Federal Court  Cour fédérale

Date: 20120515

Docket: IMM-4760-11

Citation: 2012 FC 569

Ottawa, Ontario, May 15, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

B010

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] B010 [the applicant] seeks judicial review of a decision of the Immigration Division [ID or panel] of the Immigration and Refugee Board of Canada [IRB] dated July 6, 2011. The ID issued a deportation order after determining that the applicant was inadmissible for engaging in people smuggling in the context of transnational crime as set out in para 37(1)(*b*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

I. Alleged Facts

[2] The applicant, a Tamil refugee claimant from Sri Lanka, arrived in Canada on August 13, 2010 on the MV Sun Sea, an unregistered ship with 492 migrants on board seeking refuge. Their journey from Thailand had lasted approximately three months.

[3] A Globe and Mail article published on August 23, 2010 describes "the saga of the Sun Sea and its 492 bedraggled passengers" as "the stuff of spy thrillers." The article goes on to outline the very serious danger and difficult conditions faced by the migrants (Trial Record [TR] at 268, 273):

> The ship's former owners are shocked the journey was attempted at all. Bhumindr Harinsuit, managing director of Harin Panich, said the 30-year-old Japanese-built ship was barely able to make the trek between Bangkok and Songkhla. The idea of taking the rickety boat as far as Canada was too crazy to contemplate.
>
> "Even in the Gulf of Thailand, if there were rough seas she wouldn't travel […]" Making the trip even more astonishing was its cargo of 492 human beings. When sold, the ship only had sleeping space for 15 crew, one small toilet, a galley kitchen and life rafts for a maximum of 30 people. With space for only 12 tonnes of water, supplies would have had to have been harshly rationed to keep from running out mid-journey.
>
> "The captain was taking an amazing risk. We wouldn't even send it to Malaysia," Mr. Harinsuit said. "The surprise isn't that someone died [on the way to Canada], the surprise is that it was only one person who died."

[4] A Canada Border Services Agency [CBSA] investigation revealed that the ship had been part of an elaborate for-profit scheme to bring migrants to Canada. It also emerged from the investigation that the applicant was one of 12 migrants serving as the ship's crew during the voyage. As a result, an immigration officer reported the applicant under subsection 44(1) of the IRPA as being inadmissible to Canada for people smuggling. A subsection 44(2) report was then referred to the ID and an admissibility hearing was held on April 15, 2011.

[5] The applicant testified at the hearing that until 2009, he had lived in the area of Sri Lanka controlled by the Liberation Tigers of Tamil Eelam [LTTE]. When the Sri Lankan army reasserted control of the area that year, he was held in a detention camp for suspected ties to the LTTE, interrogated, and beaten over a period of five months. As his ties to the LTTE were unsubstantiated, the applicant was eventually released, but remained the target of repeated harassment and interrogation by government forces.

[6] When he later refused to report to a detention camp and was nearly taken away by paramilitaries, the applicant fled to Thailand, leaving behind his wife and child. The applicant then waited in Bangkok while an agent arranged for him to travel to a country where he could claim refugee status. Unable to acquire a visa after a two-month wait, the agent offered him an opportunity to travel to Canada on the MV Sun Sea. The cost of the trip would be $30,000 and the applicant paid $5,000 up front.

[7] Ten days later, the applicant made his way to the ship in a van with about ten other men. They all boarded the vessel, which at that time had only a Thai crew and no other passengers on board. At the hearing before the ID, the applicant testified that he placed his belongings in one of the cabins of the vessel and slept. After two or three days, the Thai crew purportedly abandoned the vessel, leaving its passengers behind. The applicant claims that there was then a discussion as to what to do, that one of the men asked him if he could work on the ship, and that because he had already paid a portion of the fee for the voyage and feared returning to Sri Lanka, he agreed to help. For the rest of the voyage, the applicant worked twice a day in three-hour shifts in the engine room, monitoring the temperature, water, and oil level of the equipment. With regard to any material benefit he may have gained from his work, the applicant testified before the ID that he did not receive better accommodation or extra food, that he slept in a room because he was one of the first

on the ship, and that he shared the room with eight others. Questioned again about receiving any extra food, the applicant stated that he received extra food on one occasion when the engine had broken down while he was on duty and one of the other men worked to repair it (TR at 57-63, Transcript of Proceedings at 11-17).

[8] There were notable differences between the above account provided to the ID and some of the answers given by the applicant in solemn declarations made to CBSA enforcement officers over the course of several interviews. During questioning, when asked what he received in exchange for working in the engine room, the applicant answered that he was able to sleep in a room in a level above (TR at 192, 196). Questioned as to why others would have identified him as a member of the LTTE, the applicant eventually stated the following: "See I was taken first on the ship, because of that I had a place to sleep and then I had the desire to learn more about the engine room so I had the opportunity and I worked there and then by working there we had kind of like extras, like noodles and stuff like that so maybe looking at all these things they have thought this way" (TR at 221). And later, questioned about what kind of food he received in comparison to the limited rations of noodles and water received by the passengers, the following exchange took place (TR at 237):

> Q: Tell me about what kind of meals you ate.
> A: Whatever is cooked that we eat but sometimes when I work in the engine room we are given some noodles.
>
> Q: Tell me about the chicken and the pork and the beef.
> A: They give us that. After a few days they said that's all, we ran out of stock.
>
> Q: Tell me about the soda pop, Coca Cola, Pepsi.
> A: Yeah they gave soda.
>
> Q: Not just everybody though.
> A: That I don't know.

> Q: That was just to you guys. You guys got all kinds of good stuff. There was liquor, cigarettes if you wanted them, pop, soda, traditional foods.
> A: Most of the people I see they were smoking but I'm not into smoking.
>
> Q: But you still got traditional foods just like everyone else in the crew. See the thing is the passengers could smell it. The people in the hatch could smell it. They can smell the cooking 3 times a day for you guys while they're stuck with noodles and small amounts of water.
> A: What can I do? Those people give that what can I do? Whatever is given to me I'll eat.

[9] In his solemn declarations, the applicant also confirmed that after the Thai crew left the ship, and before any other passengers had yet to board, he and seven of the men he had first boarded the ship with formed a crew that proved capable of picking up nearly five-hundred migrants and feeding them while navigating across the Pacific Ocean to Canada (TR at 195, 229). The applicant explained that he volunteered to work in the engine room because of his previous experience as a mechanic, but denied already knowing he would take on this role before boarding the ship.

