Federal Court  Cour fédérale

Date: 20161018

Docket: IMM-6942-13

Citation: 2016 FC 914

Ottawa, Ontario, October 18, 2016

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

FRANCIS MANOHARAN ANTHONIMUTHU APPULONAPPAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED JUDGMENT AND REASONS

I. Introduction

[1] Francis Manoharan Anthonimuthu Appulonappar is a citizen of Sri Lanka and an ethnic Tamil. He served as a crew member aboard the vessel *Ocean Lady*, which transported 76 undocumented asylum-seekers from Southeast Asia to Canada in 2009. Mr. Appulonappar sought refugee protection upon his arrival in Canada, but was found to be inadmissible pursuant to s 37(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] on the

ground that he had engaged in people-smuggling. This deprived him of the right to have his refugee claim determined on its merits.

[1] The Immigration Division of the Immigration and Refugee Board [Board] found Mr. Appulonappar to be inadmissible to Canada on October 2, 2013. Mr. Appulonappar's application for judicial review of that decision was held in abeyance pending the Supreme Court of Canada's ruling in *B010 v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 58 [*B010*] and related decisions.

[2] The Supreme Court of Canada issued its judgment in *B010* on November 27, 2015. The Supreme Court held that s 37(1)(b) of the IRPA applies only to foreign nationals who act to further the illegal entry of asylum-seekers and who obtain, directly or indirectly, a financial or other material benefit. Foreign nationals may escape inadmissibility if they "merely aided in the illegal entry of other refugees or asylum-seekers in the course of their collective flight to safety".

[3] Mr. Appulonappar was found to be inadmissible to Canada based on an interpretation of s 37(1)(b) of the IRPA that has been superseded by *B010.* Nevertheless, the Board found that Mr. Appulonappar received a material benefit, namely a reduction in the cost of his passage, in exchange for working as a crew member. Pursuant to *B010*, those who act in knowing furtherance of a criminal aim of criminal organizations, or who abet serious crimes involving such organizations, continue to be inadmissible to Canada. The Board's decision complies with *B010* and related decisions, and was reasonable. The application for judicial review is therefore dismissed.

II. Background

[4] Mr. Appulonappar fled Sri Lanka in September 2008 and applied for refugee status in Thailand, alleging that Sri Lankan authorities had detained and tortured him for two years as a suspected supporter of the Liberation Tigers of Tamil Eelam. In July 2009, the Office of the United Nations High Commissioner for Refugees informed Mr. Appulonappar that he was eligible for third country resettlement. Mr. Appulonappar was granted three extensions of his visa in Thailand, the last of which was due to expire on February 7, 2010.

[5] Mr. Appulonappar told the Board that he believed resettlement would not happen for many years, and he could not support himself financially in Thailand for an extended period of time. He therefore asked his aunt for help. She contacted a smuggler named Anthony, and agreed to pay him $35,000 to smuggle her nephew to Canada. She paid $7,000 in advance.
Mr. Appulonappar initially planned to travel by air. However, Anthony informed him that the Thai authorities had "caught the route" he intended to use, and he would therefore have to travel by sea.

[6] Mr. Appulonappar had worked as a fisherman in Sri Lanka for 13 years. Anthony therefore asked him to work as a crew member aboard the *Ocean Lady*. Mr. Appulonappar agreed, but asked what he would obtain in return for his labour. Anthony said he would discount his fee by $5,000.

[7] Mr. Appulonappar boarded the *Ocean Lady* on September 3, 2009. He worked eight-hour shifts each day in the engine room for the duration of the voyage to Canada. On October 17,

2009, the *Ocean Lady* was apprehended off the west coast of Vancouver Island, British Columbia. All 76 people aboard were Tamils from Sri Lanka and all sought refugee status in Canada. None had the required legal documentation to enter Canada.

[8] Upon arrival, Mr. Appulonappar was arrested and charged under s 117(1) of the IRPA, which makes it an offence to "organize, induce, aid or abet" the entry into Canada of people knowing that, or being reckless as to whether, their coming into Canada is in contravention of the IRPA. The Crown alleged that Mr. Appulonappar and the other accused were the "point persons" for a transnational, for-profit organization whose purpose was to smuggle undocumented migrants into Canada, and that they served as the chief crew aboard the *Ocean Lady*.

