

Federal Court



Cour fédérale

**Date: 20130605**

**Docket: IMM-4310-12**

**Citation: 2013 FC 604**

**Ottawa, Ontario, June 5, 2013**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**SIVAGARAN SIVAGNANASINGAM**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

I. Overview

[1] In 2010, Mr Sivagaran Sivagnanasingam arrived in Canada aboard the MV Sun Sea, along with nearly 500 other Tamil migrants. He claimed refugee protection, but a panel of the Immigration Division (ID) of the Immigration and Refugee Board found that he was inadmissible to Canada for having engaged in “people smuggling” as defined in s 37(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] (see Annex for enactments cited).

[2] The ID found that Mr Sivagnanasingam had voluntarily joined the crew of the MV Sun Sea, and was either aware of, or wilfully blind to, the fact that the other passengers were undocumented migrants who intended to enter Canada illegally. It concluded that there were reasonable grounds to believe Mr Sivagnanasingam had engaged in the transnational crime of “people smuggling”.

[3] Mr Sivagnanasingam argues that the ID erred in its interpretation of the meaning of “people smuggling” and “wilful blindness”. He asks me to quash the ID’s decision and order another panel to reconsider the issues.

[4] I can find no grounds for overturning the ID’s decision and must, therefore, dismiss this application for judicial review.

[5] The issues are:

1. Did the ID err in its interpretation of “people smuggling”?
2. Did the ID err in applying the concept of wilful blindness?

## II. Factual Background

[6] Mr Sivagnanasingam was born in Sri Lanka in 1972 and lived there most of his life. He regularly traveled outside the country working on an oil tanker and as an importer. After trips abroad, he used his own passport to re-enter Sri Lanka.

[7] In 2009, desiring to leave Sri Lanka permanently, Mr Sivagnanasingam made contact with a smuggler who was arranging a mass emigration to Canada by ship. The price was \$40,000, which Mr Sivagnanasingam could not afford. After mentioning his sailing experience, the organizers reduced his fee to \$25,000. Mr Sivagnanasingam paid a deposit of \$2,500; the balance was due after arrival in Canada.

[8] In 2010, Mr Sivagnanasingam obtained a visa to travel to Thailand where he met up with the ship's captain and a number of other crew members. As the crew was shorthanded, Mr Sivagnanasingam agreed to help out.

[9] On the journey to Canada, the ship did not fly a registered flag or use a registered name. Mr Sivagnanasingam acted as a crew member throughout the trip. On arrival in Canada in 2010, Mr Sivagnanasingam was found on the bridge and described himself as a crew member. In addition, over the course of numerous interviews with Canada Border Services Agency (CBSA) officers, Mr Sivagnanasingam consistently referred to himself as a member of the crew.

### III. The ID's Decision

[10] The ID concluded that Mr Sivagnanasingam had willingly joined the crew of the MV Sun Sea, after having negotiated a reduced fare on that basis. Further, Mr Sivagnanasingam was aware that the passengers were undocumented and would be attempting to circumvent Canada's passport and visa requirements. He knowingly and willingly assisted the operation.

[11] The ID then considered whether Mr Sivagnanasingam was inadmissible to Canada. A person is inadmissible on the grounds of organized criminality for “engaging, in the context of transnational crime, in activities such as people smuggling” (IRPA, s 37(1)(b)).

[12] The ID considered whether Mr Sivagnanasingam had engaged in a transnational crime. It applied the definition of that term set out in the *United Nations Convention Against Transnational Organized Crime* (UNCATOC), Article 3, para 2. That provision states, among other things, that a crime is transnational if it is committed in more than one state, or if a substantial part of its preparation or planning takes place in another state. The ID found that Mr Sivagnanasingam’s conduct was transnational.

[13] The ID then considered whether Mr Sivagnanasingam had engaged in “people smuggling”. There is no explicit definition of “people smuggling” in IRPA. The Minister argued that the definition should be taken from s 117 of IRPA which makes it an offence to “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”. Mr Sivagnanasingam argued that the definition should be narrower and include a requirement that the alleged smuggler be motivated by profit.