[10] At the hearing, the applicant also denied knowing any of the other crew members prior to the voyage, but was presented with evidence to the contrary. Three photographs show him posing with three members of the crew (including the captain) while still in Bangkok. The men can even be seen eating a meal together in one of the photos. Invited to respond, the applicant could not remember when these photographs were taken and could only explain that he would sometimes interact with other members of the Tamil Diaspora he encountered in Bangkok during the approximately two and a half months he spent there. Despite the photos, the applicant insisted that he did not remember seeing the crew members in Bangkok (TR at 232-233).

II. Impugned Decision

A. *Interpreting the Relevant Provisions of the IRPA and Identifying the Requirements to Establish People Smuggling*

[11] The applicant was reported inadmissible to Canada under para 37(1)(*b*) of the IRPA, which reads as follows:

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2011, ch 27
Organized criminality	Activités de criminalité organisée
37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for	37. (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :
[…]	[…]
(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.	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.
[Emphasis added.]	[Nous soulignons.]

[12] In its reasons, the ID first examined the term 'transnational.' Finding no interpretation of it anywhere in the IRPA, the panel relied on the *United Nations Convention Against Transnational Organized Crime*, November 2000, GA Res 55/25, Annex I [the Convention], which sets out in para 2*(a)* of article 3 of the Convention that an offence is transnational in nature when it is committed in more than one State. The ID was thus satisfied there was a transnational component to the MV Sun Sea operation since people had been transported from Thailand to Canada.

[13] Turning then to the meaning of ‘people smuggling,’ the ID first noted that Annex III of the Convention, the *Protocol against Smuggling of Migrants by Land, Sea and Air* [the Protocol], offered the definition of a similar term: ‘smuggling of migrants’. Article 3 of the Protocol defines this as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident” and ‘illegal entry’ is defined as “crossing borders without complying with the necessary requirements for legal entry into the receiving State.” The applicant argued that this provision of the Protocol should be applied to define ‘people smuggling’ and that in fact, previous decisions of the IRB had done just that: *HIC v Canada (Minister of Citizenship and Immigration)*, [2004] IDD 1 at paras 16-17; *Canada (Minister of Citizenship and Immigration) v Khan*, 2004 CanLII 56758 (IRB) at 15 and 26; *Canada (Minister of Public Safety and Emergency Preparedness) v Chung*, [2007] IADD 506 at paras 9, 14 and 19; *Canada (Minister of Public Safety and Emergency Preparedness) v UOP*, [2009] IDD 9 at paras 6, 13 and 17.

[14] The ID was not convinced by this argument, concluding instead that past IRB decision-makers had wrongly viewed section 37 of the IRPA as Canada’s response to the Protocol, thus incorrectly adopting all of its notions. According to the ID, it was in fact section 117 of the IRPA that criminalized the smuggling of migrants, as called for by article 6 of the Protocol. Section 37’s role then is to recognize the criminality of this act and makes it a ground for deportation. As a result, the panel preferred the argument submitted by the Minister of Public Safety and Emergency Preparedness [the Minister] that there was no need to consult the Convention and Protocol for a definition of ‘people smuggling’ when such a definition could already be found in subsection 117(1) of the IRPA:

Immigration and Refugee Protection Act, SC 2011, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2011, ch 27
Human Smuggling and Trafficking	Organisation d'entrée illégale au Canada
Organizing entry into Canada	Entrée illégale
117. (1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.	117. (1) Commet une infraction quiconque sciemment organise l'entrée au Canada d'une ou plusieurs personnes non munies des documents — passeport, visa ou autre — requis par la présente loi ou incite, aide ou encourage une telle personne à entrer au Canada.
[Emphasis added.]	[Nous soulignons.]

[15] In order to prove that 'people smuggling' had occurred for the purposes of subsection 37(1), the ID concluded that six elements were required. The first two elements are found in subsection 37(1) itself, specifically, that the smuggler is either a permanent resident or foreign national and that the crime is transnational. The panel confirmed that the Minister had already established these two elements given that the applicant was a foreign national and that there was a transnational component since the migrants were brought from Thailand to Canada.

[16] The ID drew the remaining four elements from subsection 117(1), relying on the Ontario Superior Court's decision in *R v Alzehrani* (2008), 75 Imm LR (3d) 304, [2008] OJ 4422 [*Alzehrani*], in which the defendants were accused of engaging in a conspiracy to smuggle people across the border between Canada and the United States in contravention of section 117 of the IRPA. At para 10 of *Alzehrani*, based on a reading of subsection 117(1), Justice Molloy determined that in order to establish the offence, the Crown had to prove that: (i) the persons being smuggled

did not have the required documents to enter Canada; (ii) the persons were coming into Canada; (iii) the smuggler was organizing, inducing, aiding or abetting the person to enter Canada; and (iv) the accused had knowledge of the lack of required documents.

[17] Before proceeding with its analysis of these four remaining elements, the ID addressed the applicant's concern that this interpretation contained no requirement that the smuggler engage in the act of smuggling for financial benefit, as set out in the Protocol definition of 'smuggling of migrants.' The panel acknowledged that para 3(3)(*f*) of the IRPA required that its provisions be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory. The ID further recognized that the definition under section 117 was not the same as that of the Convention and Protocol because it did not require that the smuggler commit the offence for financial or other material benefit. That said, the panel interpreted the Convention "as setting a minimum with which signatories must comply. The fact that section 117 is broader than the Protocol definition does not mean it is not in compliance with that instrument" (TR at 8, ID Reasons at para 24).

[18] The panel also acknowledged that not requiring that the offence be committed for financial or material gain could pose difficulties in certain situations: "For example, a relative could assist a genuine refugee claimant in coming to Canada without documents and if the relative was a foreign national or permanent resident of Canada, they would be liable to deportation, and certainly if they were reported and referred to the Immigration Division, the Immigration Division would be required to hear the case" (TR at 8, ID Reasons at para 25). The ID concluded however that if necessary, this was a problem for Parliament to resolve by amending the legislation.

B. *Analyzing the Evidence to Determine Whether the Applicant Engaged in People Smuggling*

[19] The ID confirmed that the appropriate standard of proof in this matter was that of 'reasonable grounds to believe' as set out in section 33 of the IRPA. This standard requires something more than mere suspicion, but less than the standard of 'balance of probabilities,' and it will be met where there is an objective basis for the belief the applicant engaged in people smuggling, based on compelling and credible information (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114, [2005] 2 SCR 100 [*Mugesera*]).