[9] The accused, including Mr. Appulonappar, argued before the British Columbia Supreme Court that s 117(1) of the IRPA was overbroad. This argument was accepted by the trial judge, but rejected by the British Columbia Court of Appeal. The accused appealed their convictions to the Supreme Court of Canada (*R v Appulonappa*, 2015 SCC 59 [*Appulonappa*]).[1] The Supreme Court, in a decision issued in tandem with *B010*, allowed the appeals and remitted the charges for trial, holding that s 117(1) was unconstitutional insofar as it permitted prosecution for humanitarian aid to undocumented entrants, mutual assistance amongst asylum-seekers, or assistance to family members.

[1] According to Mr. Appulonappar, the different spellings of his name are the result of phonetic transcription.

III. Decision under Review

[10] The Board found Mr. Appulonappar to be inadmissible to Canada under s 37(1)(b) of the IRPA. This provision precludes access to the refugee determination procedure if there are reasonable grounds to believe that a person has, in the context of transnational crime, engaged in activities such as people smuggling or trafficking in persons.

[11] The Board determined that Mr. Appulonappar had committed a transnational crime. It applied the definition of that term found in the *United Nations Convention Against Transnational Organized Crime*, 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003). According to Article 3, paragraph 2 of this Convention, 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.

[12] The Board then considered whether Mr. Appulonappar had engaged in "people smuggling", a term that is not explicitly defined in the IRPA. The Minister of Citizenship and Immigration [Minister] argued that the definition should be derived from s 117(1) of the 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 [the IRPA]". Mr. Appulonappar argued that the definition should be narrowed to include a requirement that the smuggler be motivated by profit. Since the British Columbia Supreme Court had found s 117(1) of the IRPA to be overbroad, he maintained that the provision could not be relied upon to inform the definition of "people smuggling".

[13] The Board declined to import a profit motive into the definition of "people smuggling". Regardless, the Board found that Mr. Appulonappar had received a material benefit in exchange for his agreement to serve as a crew member aboard the *Ocean Lady*, namely a reduction in the fee for his passage to Canada.

[14] The Board defined the term "people smuggling" in light of the behaviour prohibited by s 117(1) of the IRPA, and held that Mr. Appulonappar's rights under s 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] were not engaged. The Board also found that the remaining elements of the offence of people smuggling set out in s 117(1) of the IRPA were met. In other words, the Board found that Mr. Appulonappar had knowingly aided in the ship's operation, the purpose of which was to transport undocumented persons to Canada; that the smuggled persons lacked proper documentation; that the persons being smuggled were coming into Canada; and that Mr. Appulonappar knew, or was wilfully blind to the fact that, the persons aboard the *Ocean Lady* lacked proper documentation.

[15] The Board rejected Mr. Appulonappar's submission that he acted out of necessity, noting that he was not in Sri Lanka when he boarded the vessel. The Board found there was no objective evidence that Mr. Appulonappar faced physical jeopardy or removal to Sri Lanka while awaiting resettlement in Thailand. The Board determined that he voluntarily chose to join the crew of the *Ocean Lady*, and aid the smugglers in transporting undocumented migrants to Canada. The Board specifically found that his actions were not humanitarian.

[16] In sum, the Board was satisfied that there were reasonable grounds to believe that Mr. Appulonappar, a foreign national, had engaged in people smuggling in the context of transnational crime. The Board therefore found him to be inadmissible to Canada, and issued a deportation order against him.

IV. Issues

[17] This application for judicial review raises the following issues:

A. What is the standard of review?

B. Do the Supreme Court of Canada's decisions in *B010* and *Appulonappa* render the Board's finding that Mr. Appulonappar is inadmissible to Canada unreasonable?

C. Did the Board understand and properly apply the legal doctrines of *mens rea* and wilful blindness, and the defences of necessity and duress?

V. Analysis

A. *What is the standard of review?*

[18] The applicable standard of review must be determined in relation to three different aspects of the Board's decision: (1) the Board's interpretation of s 37(1)(b) of the IRPA; (2) the Board's application of s 37(1)(b) to the facts of the case; and (3) the Board's articulation and application of the legal doctrines of *mens rea*, wilful blindness, and the defences of necessity and duress.