[14] The ID rejected Mr Sivagnanasingam’s submissions on this point and declined to import a profit motive into the definition of “people smuggling”. It found that Mr Sivagnanasingam had knowingly aided in the ship’s operation, whose aim was to transport undocumented persons to Canada. In the ID’s view, this constituted “people smuggling”. The ID went on to find, in addition, that the elements of the offence set out in s 117 of IRPA were present. That is, Mr Sivagnanasingam

aided and abetted the smuggling operation, the smuggled persons lacked proper documentation, Mr Sivagnanasingam knew or was wilfully blind to the fact that those persons lacked documentation, and the smuggled persons entered Canada.

[15] Accordingly, the ID was satisfied that there were reasonable grounds to believe that Mr Sivagnanasingam, a foreign national, had engaged in people smuggling in the context of transnational crime. Therefore, he was inadmissible to Canada. The ID issued a deportation order against Mr Sivagnanasingam.

IV. Issue One - Did the ID err in its interpretation of “people smuggling”?

[16] Mr Sivagnanasingam argues that the ID erred by failing to include in the definition of “people smuggling” a requirement that the person be motivated by profit.

[17] Subsequent to the hearing of this application for judicial review, the Federal Court of Appeal rendered its decisions in *B010 v Canada (Minister of Citizenship and Immigration)* and *B072 v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 87. There, Justice Eleanor Dawson (Justices John Evans and David Stratas concurring) concluded that “people smuggling does not require that a material benefit be conferred upon the alleged smuggler” (at para 8). In particular, the definition of “people smuggling” can be taken from s 117 of IRPA which makes it an offence to knowingly aid or abet the coming into Canada of persons who lack the necessary documentation.

[18] Therefore, it is clear that the ID did not err in finding that Mr Sivagnanasingam's conduct came within the definition of "people smuggling".

V. Issue Two - Did the ID err in applying the concept of wilful blindness?

[19] Mr Sivagnanasingam argues that the ID erred by concluding that he was wilfully blind to the fact that the MV Sun Sea's passengers lacked proper documentation.

[20] In fact, the ID's discussion of wilful blindness was part of an alternative analysis, supplementary to its main finding that Mr Sivagnanasingam's conduct came within the definition of "people smuggling". Therefore, any error on the ID's part relating to the concept of wilful blindness did not affect its principal conclusion.

[21] In any case, however, I see no error on the ID's part.

[22] Wilful blindness refers to a situation where a person's suspicion "is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries" (*R v Briscoe*, 2010 SCC 13, at para 21, emphasis in original). The ID specifically concluded that Mr Sivagnanasingam was aware that passports and visas were required for entry into Canada. At a minimum, he suspected that the passengers did not meet that requirement, and he decided not to make any further inquiries about it. The ID reasonably concluded that these circumstances amounted to wilful blindness on Mr Sivagnanasingam's part.

VI. Conclusion and Disposition

[23] The ID did not err either in its definition of “people smuggling” or its application of the concept of wilful blindness. Therefore, I must dismiss this application for judicial review. The parties proposed that I certify the same question of general importance that arose in *B010* and *B072*, above, but an answer to that question has already been provided by the Federal Court of Appeal. Therefore, no question of general importance arises for certification.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that** the application for judicial review is dismissed.

“James W. O’Reilly”

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Judge



## Annex

*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) Empoignent 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.

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.

**General Assembly, United Nations Convention against Transnational Organized Crime: 15 November 2000, A/RES/55/25**

**Assemblée générale, Convention des Nations Unies contre la criminalité transnationale organisée : 15 novembre 2000, A/RES/55/25**

**3.2.** For the purpose of paragraph 1 of this article, an offence is transnational in nature if:

**3.2.** Aux fins du paragraphe 1 du présent article, une infraction est de nature transnationale si:

(a) It is committed in more than one State;

a) Elle est commise dans plus d'un État;

(b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;

b) Elle est commise dans un État mais qu'une partie substantielle de sa préparation, de sa planification, de sa conduite ou de son contrôle a lieu dans un autre État;

(c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or

c) Elle est commise dans un État mais implique un groupe criminel organisé qui se

*(d)* It is committed in one State but has substantial effects in another State.

livre à des activités criminelles dans plus d'un État; ou

*d)* Elle est commise dans un État mais a des effets substantiels dans un autre État.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4310-12

**STYLE OF CAUSE:** SIVAGARAN SIVAGNANASINGAM  
v  
MPSEP

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** February 20, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT:** O'REILLY J.

**DATED:** June 5, 2013

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