[20] While the applicant essentially claimed to have become a member of the crew by accident, the panel noted that the Minister had submitted three photographs that cast doubt on this account. As mentioned, the photographs are of the applicant with some of the other crew members and the captain, taken while they were still onshore in Thailand. The applicant claimed that he did not know the men in the photographs prior to boarding the ship, but that there were many Sri Lankan Tamils in Thailand and he would often mix with them if he encountered them while out somewhere. He believed that the photographs must have been taken on such an occasion.

[21] The ID rejected the applicant's explanation and determined that there was reasonable ground to believe he had boarded the ship knowing that he would be a crew member. The panel noted that the applicant had mechanical experience and that the photographs submitted by the Minister showed that the applicant had spent time in Thailand with the captain of the ship and two other members of the crew. The ID further noted that the applicant was among the first to board the ship and was deliberately evasive when asked about the functions performed by other members of the crew not in the engine room. Taking all of the above into consideration, the panel was satisfied that there were reasonable grounds to believe the applicant knew before boarding the ship that he

would be a crew member and it did not believe his explanations to the contrary. The ID remarked that even if it were wrong on this point, the applicant had still chosen to work once on the ship (TR at 11, ID Reasons at paras 34-35).

[22] Examining the elements set out in *Alzehrani*, above, the ID asserted that the Minister had established that: (i) the passengers of the MV Sun Sea did not have the documents required to enter Canada; (ii) they were coming to Canada; and (iii) the applicant aided in their coming into Canada by serving as an engine room assistant. As for the fourth element, the panel admitted that it was not entirely clear from the evidence whether the applicant knew the passengers did not have the required documents or whether he merely suspected that they did not have them. Regardless, the ID applied the concept of wilful blindness also invoked in *Alzehrani*. The panel was satisfied that if the applicant did not know whether the passengers had the required documents, it was because he deliberately chose not to obtain that knowledge.

[23] Turning then briefly to the question of material benefit, the ID concluded that if it had erred and profit or material gain was indeed a necessary element of people smuggling, it did not believe the applicant had received a material benefit for working as a member of the MV Sun Sea. The panel ruled that the Minister had failed to establish that the applicant received free passage or was paid for his work. While he may have received better accommodations than the regular passengers, the panel did not consider this to be a material benefit.

[24] Finally, before concluding, the ID addressed the applicant's argument that people smuggling had not occurred because the intent of the passengers was never to enter Canada clandestinely, but rather to report to a port of entry to make refugee claims. The applicant submitted that the IRPA allows refugee claimants without the required documents to enter Canada, attend at a port of entry,

present themselves for examination, and make a refugee claim. Accordingly, they had complied with the requirements and there was no ‘illegal entry’ as required by article 3 of the Protocol.

[25] The ID rejected this argument, satisfied that there was no requirement in the IRPA that people smuggling involve a plan to bring people into Canada without presenting them for examination at a port of entry. It further noted that in the two cases considered where migrants had appeared at a port of entry, the courts still found this constituted ‘coming into Canada’ as required by section 117 of the IRPA (*R v Godoy* (1996), 34 Imm LR (2d) 66 at para 35, [1996] OJ 2437 [*Godoy*] and *R v Mossavat* (1995), 30 Imm LR (2d) 201 at para 1, [1995] OJ 2645 (CA) [*Mossavat*]).

III. Parties’ Positions

[26] The applicant asserts that the ID performed an incomplete statutory analysis of para 37(1)(*b*), failed to properly distinguish the essential elements required to constitute ‘people smuggling,’ and erroneously concluded that it was equivalent to the criminal offence of ‘organizing entry into Canada’ found in section 117 of the IRPA. As a result, he contends the panel incorrectly defined the term ‘people smuggling’ and that its definition would lead to absurd results. When applying the ordinary principles of statutory interpretation and considering the plain meaning of the words read in their entire context, the objectives of the IRPA, and Canada’s international law obligations, the applicant submits that ‘people smuggling’ should properly be defined “as the secret or clandestine movement of persons across borders for material benefit” (Applicant’s Further Memorandum of Argument [AFMA] at para 4). Because he did not receive profit or material benefit and the MV Sun Sea and its passengers did not enter Canada secretly or clandestinely, the ID erred in finding the applicant inadmissible.

[27] Not surprisingly, the Minister asserts the ID correctly relied on section 117 of the IRPA and contests the applicant's definition of 'people smuggling,' arguing his narrow definition would also lead to absurd results. The Minister specifically opposes the notion that people smuggling requires the migrants to have entered Canada clandestinely, maintaining that entering Canadian territory without the required documents is in itself sufficient to invoke the provision. In addition, it puts forward that material benefit is not necessary to engage in people smuggling and that regardless, the applicant received a material benefit in the form of superior accommodations and food in return for his work as a crew member.

[28] The applicant's secondary argument is that the ID misapplied the concept of wilful blindness when it imputed that he had knowledge the other passengers lacked the necessary documents to enter Canada. He says he believed that he and the other passengers could legally file a refugee claim without the documents and so he had no reason to enquire as to whether the other passengers possessed the necessary documentation. He could therefore not be wilfully blind to that fact. For its part, the Minister disputes this assertion and argues that even if the ID had erred in its finding on this point, it would not be determinative of the case because there is no *mens rea* requirement under para 37(1)(*b*).

[29] As the Minister has pointed out, in essence, the applicant is not challenging the ID's finding that he aided the migrants aboard the ship to enter Canada without the required documents or that he was not truthful when he claimed to have become a crew member "by happenstance." Instead, the applicant is only arguing that the ID should have applied a more restrictive definition of 'people smuggling' for the purposes of inadmissibility under para 37(1)(*b*) that included both a profit or material benefit component and a clandestine component. Such an interpretation of the provision

would arguably spare him from its application. Likewise, the applicant's criticism of the ID's application of wilful blindness is also an attempt to dodge section 117.

IV. Issues

[30] The applicant asks this Court to consider two issues:

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

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

The applicant submits that if the ID erred on either point, this would render the finding that he engaged in people smuggling unreasonable as well.