[19] It is unnecessary to determine the standard of review that applies to the first aspect of the Board's decision. Following the judgments of the Supreme Court of Canada in *B010* and

Appulonappa, it is clear that the Board's interpretation of s 37(1)(b) of the IRPA was both unreasonable and incorrect.

[20] With respect to the second aspect, the Federal Court of Appeal has held that the Board's decisions under s 37(1)(b) of the IRPA are subject to review by this Court against the standard of reasonableness (*Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at para 24; *B010 v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 87 at paras 52-72, rev'd on other grounds 2015 SCC 58).

[21] The Board's understanding of the legal doctrines of *mens rea*, wilful blindness, and the defences of necessity and duress are subject to review by this Court against the standard of correctness, while its application of those doctrines to the facts attracts the reasonableness standard of review (*S.C. v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 491 at para 18 [*S.C.*]).

[22] Reasonableness is a deferential standard. In the context of judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process, and also whether the decision 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).

B. *Do the Supreme Court of Canada's decisions in B010 and Appulonappa render the Board's finding that Mr. Appulonappar is inadmissible to Canada unreasonable?*

[23] Mr. Appulonappar argues that *B010* and *Appulonappa* have fundamentally changed the interpretation of s 37(1)(b) of the IRPA, and the Board's finding that he is inadmissible can no longer be sustained. The Minister argues that the Board's decision is consistent with the law established in *B010* and *Appulonappa*, and should be upheld.

[24] The Board's finding that s 37(1)(b) of the IRPA does not require the conduct forming the basis for inadmissibility to be for the purpose of profit or other material benefit has been superseded by *B010*. The Board's conclusion that s 117(1) of the IRPA is not overbroad has effectively been overturned by *Appulonappa*.

[25] A judge may overlook an error of law that is not conclusive, or if the judge is satisfied that, had the tribunal applied the right test, it would have come to the same conclusion (*Cartier v Canada (Attorney General)*, 2002 FCA 384 at para 33 [*Cartier*]). It is futile to quash a tribunal's decision due to an error of law and refer the case back for redetermination if the tribunal would "unavoidably arrive at the same conclusion, although this time for the right reasons" (*Cartier* at para 35). However, a decision that is based upon an incorrect apprehension of the law may be upheld only in "the clearest of circumstances" (*Cartier* at para 34, citing *Rafuse v Canada (Pension Appeals Board)*, 2002 FCA 31).

[26] In *B010*, the Supreme Court of Canada held that s 37(1)(b) of the IRPA "targets procuring illegal entry in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime" (at para 72). Foreign nationals may

escape inadmissibility if they "merely aided in the illegal entry of other refugees or asylum-seekers in the course of their collective flight to safety".

[27] In the companion case of *Appulonappa*, the Supreme Court held that s 117(1) of the IRPA is overbroad insofar as it permits the prosecution of humanitarian aid to undocumented entrants, mutual assistance amongst asylum-seekers, or assistance to family members.

[28] While I agree with Mr. Appulonappar that *B010* and *Appulonappa* have changed the interpretation of ss 37(1)(b) and 117(1) of the IRPA in significant ways, in my view they have not altered the law that applies to his particular circumstances. The effect of the decisions is to remove the following activities from the definition of human smuggling in s 37(1)(b):

a) the provision of humanitarian aid to undocumented entrants, mutual assistance amongst asylum-seekers, or assistance to family members;

b) the mere provision of aid in the illegal entry of other refugees or asylum-seekers in the course of a collective flight to safety; and

c) acts that are not knowingly connected to and do not further transnational organized crimes or criminal aims.

[29] Mr. Appulonappar argues that his conduct falls outside of the scope of s 37(1)(b) of the IRPA. He says that he was not a member of an organized criminal group, but rather a passenger who was charged an extortionate fee for his voyage. In essence, he claims that he was one of the smuggled, not a smuggler, and is therefore not inadmissible to Canada.

