefit is a necessary element of people smuggling and that people engaged in humanitarian smuggling should not be found inadmissible under paragraph 37(1)(*b*).

[30] Paragraph 121(1)(*c*) of the *IRPA* makes it very clear that committing human smuggling for profit is an *aggravating factor* rather than a required element of the offence. Reading in the additional element of profit for people smuggling would, therefore, create a situation where a person could be found guilty of human smuggling (and liable for a fine of up to $1 000 000,00 and life imprisonment for smuggling a group of 10 or more persons) but not be found inadmissible under paragraph 37(1)(*b*). Justice Noël, in *B010* (FC) cited above, reasoned that such an absurd result was yet "another indication that para 37(1)(*b*) should be interpreted in conformity with section 117" (see *B010* (FC) at para 44).

[31] In *Hernandez v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1417 at para 64 [*Hernandez*], Justice Zinn found that requiring a profit element for people smuggling would not necessarily lead to an absurd result. While he acknowledged that a person found guilty of people smuggling could nonetheless not be inadmissible under paragraph 37(1)(*b*), they would, still, remain inadmissible to Canada under subsection 36(1) of the *IRPA*:

> [64] It is true that if "people smuggling" requires the Profit Element then a humanitarian smuggler convicted under section 117 would not be inadmissible by virtue of paragraph 37(1)(b); however, that individual would nonetheless be inadmissible for "serious criminality" through the straightforward application of subsection 36(1), and would be subjected to the attendant consequences of such a designation. In other words, notwithstanding paragraph 37(1)(b), the humanitarian people smuggler is already inadmissible in the same manner as others convicted of serious crimes.

[32] What purpose is served by requiring a profit motive for people smuggling? According to the Court in *Hernandez*, cited above, it is to further punish or create further drawbacks for those who smuggle people for profit. Such an intent is, in fact, consistent with Parliament listing a profit motive as an aggravating factor for human smuggling according to paragraph 121(1)(*c*):

> "Moreover, in Sullivan's words, I find there is a "plausible reason for distinguishing between the two groups." Individuals who smuggle people for profit arguably should be afforded fewer protections than those who do not. Indeed, Parliament listed the profit motive as an aggravating factor to be considered at the sentencing stage for the offence of Human Smuggling in section 117: See paragraph 121(1)(c). Parliament therefore obviously intended that the smuggling of people for profit is to be met with harsher treatment than humanitarian smuggling. Including the Profit Element as a requirement of people smuggling in paragraph 37(1)(b) accords with that intention" (*Hernandez* at para 66).

[33] The Court disagrees with this line of reasoning. While the Court acknowledges that, in listing profit as an aggravating factor, Parliament intended to treat those who smuggled humans with that motive more harshly; it does not follow that it intended to let not-for-profit smugglers go unpunished under paragraph 37(1)(*b*). If Parliament intended to criminalize non-profit motive smuggling, then it would not have assigned a lower standard of proof (i.e. "reasonable grounds to believe" pursuant to section 33 of the *IRPA*). While a non-profit motive smuggler could be found inadmissible under subsection 36(1), this would only occur after he was found guilty beyond a reasonable doubt under subsection 117(1).

[34] The Court acknowledges the evidence adduced by the Applicant from the Parliamentary committee hearings indicating that while it was Parliament's intention to capture humanitarian smugglers in subsection 117(1), it also intended for subsection 117(4) (i.e. no proceedings for an offence under section 117 without the consent of the Attorney General) to serve as a safety net preventing them from being prosecuted. Parliament clearly intended to cast a broad net with subsection 117(1). It is only logical to impute the same intent with regards to people smuggling under paragraph 37(1)(*b*). Interpreting people smuggling broadly is consistent with Parliament's precautionary method of combating the smuggling of human beings at large. Furthermore, like

117(4), paragraph 37(2)(*a*) also acts as a safety net and prevents those described in paragraph 37(1)(*b*) from being found inadmissible if they can satisfy the Minister that their presence in Canada would not be detrimental to the national interest.