V. Standard of Review

[31] The applicant submits that the interpretation of a statute (the interpretation of 'people smuggling') and the application of a legal test (wilful blindness) are both questions of law to which the applicable standard of review is correctness (*Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326 at paras 15 and 31, [2006] FCJ 1512 [*Sittampalam*]; *Ezemba v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1023 at para 14, [2005] FCJ 1265). Accordingly, the Court would owe no deference to the ID's determination of these issues. The Minister disagrees, stating that since the issues at play here are the tribunal's findings of facts and weighing of the evidence, this Court should show deference and the applicable standard of review would therefore be reasonableness.

[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).

[33] With regard to the ID's interpretation of the IRPA, the Supreme Court has consistently spoken of the need for deference when a tribunal is interpreting its own statute (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30, [2011] SCJ 61 [*Alberta Teachers'*]; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at paras 37-39 [*Alliance Pipeline*], [2011] 1 SCR 160; *Khosa*, above, at para 44; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54, [2008] 1 SCR 190 [*Dunsmuir*]). Accordingly, this Court will apply the standard of reasonableness to the ID's interpretation of para 37(1)(*b*) of the IRPA, ensuring that there was justification, transparency, and intelligibility within the decision-making process and that the ID's interpretation fell within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at para 47).

VI. Analysis

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

[34] The term 'people smuggling' found in para 37(1)(*b*) is left undefined. By basing itself almost entirely on section 117, the applicant is of the view the ID failed to conduct any significant analysis of statutory interpretation, ignoring several important aspects including meaning, purpose, and context. The applicant relies here on *Bell ExpressVu Limited Partnership*

v Rex, 2002 SCC 42, [2002] 2 SCR 559 [*Bell*], where the Supreme Court noted that Driedger's modern approach to statutory interpretation has been the preferred approach across a wide range of interpretive settings. Driedger's modern approach notably calls for the words of an Act "to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Elmer A Driedger, *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at 87, cited in *Bell*, above, at para 26).

[35] The applicant argues that when applying these principles, 'people smuggling' is properly defined as "the secret or clandestine movement of persons across borders for material benefit or profit" (AFMA at para 4). Naturally, the applicant relies on this definition in order to avoid the consequences of para 37(1)(*b*). As mentioned, if 'people smuggling' requires a secret or clandestine component, it is argued this would not encompass him because the ID believed that he and others on board the MV Sun Sea planned to report directly to a port of entry to make a refugee claim (TR at 12, ID Reasons at para 41). Likewise, if the definition requires an element of material benefit or profit, this would not apply to him because the ID found that he paid for passage aboard the ship and gained no material benefit from his work as a crew member (TR at 14-15, ID Reasons at para 50).

[36] However, and at the risk of repeating myself, I must stress that in applying the reasonableness standard of review, this Court's task is not to assess the applicant's proposed definition, but only to determine whether the ID's chosen interpretation falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at paras 47 and 54).

[37] For the sake of clarity and comparison, here are para 37(1)(*b*) and the possible definitions at play in subsection 117(1) of the IRPA and article 3 of the Protocol:

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27
Organized criminality	Activités de criminalité organisée
37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for	37. (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :
[…]	[…]
(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.	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.
[…]	[…]
Human Smuggling and Trafficking	Organisation d'entrée illégale au Canada
Organizing entry into Canada	Entrée illégale
117. (1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.	117. (1) Commet une infraction quiconque sciemment organise l'entrée au Canada d'une ou plusieurs personnes non munies des documents — passeport, visa ou autre — requis par la présente loi ou incite, aide ou encourage une telle personne à entrer au Canada.

Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime	*Protocole contre le trafic illicite de migrants par terre, air et mer, additionnel à la Convention des Nations Unies contre la criminalité transnationale organisée*
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;	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;
(b) "Illegal entry" shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State.	b) L'expression "entrée illégale" désigne le franchissement de frontières alors que les conditions nécessaires à l'entrée légale dans l'État d'accueil.
[…]	[…]
[Emphasis added.]	[Nous soulignons.]

[38] I would begin with a few preliminary remarks. First, I would observe that to apply Driedger's modern approach and read para 37(1)(*b*) in its entire context, as the applicant suggests, one must first tackle the IRPA in its entirety to get a sense of its overall structure "and also 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 [emphasis added]" (Ruth Sullivan, *Statutory Interpretation*, 2d ed (Toronto: Irwin Law Inc, 2007) at 132 [*Statutory Interpretation*]). Indeed, by examining the IRPA as a whole, the ID identified the important relationship between subsections 37(1) and 117(1) and

came to the conclusion that section 117, found under the heading ‘human smuggling and trafficking,’ serves to criminalize the act that then renders anyone who has engaged in it inadmissible for ‘people smuggling’ under para 37(1)(*b*).

[39] Second, given the significant emphasis that has been placed on the term ‘human smuggling’ located in the heading above section 117, I note that it is well accepted that headings may be treated as an integral part of the context and relied on as “intrinsic aides” to interpret a statute or to examine its structure (*R v Lohnes*, [1992] 1 SCR 167 at para 23, [1992] SCJ 6; *Charlebois v Saint John (City)*, 2005 SCC 74, [2005] 3 SCR 563; *Statutory Interpretation*, above, at 142-144). Accordingly, I find it reasonable to utilize the heading above section 117 in order to give added credence to the existence of a link between it and subsection 37(1).

[40] Third, I do not ignore there is a difference between the terms ‘people smuggling’ and ‘human smuggling’ found respectively in para 37(1)(*b*) and the heading above section 117. However, when considering the textual analysis technique by which different words appearing in the same statute should be given different meanings, as exemplified by Justice Dickson in *R v Frank* (1977) 75 DLR (3d) 481, [1978] 1 SCR 95, I see no meaningful or plausible reason in this case to distinguish between the act of ‘people smuggling’ and that of ‘human smuggling.’ Both provisions are clearly meant to address the same criminal activity: the smuggling of human beings.

[41] Should this difference in terms remain a concern, I would point out that the definition relied on by the applicant found in article 3 of the Protocol also refers not to ‘people smuggling,’ but instead to the ‘smuggling of migrants.’ Nevertheless, it is this Court’s view that all three terms clearly seek to address the same act and so the only question that remains is whether

'people smuggling' had to be interpreted on its own, or whether it was reasonable for the ID to also rely on section 117, but not to adopt all components found in article 3 of the Protocol.

[42] Considering then the interpretation of subsection 37(1) and 117(1) of the IRPA, I am mindful of the words of the Chief Justice of the Supreme Court and her colleague Justice Major expressed in *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10, [2005] 2 SCR 601 [*Canada Trustco*]:

> **10** It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole. [Emphasis added.]