[30] The Board found that Mr. Appulonappar was not a member of a criminal organization, and that the profits of the operation accrued to the smugglers. However, the Board also found that Mr. Appulonappar knowingly and voluntarily joined the crew of the *Ocean Lady* at least two weeks before boarding the vessel, and "significantly aided" the smugglers in transporting undocumented persons to Canada. Mr. Appulonappar monitored the engine of the vessel, operated the bilge pumps and oil pressure gauges, and also stood watch for incoming ships to avoid collisions. Mr. Appulonappar testified that his duties were vital to the safety and operation of the vessel. The Board held that the smugglers' operation fundamentally depended on their ability to recruit crew members who were able to operate and navigate the ship. By agreeing to become a crew member, the Board found that Mr. Appulonappar "freely accepted an active role" in the smugglers' criminal enterprise and, in doing so, aided in the illegal entry of the passengers into Canada.

[31] In my view, the Board's conclusion that Mr. Appulonappar acted in knowing furtherance of the aims of the criminal organization, even if he was not himself a member of that organization, was well-supported by the evidence and was reasonable. Pursuant to *B010*, those who act in knowing furtherance of a criminal aim of criminal organizations, or who abet serious crimes involving such organizations, continue to be inadmissible to Canada.

[32] Mr. Appulonappar argues that he received no material benefit in exchange for agreeing to serve as a crew member aboard the *Ocean Lady*. He says that he was never remunerated for his labour, and that neither he nor his aunt ever received the promised discount. More generally, he

maintains that the discount of an exorbitant fee for his passage to Canada cannot constitute a material benefit.

[33] The Board found that even if a material benefit were required under the definition of "human smuggling", Mr. Appulonappar would meet the definition because he acted "to obtain a material benefit," and that "the reduction in the fee charged for him to travel to Canada" qualified as a "financial or material benefit". This is a finding of mixed fact and law, and is entitled to deference. Furthermore, this Court has previously held that a discounted fare may be considered a material benefit for the purpose of s 37(1)(b) of the IRPA (*S.C.* at paras 42, 63).

[34] Mr. Appulonappar objects to the Board's reliance on s 117(1) of the IRPA to define "human smuggling", given that the provision has since been found to be unconstitutional insofar as it includes foreign nationals who merely render mutual assistance to fellow asylum-seekers (*Appulonappa*). However, the Supreme Court confirmed in *B010* that s 7 of the *Charter* is not engaged at the stage of determining admissibility to Canada under s 37(1) of the IRPA (*B010* at para 75, citing *Hernandez Febles v Canada (Minister of Citizenship and Immigration),* 2014 SCC 68). Furthermore, the Supreme Court did not state in *Appulonappa* that the conduct prohibited by s 117(1) of the IRPA could not be relied upon to interpret s 37(1)(b) of the IRPA. Rather, the Supreme Court held that s 117(1) was unconstitutional insofar as it captured certain conduct, including humanitarian aid to undocumented entrants, or the provision of mutual assistance amongst asylum-seekers. Mr. Appulonappar has not demonstrated that he benefits from any of these exceptions.

[35] The Board did not consider whether Mr. Appulonappar might escape inadmissibility on the ground that he merely aided in the illegal entry of other refugees or asylum-seekers in the course of their collective flight to safety (*B010* at para 72). However, the Board did find that Mr. Appulonappar had "no humanitarian purpose" when he agreed to work as a crew member aboard the *Ocean Lady.* More fundamentally, the Board held that there was no objective evidence that Mr. Appulonappar was at risk in Thailand or that there was a prospect of removal to Sri Lanka. This finding, which was amply supported by the evidence, confirms that Mr. Appulonappar was not fleeing to safety, and he therefore could not be considered to have been merely aiding in the "illegal entry of other refugees or asylum seekers *in the course of their collective flight to safety*" [emphasis added].

C. *Did the Board understand and properly apply the legal doctrines of mens rea and wilful blindness, and the defences of necessity and duress?*

[36] Mr. Appulonappar argues that the Board was wrong to find that he had the necessary intention to engage in human smuggling, and conflated the notions of recklessness and wilful blindness.

[37] The *mens rea* component of s 37(1)(b) of the IRPA requires that there be reasonable grounds to believe that the foreign national knew that the smuggled persons were entering Canada without the required documentation, but nevertheless organized, induced, aided or abetted the entry of those persons into Canada (*J.(P.) v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 262 at para 87, rev'd on other grounds 2015 SCC 58).