[35] The Applicant also submits that interpreting people smuggling as not requiring a profit motive would violate paragraph 3(3)(*f*) of the *IRPA*, which requires its other provisions to "be construed and applied in a manner that . . . complies with international human rights instruments to which Canada is signatory". Specifically, the Applicant argues that the *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime* (the "Protocol") requires at paragraph 1(a) of Article 6 that:

> 1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:
>
> (a) The smuggling of migrants; . . .

[36] The Court, in *Hernandez*, cited above, dealt with this very question and found that paragraph 37(1)(*b*), without the element of profit, would not be "truly inconsistent with either the Protocol or the [*Convention Relating to the Status of Refugees* and the *Protocol Relating to the Status of Refugees* [collectively the Refugee Convention]" (*Hernandez*, at para 55). Regarding the Protocol, the Court found:

> [48] Unlike the Protocol, which establishes crimes, paragraph 37(1)(b) of the Act is an inadmissibility provision with consequences to a foreign national's ability to claim protection, and a permanent resident's or foreign national's ability to remain in Canada.
>
> [49] Canada's international commitment to criminalize the smuggling of migrants when engaged in transnationally, has no bearing on when it must permit persons to seek Convention refugee

> protection or when the exceptions to the principle of non-refoulement will be met . . . (*Hernandez*, above at paras 48-49)

[37] The Court agrees. The obligation in the Protocol applies to criminal legislation and should only inform the interpretation of section 117. Furthermore, the Protocol creates a minimum that Canada must adhere to, it does not prevent Canada from applying a more stringent or rigorous sanction for an offence.

[38] The Applicant additionally argues that the IAD's construal of "people smuggling" would also violate the principle of non-refoulement of refugees. Article 33 of the Refugee Convention provides as follows:

> Article 33 - Prohibition of expulsion or return ("refoulement")
>
> 1. No Contracting State shall expel or return (" refouler ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

[39] The Applicant argues that the IAD's interpretation of "people smuggling" goes against the principle of non-refoulement of refugees. The Court disagrees.

[40] Paragraph 2 of article 33 is clear that refugees will not benefit from the principle of non-refoulement if there are reasonable grounds for regarding them as a danger to the security of the country they are in. Nonetheless, if a refugee who is subject to the application of paragraphs

37(1)(*b*) and 37(2)(*a*) will not be found inadmissible provided he satisfies the Minister of Public Safety and Emergency Preparedness that his presence is not detrimental to Canada's national interest. The IAD's interpretation of section 37 is not inconsistent with Article 33 of the Refugee Convention. Furthermore the principle of non refoulement must not be conflated with issues on admissibility.

[41] The Court also rejects the Applicant's argument based on Article 31 of the Refugee Convention. That provision forbids penalizing a refugee for his own unlawful entry and not for organizing, inducing, aiding or abetting refugees to enter unlawfully. Paragraph 37(1)(*b*) is not inconsistent with the duty imposed on Canada by Article 31. Furthermore, paragraph 37(2)(*b*) of the *IRPA* specifically forbids "a determination of inadmissibility by reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal activity".

[42] Finally, the Court underlines that the Applicant did receive a material benefit for his work in aiding the Ship's venture.

[43] The Applicant also alleges that the IAD erred in not finding that people smuggling required clandestine entry. As the Respondent notes, this very issue was dealt with in *B010* (FC) cited above, and confirmed by Justice Hughes in *B072 v Canada (Minister of Citizenship and Immigration)*, 2012 FC 899. In paragraph 61 of *B010* (FC), cited above, Justice Noël answered this issue in the following way:

> [61] . . . While the applicant sought to include a "secret or clandestine" element, the panel correctly pointed out that where a