[43] There is little doubt we find ourselves in the situation described above "where the words can support more than one reasonable meaning." As demonstrated by the arguments of both parties and the different provisions they rely on, while the word 'smuggling' may include a profit or material benefit component (as seen in article 3 of the Protocol), it is not strictly necessary (see section 117 of the IRPA). In this situation, the Supreme Court instructs us that the ordinary meaning of the word plays a lesser role and that we should seek to conduct a textual, contextual, and purposive analysis to find a meaning that is harmonious with the IRPA as a whole. The Supreme Court put great emphasis on this latter point by repeating that in all cases, regardless of

which analysis proves most helpful, courts should seek to read the provisions of the IRPA as a harmonious whole.

[44] This then raises a second important point. If the provisions of the IRPA are to be read in such a manner, how can we adopt an interpretation of the IRPA in which two sections hold different meanings when they employ such strikingly similar terms and appear to address the same conduct? One would be hard pressed to explain why an individual convicted of ‘organizing entry into Canada’ pursuant to section 117 could remain admissible to Canada despite para 37(1)(*b*). Indeed, when the offence set out in section 117 is located under the heading ‘human smuggling and trafficking’ and may result in both a fine of up to $1,000,000 and life imprisonment for any individual that smuggles a group of 10 or more persons, how can an individual convicted of this offence not be found to have engaged in ‘people smuggling’ under para 37(1)(*b*)? It strikes me as improbable that differing interpretations given to the terms ‘people smuggling’ and ‘human smuggling’ could justify such a contradiction. Hence, for the sake of coherence and consistency, unless the contrary is clearly indicated by the context, this is another indication that para 37(1)(*b*) should be interpreted in conformity with section 117 so that it may be given “a meaning that is harmonious with the Act as a whole” (*Canada Trustco*, above, at para 10).

[45] This conclusion is further supported by a purposive analysis of the provisions, where section 3 of the IRPA comes into play. Section 3 provides meaningful guidance as to the objectives and proper application of the IRPA. While it does not impose directions, it certainly provides the decision-maker and this Court with greater guidance on how to interpret the statute. Its importance will also become readily apparent as we examine related jurisprudence of this Court and the Court of Appeal:

Immigration and Refugee Protection Act, SC 2011, c27	*Loi sur l'immigration et la protection des refugiés*, LC 2011, ch27
OBJECTIVES AND APPLICATION	OBJET DE LA LOI
Objectives — immigration	Objet en matière d'immigration
3. (1) The objectives of this Act with respect to immigration are	3. (1) En matière d'immigration, la présente loi a pour objet :
[…]	[…]
(*i*) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks;	*i*) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;
[…]	[…]
Objectives -- refugees	Objet relatif aux réfugiés
(2) The objectives of this Act with respect to refugees are	(2) S'agissant des réfugiés, la présente loi a pour objet :
[…]	[…]
(*h*) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.	*h*) de promouvoir, à l'échelle internationale, la sécurité et la justice par l'interdiction du territoire aux personnes et demandeurs d'asile qui sont de grands criminels ou constituent un danger pour la sécurité.
Application	Interprétation et mise en œuvre
(3) This Act is to be construed and applied in a manner that	(3) L'interprétation et la mise en œuvre de la présente loi

	doivent avoir pour effet :
(*a*) furthers the domestic and international interests of Canada;	*a*) de promouvoir les intérêts du Canada sur les plans intérieur et international;
[…]	[…]
(*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.

The IRPA thus seeks to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals. Furthermore, it is clear that the IRPA is to be interpreted and applied in a manner that furthers the domestic and international interests of Canada while also complying with the international human rights instruments to which Canada is a signatory. This is also corroborated by section 12 of the *Interpretation Act*, RSC 1985, c I-21, which states that every enactment "shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[46] With regard to the need to comply with international instruments, it is important to point out that para 3(3)(*f*) does not require that a definition found in an international instrument (in this case the Protocol) be imported in its entirety into the IRPA. For example, I note that in *Sittampalam*, above, at para 40, when asked to consider international instruments, Justice Linden of the Federal Court of Appeal had the following to say:

> **40** With respect to the appellant's argument that criminal jurisprudence and international instruments should inform the meaning of a criminal "organization", I disagree. Although these materials can be helpful as interpretive aides, they are not directly applicable in the immigration context. Parliament deliberately chose not to adopt the definition of "criminal organization" as it appears in section 467.1 of the *Criminal Code*, R.S. 1985, c. C-46.

> Nor did it adopt the definition of "organized criminal group" in the [Convention]. The wording in paragraph 37(1)(a) is different, because its purpose is different. [Emphasis added.]

[47] In the case at bar, the ID concluded that section 37 only recognizes the criminality of smuggling while section 117 is the one to actually implement the Protocol by criminalizing such activity. The question remains, does such an interpretation conform to the objectives of the IRPA? In other words, do section 117 and its definition of human smuggling meet Canada's domestic and international obligations by complying with the international Convention and Protocol to which Canada is a signatory?

[48] After examining the relevant provisions, I conclude the ID's interpretation is correct and section 117 is in fact the provision that, for Canadian domestic purposes, criminalizes the smuggling of human beings into Canada. While it is broader in scope than the definition set out in the Protocol and does not have the more restricted scope sought by the applicant, it remains the legislative answer to Canada's obligations undertaken by its adherence to the Protocol since it clearly condemns the act of human smuggling (albeit to a broader extent) and remains a legitimate response to valid human rights concerns. Furthermore, in the unlikely event section 117's broader definition should somehow conflict with the Convention or Protocol, it is worth remembering that a validly enacted legislation will prevail over international law (*Statutory Interpretation*, above, at 33).

[49] The ID was cognizant of the fact para 3(3)(*f*) called for the IRPA to be construed and applied in a manner that complies with international human right instruments to which Canada is a signatory. The panel recognized that the definition in section 117 differed from that found in the Protocol. However, it reasonably concluded that the fact section 117's definition was broader than

that of the Protocol did not hinder its compliance with the latter. Nothing in the Protocol or in the Convention explicitly prevents criminalizing those who engage in migrant smuggling without deriving material gain or profit from it. Likewise, nothing in these instruments prevents a Contracting State from making inadmissible those who engage in such conduct.

[50] The applicant referred this Court to articles 2 and 5 of the Protocol, but these only make clear that the Protocol's purpose is to protect the rights of smuggled migrants and that they are not to face criminal prosecution under the Protocol for having been the object of smuggling. Similarly, article 31 of the *Convention Relating to the Status of Refugees*, Can TS 1969 6, which the applicant also referred to, states the following:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. [Emphasis added.]

