

C(S) v. Canada

Facts

In August 2010, an unregistered vessel carrying 492 irregular migrants was intercepted by the Royal Canadian Mounted Police (RCMP), in Canadian waters, off the coast of British Columbia (Canada). It had departed from Thailand in early July 2010. This episode concerned migrant smuggling operation that involved significant organisation, planning and preparation by numerous perpetrators (approximately 45), based in several countries. Migrants paid between 20 000 and 35 000 Canadian Dollars for their passage to Canada. The migrants had to make an initial deposit ranging from 25% to 50% of their full passage fee before boarding the vessel, and execute a written promise to pay the remaining balance upon arrival in Canada. The smugglers took the migrants' identifying documents before they boarded the vessel. On the vessel, migrants faced food and water shortages, overcrowded sleeping space and inadequate sanitary conditions.

The defendant was one of the vessel's twelve crewmembers. The defendant did not pay the travel fee. Instead, he agreed to work as a cook on the vessel (for the other 11 crewmembers) and assisted the vessel's chief engineer. The defendant negotiated an agreement whereby his father would pay a post-voyage fare that would be assessed on the basis of the value of his work.

The Immigration and Refugee Board deemed the defendant a foreign national inadmissible to Canada on the grounds of engaging in migrant smuggling. The

defendant filled an application for judicial review.

Elements of success

- Teleological and contextualised interpretation of 'profit'

Challenges

- 'Financial or other material element' not constituent element of the offence

Background

The vessel belonged to the defendant's brother, who was one of the smuggling venture's organizers and, together with his wife, was also on board the vessel.

Key issues

- ❖ Financial or other material benefit
- ❖ Organised crime
- ❖ Protocol against the Smuggling of Migrants by Land, Sea and Air
- ❖ International obligations

Investigation

In ascertaining the facts, authorities relied much on testimonial evidence, notably (i) declarations of the defendant, (ii) declarations of migrants.

The defendant denied having any knowledge of his brother's involvement in the organization of the smuggling venture and the ownership of the vessel. He admitted to his role in the smuggling venture in the terms described under "Facts".

Reasoning

On its application for judicial review, the Defence argued *inter alia* that the defendant had not perceived any financial or other material benefit. It directly invoked the Protocol against the Smuggling of Migrants by Land, Sea and Air, which determines the intent of perceiving a financial or other material benefit as a constituent element of the crime. The Defence further argued the defendant was unaware of the irregular status of the other migrants travelling on the vessel.

The purpose of obtaining “*profit*” out of migrant smuggling activities is an aggravating factor rather than a constitutive element of the offence. In listing profit as an aggravating factor, the Canadian Parliament intended to treat those who smuggle migrants with that motive more harshly. However, it does not follow that it aimed at letting not-for-profit smugglers go unpunished. Individuals will not be found inadmissible into Canada if they can satisfy the Minister of Public Safety and Emergency Preparedness that their presence in Canada would not be detrimental to the national interest. Canadian law is not *per se* inconsistent with the principle of *non-refoulement*.

The defendant perceived a material benefit for his work in assisting the smuggling venture; that is, he did not have to pay the travel fee attached to the smuggling venture.

The Protocol against the Smuggling of Migrants by Land, Sea and Air creates a minimum that Canada must adhere to; it does not prevent Canada from applying

different or more rigorous standards or sanctions for an offence.

Article 31 of the Geneva Convention relating to the Status of Refugees is not applicable in the instant case. This provision forbids penalizing a refugee for his own unlawful entry but not for organizing, inducing, aiding or abetting other refugees to enter unlawfully. When a smuggled migrant appears at the port of entry to lawfully submit a refugee claim, an individual that aided that person to enter Canada irregularly might still be found guilty of an offence.

In order to determine the defendant was ‘wilfully blind’, it is necessary to make proof that he knew there was reason to inquire (on the status of the other migrants). It is irrelevant that the defendant argues he did not know it was illegal to aid irregular migrants entering Canada because “*ignorance of the law is no defence*”. Nor it is credible that he did not perceive himself as “*aiding*” the irregular migrants in entering Canada illegally by cooking for the crew and assisting the vessel’s engineer. The defendant was a crewmember and negotiated his passage by agreeing to work for a reduced fare prior to boarding the vessel. For the same reasons, the defendant’s claim that he did not inquire as to whether the other migrants had proper documentation because “*his suspicions were not aroused*” is equally untenable.

Verdict/Decision

Application for judicial review dismissed.

Opinion

In addition to clarifying the objective elements of migrant smuggling for purposes of assessing admissibility to Canada, this decision also provides important guidance regarding the determination of *mens rea* in respect of the said crime type. Furthermore, it expounds on Canadian law's compliance with a number of international obligations, including those emerging from the Protocol against the Smuggling of Migrants by Land, Sea and Air.