> person smuggled appeared at the port of entry to make a refugee claim, an individual that had aided that person to enter Canada could still be found guilty of an offence under section 117 (*Godoy*, above, at para 35 and *Mossavat*, above, at paras 1-2). The Minister also rightfully submitted to this Court that no such component can be derived from a reading of para 37(1)(b), of section 117, or even of the Protocol, and this in either French or English. The Minister also referred this Court to section 159 of the *Customs Act*, RSC 1985, c 1 (2d Supp), which defines smuggling as follows: "Every person commits an offence who smuggles or attempts to smuggle into Canada, whether clandestinely or not, any goods subject to duties, or any goods the importation of which is prohibited, controlled or regulated by or pursuant to this or any other Act of Parliament [emphasis added]." I agree with the Minister that subsections 37(1) and 117(1) do not require a "secret or clandestine" component, but are instead concerned only with the 'organizing of entry into Canada,' whether the person entering declares themselves at a port of entry or not, when such a person is "not in possession of a visa, passport or other document required by this Act" (subsection 117(1) of the IRPA). Evidence submitted to the ID showed that the majority of the passengers on board the MV Sun Sea were in fact not in possession of the visas and passports required by the IRPA.

[44] The Court agrees with Justice Noël's analysis on this issue and finds that it provides a complete answer to the issues raised by the Applicant. The Court also underlines that, as the Respondent correctly pointed out in his submissions, the Ship did enter Canada clandestinely. After it "unlawfully left the Gulf of Thailand and […] travelled surreptitiously, unregistered and falsely labelled the "MV Sun Sea", […] did not comply with international reporting and safety regulations […]" and was intercepted in Canadian waters by Canadian authorities (Respondent's Memorandum of argument at para 42).

[45] In light of the reasons presented above, the Court finds that the IAD's interpretation of the activity of "people smuggling" in paragraph 37(1)(*b*) of the *IRPA* was reasonable and falls "within a

range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

2. Did the IAD err in its understanding or application of the concept of wilful blindness?

[46] Having concluded that the constitutive elements of "human smuggling" under subsection 117(1) and "people smuggling" under paragraph 37(1)(*b*) are the same, the IAD was asked to decide whether there were reasonable grounds to believe the Applicant knowingly organized, induced, aided or abetted the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by the *IRPA*.

[47] The Applicant submits the IAD committed an error in concluding that the Applicant knew the other Migrants he was aiding to enter Canada did not have proper documentation. The IAD concluded that the Applicant either knew or was wilfully blind to the fact that the Migrants did not have the required documents. The Applicant argues that the IAD erred in its understanding of wilful blindness "by equating it to mere suspicion and not considering whether the Applicant had a [need] to inquire whether the other refugee claimants had the documents to enter Canada" (Applicant's Memorandum of fact and argument at para 68). The Applicant also claims that there was no evidentiary basis for concluding that he deliberately refrained from inquiring in order to avoid knowledge.

[48] The Applicant is correct in affirming that in order to establish that the he was wilfully blind, the IAD had to determine that he knew that there was reason to inquire. This requirement was described in *R. v Sansregret*, [1985] 1 SCR 570 at para 22, [1985] SCJ No 23:

> 22 Wilful blindness is distinct from recklessness because […] [it] arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability […] in wilful blindness […] is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry. […]

[49] The Court notes that while the IAD did not explicitly mention this aspect of the test, it did note that the Applicant testified to having given up his own passport before boarding the Ship and to knowing that he needed to at least have a passport to enter Canada lawfully. In that sense, the Applicant knew of a reason to inquire. In the presence of a very similar argument and facts, Justice Noël, found as follows:

> "Regarding this first matter of *mens rea*, I agree that the ID did not explicitly enunciate this component of the concept of wilful blindness. However, the Supreme Court recently confirmed that "[a] decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII), 2011 SCC 62 at para 16, [2011] SCJ 62). In addition, I note the ID did make a finding that the applicant knew of a reason for inquiry. Specifically, the ID determined at para 48 of its reasons that the applicant knew that as a Sri Lankan, he needed a visa to enter Canada. This was sufficient for it to determine he had knowledge of a need for inquiry under section 117 and shows that the panel's understanding of the test for wilful blindness was not deficient" (see *B010* (FC) at para 67).