I need only emphasize here that the inadmissibility ruling under paragraph 37(1)(*b*) is not a result of the applicant's illegal entry into Canada, but rather of his role in facilitating the entry into Canada of other refugees. Thus, the ID's interpretation of sections 37 and 117 remains compliant with Canada's obligations under the international instruments above.

[51] Continuing with the purposive analysis, I turn to another compelling point on which the Minister placed great emphasis, specifically, the Federal Court of Appeal's ruling that section 37 of the IRPA should be given an "unrestricted and broad" interpretation (*Sittampalam*, above, at para 36). While I note that the Court of Appeal in that case considered the specific interpretation of the term 'organization' in para 37(1)(*a*) and not the whole section, it is also apparent that the Court was

driven in great part by the IRPA's objective of prioritizing the security of Canadians. With respect to immigration, the Court of Appeal relied on a provision now found in para 3(1)(*i*), expressed as the objective "to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks." I note that the same objective is found to apply with respect to refugees, as set out in para 3(2)(*h*), expressed again as an objective "to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals [emphasis added]."

[52] It was in fact this same objective of promoting international justice and security which formed the basis in several cases for applying a broader interpretation to sections 33 to 37 of the IRPA under previous legislation (see *Medovarski v Canada (Minister of Citizenship and Immigration) and Esteban v Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 539, 2005 SCC 51 [*Medovarski*]; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350; *Sittampalam*, above, at para 21; *Canada (Minister of Citizenship and Immigration) v Singh*, (1998), 151 FTR 101, [1998] FCJ 1147 (FCTD)).

[53] As mentioned in *Medovarski*, above, at para 10, the objective of the IRPA set out in section 3 is to prioritize security. With this objective in mind, when applying some of the inadmissibility provisions in division 4 of the IRPA, our courts have given a broad and unrestricted approach to such terms as "danger to the security of Canada" and "member of an organization" found in section 34 (for example, see *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 90, [2002] 1 SCR 3; *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at para 29, [2005] FCJ 381; *Harkat (Re)*, 2010 FC

1241 at paras 85-88, [2010] FCJ 1426; *Charkaoui (Re)*, 2005 FC 248 at paras 35 and 36, [2005] 3 FCR 389).

[54] I would add that in *Poshteh*, above, at para 29, the Federal Court of Appeal ruled that the availability of a ministerial exemption justified a continued broad interpretation of the term 'member.' I note that the same ministerial exemption to which the Court of Appeal referred to in section 34 and which justified broad interpretation of the provision can also be found in section 37. This exception clause thus permits the Minister to declare that an inadmissible person can remain in Canada if their presence here would not be detrimental to the national interests (subsection 34(2) and para 37(2)(*a*) of the IRPA). Such discretionary ministerial powers may be employed in cases where an individual found inadmissible for having engaged in 'people smuggling' can demonstrate to the Minister personal circumstances which would justify such an exception. Therefore, even if 'people smuggling' is defined more broadly, another remedy remains available to the applicant.

[55] Clearly, given the presence of a ministerial exemption, the above jurisprudence, and most notably the "unrestricted and broad" approach applied by the Court of Appeal in *Sittampalam*, the ID's interpretation appears well founded. It begs the question: why should the term 'people smuggling' be given a more restricted interpretation than the one the ID adopted by relying on subsections 37(1) and 117(1) of the IRPA? The applicant contends that the basic rules of interpretation call for such, but as we have seen up to this point, these rules appear to support the ID's conclusion.

[56] The applicant submitted that sections 37 and 117 were not comparable for the following reasons:

1) both sections have different roles within the IRPA: an enforcement and an inadmissibility purpose;

2) section 37 leads to a deportation order while section 117 leads to a criminal conviction, each applying a different approach and resulting in different consequences;

3) while section 117 includes the English heading “human smuggling and trafficking,” the French heading reads “Organisation d’entrée illégale au Canada” and makes no reference to smuggling. The applicant argues there is therefore no link between this and section 37’s “passage des clandestins.”

[57] I have already commented on the different purposes sought by sections 37 (Inadmissibility) and 117 (Enforcement). The fact there are different purposes does not forbid the use of a definition in one section for the purposes of another section. As seen before, I do not see this as an obstacle to a harmonious interpretation of the statute, quite the opposite.

[58] As for the different perceptions drawn by the applicant from the French and English text references, I find these to be unclear. It is true that different head notes are employed to explain the sections, but it does not change the fact that smuggling of human beings is the crime addressed in both provisions. A reading of para 37(1)(*b*) and section 117 in both French and English makes it clear that the concern addressed by the IRPA, both for inadmissibility and enforcement purposes, was the condemnation of people/human smuggling (‘passage de clandestins’) into Canada. Subsection 118(1) also makes it clear that the enforcement purpose targets the ‘trafficking in persons’ (‘traffic de personnes’). Having reviewed the contextual situation of both sections, I can only conclude that, regardless of the different terms employed, both provisions have the same

concern in mind: the condemnation of trafficking/smuggling of people/humans (passage de clandestins) into Canada for both admissibility and enforcement purposes.

[59] We have seen from *Canada Trustco*, above, at para 10, that para 37(1)(*b*) must be interpreted in accordance with the words given, keeping in mind the context in which it was enacted and the objectives sought. Most importantly, the provision must be given a meaning that is harmonious with the IRPA as a whole. In this case, ensuring that 'people smuggling' and 'human smuggling' are given the same definition upholds this obligation and I find it entirely proper and justifiable to define the term 'people smuggling' in paragraph 37(1)(*b*) by relying on section 117 of the same statute when both provisions use comparable terms, address comparable acts, and are framed by the same objectives.

[60] The ID correctly pointed out that Canada's obligation under the Convention and its Protocol was to criminalize the smuggling of migrants and that it was section 117 that fulfilled this obligation, not section 37. The latter section sets out that those who engage in smuggling will be inadmissible. It also reasonably follows then that in order to engage in 'people smuggling,' there would have to be reasonable grounds to believe that the person engaged in 'human smuggling' as set out in section 117. Given the wording of para 37(1)(*b*), it was reasonable for the ID to conclude that it was a necessary requirement that the applicant be a permanent resident or foreign national and that the crime be transnational. It was also reasonable for the same criteria set out in *Alzehrani*, above, identified as necessary elements of the offence set out in section 117 in the context of 'human smuggling,' to be the criteria required in the context of 'people smuggling' under section 37.

[61] Likewise, it was reasonable for the ID not to include any criteria not already found in subsections 37(1) and 117(1). 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.

[62] As to the argument calling for a "material benefit or profit" component, section 121 of the IRPA makes clear that deriving profit from an offence under section 117 is not a necessity and profit will only be factored into the penalty handed out for engaging in such an activity. The ID therefore refused to read into the provision a "material benefit or profit" component. Still, should this conclusion prove incorrect, it is appropriate to mention that a material benefit is something that

provides a person a concrete benefit over others. For example, the Federal Court of Appeal determined that receiving special schooling for children without having to pay constituted a material benefit (*Woolner v Canada* (1999), 92 ACWS (3d) 1105 at para 13, [1999] FCJ 1615). More recently in *R v Pereira*, 2008 BCSC 184 at para 2, [2008] BCJ 2779, while interpreting the definition of "Organized criminal group" set out in article 2*(a)* of the Convention, which explicitly contains "a financial or other material benefit" component, the British Columbia Superior Court defined the term as follows: "The New Oxford Dictionary defines 'benefit' as 'an advantage or profit gained from something' and 'material' as 'important; essential; relevant.' The benefit has to be material in the sense that it must be 'important' or 'essential' and can include, but is not limited to, a financial benefit [emphasis added]."

[63] Examining the issue of profit or material benefit, the ID observed that the Minister had not established that the applicant received free passage in exchange for working during the voyage or that he was paid for working. As for any possible material benefit, while recognizing that the applicant had received better lodging than the regular passengers, the ID did not consider this to be a material benefit. The panel did not address the evidence regarding access to better food on board the ship.

[64] As outlined in paragraphs 7 and 8 of these reasons, the panel had evidence before it that because of his work as a crew member in the engine room, the applicant received better lodging and food as compared to the hundreds of passengers on board (see TR at 192, 196, 221, and 237). I find these tangible benefits did constitute important advantages gained from his work as a crew member and were therefore a material benefit. Should there be any doubt regarding this conclusion, I need only point to the markedly different conditions of the passengers in comparison to the crew, as

described in a CBSA Report (TR at 253, Canada, CBSA, *Sun Sea Human Smuggling Operation* (January 27, 2011) at 12):

> Many of the migrants comment on the poor – some use words like 'terrible', 'horrible' – conditions of their accommodations on the Sun Sea. Some migrants say the children on board suffered even more than the adults. There is general agreement among the migrants that people were very angry about the conditions on board and that the conditions they experienced were much worse than what they were promised by agents […] Complaints about the Sun Sea include:
> - food shortages
> - water shortages (being limited to ½ litre per day per person)
> - abuse of power by crew members via food and water (punishing certain people by refusing them food and/or water, allowing some people more water than others, refusing water to people who requested more water because they couldn't pass urine)
> - having to bathe in salt water
> - inadequate toilet facilities
> - cramped space
> - five or more people crowded into a single, small cabin
> - difficulty finding somewhere to sleep comfortably
> - some people having to sleep on the deck
> - some people getting sick
> - the fact there was a fatality during the voyage
> - the fact that several of the people onboard had to be taken to the hospital when the ship arrived in Canada. [Emphasis added.]

There were reasonable grounds to believe that because of his work as a crew member, the applicant did not have to experience the conditions described above. As a result, I find the ID's conclusion that the applicant did not receive any material benefit to be unreasonable in light of the facts found in the record.

B. *Did the ID err in its understanding or application of the concept of wilful blindness?*

[65] Relying on *Alzehrani*, above, the ID sets out that to have engaged in people smuggling, the applicant must have had knowledge that the migrants being smuggled did not have the required documents. Considering the issue, the ID undertook the following analysis which I will provide in full for greater certainty (TR at 14, ID Reasons at paras 48-49):

> It is not entirely clear from the evidence whether [the applicant] actually knew that the passengers did not have the required documents or merely suspected that they did not have the documents. However in [*Alzehrani*], a case involving a prosecution for people smuggling contrary to section 117 of the IRPA, at paragraph 34, the court held that:
>
> > Wilful blindness is the equivalent of knowledge; it is knowledge that is imputed to an accused who suspected the truth, knew its probability, but deliberately refrained from making the inquiry that would have confirmed his suspicion, because he wished to avoid actual knowledge: *R. v. Sansregret*, [1985] 1 S.C.R. 570 at 585-586".
>
> [The applicant] is from Sri Lanka, he knew that as a Sri Lankan he needed a visa to enter Canada and he travelled on the MV Sun Sea to try to circumvent the visa requirement. He spent more than three months on a ship with hundreds of other people from Sri Lanka. He has testified that he thought that the other people on board who were travelling on the MV Sun Sea were in similar circumstances to him. He had ample opportunity to find out if the passengers had [the] documents required for entry. I am satisfied that if he did not actually know that they did not have the required documents, it was because he deliberately chose not to obtain that knowledge. I am satisfied that at the very least he was wilfully blind as to whether the passengers had the required documents. Since wilful blindness is the equivalent of knowledge, the final element of the definition of people smuggling, that the person concerned knew that the people being smuggled did not have the required documents, is met.

[66] The applicant attacks the ID's application of wilful blindness in two ways. First, he argues the ID erred in its understanding of the test for wilful blindness and failed to consider one of its elements. Second, he argues the ID erred in its assessment of the evidence when applying that test. Beginning with the first point, the applicant argues that the panel applied the incorrect legal test for wilful blindness because it omitted an essential *mens rea* element not discussed in para 34 of *Alzehrani*. Specifically, it relies on the following statement made by the Supreme Court in *R v Sansregret*, [1985] 1 SCR 570 at para 22, [1985] SCJ 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. […] [Emphasis added.]

The Supreme Court's more recent decision of *R v Briscoe*, 2010 SCC 13, [2010] 1 SCR 411 [*Briscoe*], relied on by the Minister, also cites the very same passage at para 22. Having consulted Morris Manning and Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law*, 4th ed (Markham: LexisNexis, 2009) at 180 [*Criminal Law*], a source relied on by the Supreme Court on several occasions, it confirms that "[w]here the case for the Crown depends upon wilful blindness, it must show that the accused had a knowledge of the need for enquiry and deliberately refrained from ascertaining the true facts [emphasis added]." Based on the above, I agree that wilful blindness requires a consideration of whether the applicant knew of a need to make the enquiry.