[50] The Applicant cannot argue that he did not know it was illegal to aid the Migrants in entering Canada without proper documentation because "it is well established that ignorance of the

law is no defence" (*R v Jorgensen*, [1995] 4 SCR 55 at para 97, [1995] SCJ No 92). Nor can the Applicant argue that he did not perceive himself as "aiding" the Migrants in coming to Canada illegally by cooking for the crew and assisting the Ship's engineer.

[51] The Court is aware that in *B306 v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1282 [*B306*], Justice Gagné found, at paragraph 34, that:

> [34] . . . it is an unreasonably large reading of subsection 117(1) to suggest that any services performed in favour of smugglers can be viewed as aiding and abetting the coming into Canada of illegal aliens. In this sense, I agree with the applicant that the panel's analysis was not informed by the context of complete dependency, vulnerability and power imbalance in which the applicant found himself during the three-month journey to Canada.

[52] However, Justice Gagné distinguishes the case before her from the case at bar in the very next paragraph where she stresses that:

> [35] . . . the facts of this case should be distinguished from those that were established in *B010*, above, where the panel found that the applicant "had boarded the ship knowing that he would be a crew member". In that case the Minister had submitted three photographs that showed the applicant posing with three members of the crew (including the captain) while they were still in Bangkok. That applicant was part of the team who voluntary replaced the crew who had resigned prior to departure . . . (*B306*, above, at para 35).

[53] It is important to note that just as in *B010* (FC), the Applicant was a member of the Ship's crew. The Applicant negotiated his passage by agreeing to work for a reduced fare prior to boarding the Ship.

[54] Finally, the Applicant's argument that he did not inquire as to whether the Migrants had proper documentation because "his suspicions were not aroused" is untenable in light of the facts of

the case. The Applicant admitted to giving up his own passport before boarding the Ship and that, alone, is a reasonable ground for suspecting the other Migrants were not treated any differently. The IAD correctly found that there were reasonable grounds to suspect "that a group of migrants who paid handsomely for passage in the high risk venture of traveling on the MV Sun Sea were not in a position to use lawful, cheaper and less life-threatening options for entry to Canada" because they didn't have the proper documents to do so (IAD Reasons, at para 35).

[55] The Court concludes that the IAD had reasonable grounds to suspect that the Applicant either knew or was wilfully blind to the fact that the Migrants he was aiding in coming to Canada did not possess proper documentation and was, therefore, inadmissible on the basis of people smuggling pursuant to paragraph 37(1)(*b*) of the *IRPA*.

3. Did the IAD err in its credibility findings?

[56] The IAD's credibility findings were reasonable in this case. As the Respondent submits, the IAD's findings were "clear, well-explained and amply supported by the evidence" (Respondent's Memorandum of argument at para 62). The Applicant's testimony, at the hearing, regarding his contact with his brother during and prior to the voyage, was quite rightly determined to lack credibility. The Applicant's story that he randomly bumped into his brother at a temple in Bangkok, did not discuss the Ship and then, by coincidence, just happened to discover that they were both taking part in the venture is so far "outside the realm of what could reasonably be expected" (see *Valtchev v Canada (Minister of Citizenship and Immigration)* (2001), 208 FTR 267 at para 7).

[57] The IAD's conclusion that the Applicant's "efforts to distance himself from knowledge of and association with his brother lacked credibility and offers reasonable grounds to believe that he is attempting to hide a greater association between them" is reasonable and falls within the range of possible outcomes (IAD Reasons, at para 31).

[58] The IAD also provided clear examples of contradictory testimony from the Applicant regarding how he paid for the voyage. This is not a peripheral issue but one that goes to the very heart of the Applicant's involvement as being more than a mere passenger on the Ship. During the ID hearing, the Applicant testified that there was no agreement for a post-voyage payment by his father prior to boarding the Ship. At the IAD hearing, on the other hand, the Applicant testified that a post-voyage payment arrangement was made prior to boarding and that the agent was confident in the father's ability to pay.

[59] In sum, the Court dismisses this application because the IAD properly concluded that the Applicant is a person described under paragraph 37(1)(*b*) of the *IRPA* and is inadmissible to Canada on grounds of organized criminality for engaging, in the context of transnational crime, in people smuggling.

VIII. Certification

[60] Counsel for the Applicant suggested that the Court certify the following questions: Did the IAD Member err in her decision that adopted the definition of the crime of "organizing entry into Canada" under s. 117(1) of the IRPA as the complete definition of people smuggling under s. 37,

because this definition lacks the requirement of material gain laid down in the Convention and Protocol and bans those so defined from refugee protection? Does this definition violates (sic) Canada's obligation not to penalize refugee claimants for illegally entering a country and claiming asylum?

[61] Counsel for the Respondent objected on the grounds that this question contained a statement rather than a true question and more importantly that in this case, it is clear that there was material gain. Furthermore, the Supreme Court has answered the second part of the question in *Canada (Minister of Employment and Immigration) v Chiarelli* [1992] 1 SCR 711 [*Chiarelli*].

[62] The Court will not certify either of the proposed questions because they have already been answered by the Federal Court of Appeal in *B010* (FCA) cited above.

[63] Furthermore, the first question is not dispositive of the case and, therefore, fails to meet the test set out in *Canada (Minister of Citizenship and Immigration) v Lyanagamage*, [1994] FCJ No 1637; *Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89; and *Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 (CanLII), [2010] 1 FCR 129. In the case at bar, the question of whether the term "people smuggling" in paragraph 37(1)(*b*) requires a profit element is not dispositive of this case because the Court has already determined that the Applicant did, in any event, receive a material benefit from working on the Ship (i.e. a reduced fare).

[64] As for the second, conditional question, the Court is of the view that it is not serious in the sense that it does not raise an issue of significant doubt. As noted above, Article 31 of the Refugee Convention forbids penalizing a refugee for his own unlawful entry and not for organizing, inducing, aiding or abetting refugees to enter unlawfully. Furthermore, as the Respondent correctly submitted, the Supreme Court, in *Chiarelli*, cited above, at para 31, already determined that an inadmissibility finding is not imposed as a punishment.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed; and

2. There is no question of general importance to certify.

"André F.J. Scott"

Judge

ANNEX

***Immigration and Refugee Protection Act*, S.C. 2001, c. 27**	***Loi sur l'immigration et la protection des réfugiés*, LC 2001, c 27**
Application	Interprétation et mise en œuvre
3(3) This Act is to be construed and applied in a manner that	3(3) L'interprétation et la mise en œuvre de la présente loi doivent avoir pour effet :
…	[…]
(*f*) complies with international human rights instruments to which Canada is signatory.	*f*) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.
Division 4	Section 4
Inadmissibility	Interdictions de territoire
Rules of interpretation	Interprétation
33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	33. Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.
Serious criminality	Grande criminalité
36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	*a*) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

(*b*) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(*c*) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

Organized criminality

37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

. . .

(*b*) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.

Activités de criminalité organisée

37. (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :

[…]

b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

Application

(2) The following provisions govern subsection (1):

(*a*) subsection (1) does not apply in the case of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest; and

(*b*) paragraph (1)(*a*) does not lead to a

Application

(2) Les dispositions suivantes régissent l'application du paragraphe (1) :

a) les faits visés n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national;

b) les faits visés à l'alinéa (1)*a*)

determination of inadmissibility by reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal activity.

n'emportent pas interdiction de territoire pour la seule raison que le résident permanent ou l'étranger est entré au Canada en ayant recours à une personne qui se livre aux activités qui y sont visées.

PART 3

PARTIE 3

ENFORCEMENT

EXÉCUTION

Human Smuggling and Trafficking

Organisation d'entrée illégale au Canada

Organizing entry into Canada

Entrée illégale

117. (1) No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act.

117. (1) Il est interdit à quiconque d'organiser l'entrée au Canada d'une ou de plusieurs personnes ou de les inciter, aider ou encourager à y entrer en sachant que leur entrée est ou serait en contravention avec la présente loi ou en ne se souciant pas de ce fait.