[67] 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 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.

[68] Turning to the second point, the applicant argues that factually, he did not have a subjective reason to enquire about the documentation of other passengers because he believed and was told that they could lawfully claim refugee status despite lacking the passports and visas necessary to enter Canada (TR at 64). He argues that as a result, the ID would have erred in concluding he had a reason to make the enquiry. The applicant views this as an incorrect application of both the concept of wilful blindness and of the law.

[69] I highlight that section 117 does not require that a person know they are committing an illegal act; it simply requires that they know they are engaging in that act. After all, “it is well established that ignorance of the law is no defence” (*R v Jorgensen*, [1995] 4 SCR 55 at para 97, [1995] SCJ 92). By analogy, for a person to be charged with knowingly importing narcotics, he or she must know they are committing that act, but they need not know it is illegal. Further, where they did not know but suspected narcotics were in a package they were carrying, but decided not to ask, the concept of wilful blindness will apply to impute them with that knowledge. Their lack of knowledge was deliberate and they were wilfully refraining from making inquiries so as not to discover the truth (*Criminal Law*, above, at 178). Likewise, the applicant suspected other passengers did not have the necessary documentation, but chose not to enquire. The knowledge they did not have the necessary documentation can therefore reasonably be imputed to him, whether or not he knew it was illegal to enter Canada without these documents.

[70] I would address one final argument raised by the Minister before concluding on this issue. Attempting to refute the applicant’s argument, the Minister argued there is no *mens rea* requirement under para 37(1)(*b*), as it is not a criminal provision, and that even if the ID had erred in applying the concept of wilful blindness, the error would therefore not be determinative.

I reject this argument. The Minister has taken position that para 37(1)(*b*) does not criminalize ‘people smuggling,’ but rather establishes that those engaged in ‘people smuggling’ are inadmissible to Canada. The Minister argued that it was in fact section 117 that set out what ‘people smuggling’ is and criminalized such conduct. Following the Minister’s logic then, to find an individual has engaged in ‘people smuggling’ requires that his conduct meet the requirements set out in section 117. One such requirement is that the individual know the migrants he is smuggling do not have the necessary documents. If the ID erred in attributing that knowledge to the applicant through the concept of wilful blindness, then the requirement would not have been met and the applicant could not have engaged in ‘people smuggling.’ Hence, an error in the application of the concept would be determinative in the case at bar. While the standard of proof is clearly different and paragraph 37(1)(*b*) requires that there have been reasonable grounds to believe a person engaged in ‘people smuggling,’ for this to occur, there must also be reasonable grounds to believe that all the requirements set out in section 117 were met.

[71] In light of my above finding that knowledge of the passenger’s lack of required documents was properly imputed to the applicant, the ID’s conclusion that he engaged in people smuggling was reasonable. The applicant knowingly aided the coming into Canada of persons who were not in possession of documents required by the IRPA, as defined by subsection 117(1). Accordingly, it was also reasonable to conclude the applicant was inadmissible to Canada for having engaged, in the context of transnational crime, in ‘people smuggling’ as set out in para 37(1)(*b*). The ID’s reasons satisfy the requirement of justification, transparency, and intelligibility, and its decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at para 47).

[72] The applicant suggested the following certified question:

1. “Does ‘people smuggling’ in section 37(1)(*b*) of IRPA include requirements of either or both (1) a financial or material benefit and (2) crossing of a border without complying with the necessary requirements for legal entry into the necessary state?”

[73] The applicant argues that the act of ‘people smuggling’ referred to in para 37(1)(*b*) of the IRPA has never previously been interpreted by this Court and that different interpretations have been given to it by the IRB. It is argued that this is a question of general importance that merits certification and review by the Federal Court of Appeal as called for by para 74(*d*) of the IRPA. The applicant considers that ‘people smuggling’ should be interpreted in the context of para 37(1)(*b*) of the IRPA and that relying on section 117 did not adhere to the rules of statutory interpretation. As seen above, the applicant argues that contrary to section 117 of the IRPA, ‘people smuggling’ properly defined in para 37(1)(*b*) requires that the smuggler engage in the activity for a financial benefit with the intention of clandestinely bringing people into Canada. The applicant also implied in his last submissions that if the standard of review applicable for the interpretation of ‘people smuggling’ was reasonableness, then a certified question should be certified, relying on *Khosa*, above, at para 30. However, no specific question was submitted.

[74] The Minister objects to the proposed question, arguing that it is not dispositive of the application due to the findings of fact made by the IRB. It is also not consistent with the jurisprudential dicta that section 37 must be given an “unrestricted and broad” interpretation and that in essence, what the applicant is claiming for is a restrictive interpretation of the term ‘people smuggling.’ The Minister did not comment on the standard of review question sought by the applicant.

[75] I have decided to certify an amended question. One of the main issues at play in this procedure is the interpretation to be given to ‘people smuggling’ as referred to in para 37(1)(*b*) of the IRPA. This interpretation is determinative of the scope to be given to it. The parties did not submit any guiding jurisprudence on the topic and our research has shown none. Furthermore, depending on the definition or interpretation given, it may be dispositive of the case at hand. Therefore, I do consider that the following amended question is one that is serious, of general importance, and that should be certified:

1) For the purposes of para 37(1)(*b*) of the IRPA, is it appropriate to define the term ‘people smuggling’ by relying on section 117 of the same statute rather than a definition contained in an international instrument to which Canada is a signatory?

[76] In reference to the request by the applicant for a certified question regarding the appropriate standard of review applicable to a tribunal’s interpretation of its own statute (for which no question was submitted for consideration), I relied for this point on clear jurisprudence from the Supreme Court of Canada to conclude that the issue called for reasonableness (*Alberta Teachers’*, above, at para 30; *Alliance Pipeline*, above, at paras 37-39; *Khosa*, above, at para 44; *Dunsmuir*, above, at para 54). In such circumstances, I do not see why it is necessary for this Court to certify a question on this point.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and the following question is certified:

1) For the purposes of para 37(1)(*b*) of the IRPA, is it appropriate to define the term 'people smuggling' by relying on section 117 of the same statute rather than a definition contained in an international instrument to which Canada is a signatory?

"Simon Noël"

_____

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4760-11
STYLE OF CAUSE:	B010 v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	February 28, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	NOËL J.
DATED:	May 15, 2012

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