Penalties — fewer than 10 persons

Peines

(2) A person who contravenes subsection (1) with respect to fewer than 10 persons is guilty of an offence and liable

(2) Quiconque contrevient au paragraphe (1) relativement à moins de dix personnes commet une infraction et est passible, sur déclaration de culpabilité :

(*a*) on conviction on indictment

a) par mise en accusation :

(i) for a first offence, to a fine of not more than $500,000 or to a term of imprisonment of not more than 10 years, or to both, or

(i) pour une première infraction, d'une amende maximale de cinq cent mille dollars et d'un emprisonnement maximal de dix ans, ou de l'une de ces peines,

(ii) for a subsequent offence, to a fine of not more than $1,000,000 or to a term of imprisonment of not more than 14 years, or to both; and

(ii) en cas de récidive, d'une amende maximale de un million de dollars et d'un emprisonnement maximal de quatorze ans, ou de l'une de ces peines;

(*b*) on summary conviction, to a fine of not more than $100,000 or to a term of

b) par procédure sommaire, d'une amende maximale de cent mille dollars

imprisonment of not more than two years, or to both.

et d'un emprisonnement maximal de deux ans, ou de l'une de ces peines.

Penalty — 10 persons or more

(3) A person who contravenes subsection (1) with respect to a group of 10 persons or more is guilty of an offence and liable on conviction by way of indictment to a fine of not more than $1,000,000 or to life imprisonment, or to both.

Peines

(3) Quiconque contrevient au paragraphe (1) relativement à un groupe de dix personnes et plus commet une infraction et est passible, sur déclaration de culpabilité par mise en accusation, d'une amende maximale de un million de dollars et de l'emprisonnement à perpétuité, ou de l'une de ces peines.

Minimum penalty — fewer than 50 persons

(3.1) A person who is convicted on indictment of an offence under subsection (2) or (3) with respect to fewer than 50 persons is also liable to a minimum punishment of imprisonment for a term of

Peine minimale — moins de cinquante personnes

(3.1) Quiconque est déclaré coupable, par mise en accusation, de l'infraction prévue aux paragraphes (2) ou (3) visant moins de cinquante personnes est aussi passible des peines minimales suivantes :

(*a*) three years, if either

a) trois ans si, selon le cas :

(i) the person, in committing the offence, endangered the life or safety of, or caused bodily harm or death to, any of the persons with respect to whom the offence was committed, or

(i) l'auteur, en commettant l'infraction, a entraîné la mort de toute personne visée par l'infraction ou des blessures à celle-ci ou a mis en danger sa vie ou sa sécurité,

(ii) the commission of the offence was for profit, or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group; or

(ii) l'infraction a été commise au profit ou sous la direction d'une organisation criminelle ou d'un groupe terroriste ou en association avec l'un ou l'autre de ceux-ci ou en vue de tirer un profit;

(*b*) five years, if both

b) cinq ans si, à la fois :

(i) the person, in committing the offence, endangered the life or safety of, or caused bodily harm or death to, any of the persons with respect to whom the offence was committed, and

(i) l'auteur, en commettant l'infraction, a entraîné la mort de toute personne visée par l'infraction ou des blessures à celle-ci ou a mis en danger sa vie ou sa sécurité,

(ii) the commission of the offence was for profit, or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group.

(ii) l'infraction a été commise au profit ou sous la direction d'une organisation criminelle ou d'un groupe terroriste ou en association avec l'un ou l'autre de ceux-ci ou en vue de tirer un profit.

Minimum penalty — 50 persons or more

Peine minimale — groupe de cinquante personnes et plus

(3.2) A person who is convicted of an offence under subsection (3) with respect to a group of 50 persons or more is also liable to a minimum punishment of imprisonment for a term of

(3.2) Quiconque est déclaré coupable de l'infraction prévue au paragraphe (3) visant un groupe de cinquante personnes et plus est aussi passible des peines minimales suivantes :

(a) five years, if either

a) cinq ans si, selon le cas :

(i) the person, in committing the offence, endangered the life or safety of, or caused bodily harm or death to, any of the persons with respect to whom the offence was committed, or

(i) l'auteur, en commettant l'infraction, a entraîné la mort de toute personne visée par l'infraction ou des blessures à celle-ci ou a mis en danger sa vie ou sa sécurité,

(ii) the commission of the offence was for profit, or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group; or

(ii) l'infraction a été commise au profit ou sous la direction d'une organisation criminelle ou d'un groupe terroriste ou en association avec l'un ou l'autre de ceux-ci ou en vue de tirer un profit;

(*b*) 10 years, if both

b) dix ans si, à la fois :

(i) the person, in committing the offence, endangered the life or safety of, or caused bodily harm or death to, any of the persons with respect to whom the offence was committed, and

(i) l'auteur, en commettant l'infraction, a entraîné la mort de toute personne visée par l'infraction ou des blessures à celle-ci ou a mis en danger sa vie ou sa sécurité,

(ii) the commission of the offence was for profit, or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group.

(ii) l'infraction a été commise au profit ou sous la direction d'une organisation criminelle ou d'un groupe terroriste ou en association avec l'un ou l'autre de ceux-ci ou en vue de tirer un profit.

No proceedings without consent

(4) No proceedings for an offence under this section may be instituted except by or with the consent of the Attorney General of Canada.

Consentement du procureur général du Canada

(4) Il n'est engagé aucune poursuite pour une infraction prévue au présent article sans le consentement du procureur général du Canada.

Aggravating factors

121. (1) The court, in determining the penalty to be imposed under section 120, shall take into account whether

…

(*c*) the commission of the offence was for profit, whether or not any profit was realized;

…

Circonstances aggravantes

121. (1) Le tribunal tient compte, dans l'infliction de la peine visée à l'article 120, des circonstances suivantes :

[…]

c) l'infraction a été commise en vue de tirer un profit, que celui-ci ait été ou non réalisé;

[…]

Protocol against the Smuggling of Migrants by Land, Sea and Air

For the purposes of this Protocol:

Article 3(*a*) "Smuggling of migrants" shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;

Protocole contre le traffic illicite de migrants par terre, air et mer

Aux fins du présent Protocole:

Article 3*a*) L'expression "trafic illicite de migrants" désigne le fait d'assurer, afin d'en tirer, directement ou indirectement, un avantage financier ou un autre avantage matériel, l'entrée illégale dans un État Partie d'une personne qui n'est ni un ressortissant ni un résident permanent de cet État;

Article 6

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or

Article 6

1. Chaque État Partie adopte les mesures législatives et autres nécessaires pour conférer le caractère d'infraction pénale, lorsque les actes ont été commis intentionnellement et pour en tirer,

indirectly, a financial or other material benefit:

(a) The smuggling of migrants;

4. Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.

directement ou indirectement, un avantage financier ou autre avantage matériel:

a) Au trafic illicite de migrants;

4. Aucune disposition du présent Protocole n'empêche un État Partie de prendre des mesures contre une personne dont les actes constituent, dans son droit interne, une infraction.

Convention relating to the Status of Refugees,

Article 33 [Prohibition of expulsion or return ("refoulement")]

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Convention relative au statut des réfugiés

Article 33. -- Défense d'expulsion et de refoulement

1. Aucun des Etats contractants n'expulsera ou ne refoulera, de quelque manière que ce soit, un réfugié sur les frontières des territoires où sa vie ou sa liberté serait menacée en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques.

2. Le bénéfice de la présente disposition ne pourra toutefois être invoqué par un réfugié qu'il y aura des raisons sérieuses de considérer comme un danger pour la sécurité du pays où il se trouve ou qui, ayant été l'objet d'une condamnation définitive pour un crime ou délit particulièrement grave, constitue une menace pour la communauté dudit pays.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6392-12
STYLE OF CAUSE:	S. C. v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Vancouver (British Columbia)
DATE OF HEARING:	March 7, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	SCOTT J.
CONFIDENTIAL REASONS FOR JUDGMENT AND JUDGMENT DATED:	May 10, 2013
PUBLIC REASONS FOR JUDGMENT AND JUDGMENT (IDENTICAL TO CONFIDENTIAL REASONS FOR JUDGMENT AND JUDGMENT) DATED:	June 4, 2013

APPEARANCES:

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