[38] The Board found that Mr. Appulonappar was aware that passports and visas were required for entry into Canada and, at a minimum, suspected the passengers did not meet this requirement and decided not to make further inquiries. The Board noted that during his hearing, Mr. Appulonappar was reluctant to answer questions about why he did not approach Canadian authorities to obtain a visa for Canada, or inquire about the lawful requirements for travel to Canada. At one point, he admitted that he knew Anthony was sending him abroad without a visa, although he later recanted his testimony, stating that Anthony told him visas were not needed for travel by sea. The Board found this testimony to be unsatisfactory.

[39] Moreover, the Board held that Mr. Appulonappar was aware of the importance of obtaining valid visas when travelling to foreign countries, given that he had obtained and renewed (on three separate occasions) his visa in Thailand, and was awaiting resettlement. The Board found that Mr. Appulonappar became aware that Anthony's operations were illegal when he was told that the proposed route to Canada by air had been shut down by the Thai authorities. At this point, the Board held that Mr. Appulonappar's agreement to work for Anthony was made with full knowledge that his passage to Canada was being arranged illegally. Mr. Appulonappar also testified that he boarded the *Ocean Lady* "with no questions asked" about the identity documents he possessed. Once on board the vessel, Mr. Appulonappar learned that some of the other passengers had paid up to $60,000 to the smugglers for their passage. The Board held that the passengers agreed to pay these exorbitant amounts because they knew the ship was acting in a "secret, clandestine, illegal manner", and that "the entire purpose of the voyage was to subvert the requirements of the [IRPA]".

[40] The Board therefore concluded that Mr. Appulonappar travelled aboard the vessel in order to subvert the requirements of the IRPA, and was aware of, or wilfully blind to, the fact that the other passengers were also seeking to evade the law. The Board stated that he "knowingly aided in people smuggling by joining the crew of the Ocean Lady", "knowingly aided in transporting migrants" in contravention of the IRPA, and "knew or was wilfully blind to the nature and potential consequences of his acts". The Board correctly identified the *mens rea* required under s 37(1)(b) of the IRPA, and reasonably held that Mr. Appulonappar possessed the necessary intention.

[41] 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 original]). The Board correctly identified the test for wilful blindness, noting that it "required knowledge of the need for an inquiry and deliberately refraining from ascertaining the true facts". The Board explicitly found that Mr. Appulonappar's duty to ask questions arose after Anthony informed him that the Thai authorities had "caught the route" for smuggling people by air, and he would therefore have to travel by sea. The Board reasonably found that these circumstances amounted to wilful blindness. These findings were, in any event, made in the context of an alternative analysis. The Board's primary finding was that Mr. Appulonappa was well aware that the *Ocean Lady* was being used to smuggle people into Canada without the required documentation.

[42] The Board was also justified in rejecting Mr. Appulonappar's argument that he acted out of necessity. This Court has found that "[b]oth the defence of necessity and the defence of duress

require that the person invoking the defence face a clear and imminent peril". The Board noted that Mr. Appulonappar was not in Sri Lanka when he boarded the *Ocean Lady*, and that he faced no objective risk while awaiting resettlement in Thailand, including any risk of deportation to Sri Lanka. Mr. Appulonappar testified that he did not feel at risk prior to boarding the *Ocean Lady.* Once Mr. Appulonappar left Sri Lanka, he no longer faced a clear and imminent peril. While the Board did not explicitly address the defence of duress, a similar analysis applies and accordingly no reviewable error arises from this aspect of the Board's decision.

VI. Conclusion

[43] The Board found that Mr. Appulonappar had received a material benefit, namely a reduction in the cost of his passage, in exchange for working as a crew member aboard the *Ocean Lady.* Pursuant to *B010*, those who act in knowing furtherance of a criminal aim of criminal organizations, or who abet serious crimes involving such organizations, continue to be inadmissible to Canada. The Board's decision complies with *B010* and related decisions of the Supreme Court of Canada, and was reasonable. The application for judicial review is dismissed.

[44] Neither party proposed that a question be certified for appeal. However, both parties acknowledged in oral submissions that, depending on the Court's analysis, a certified question may arise concerning whether foreign nationals are inadmissible to Canada only if they engage in human smuggling as members of a transnational criminal organization and derive a profit. The Supreme Court of Canada has held in *B010* that foreign nationals are inadmissible to Canada if they procure illegal entry in order to obtain, directly or indirectly, a financial or other material

benefit in the context of transnational organized crime. In my view, the law governing this matter is sufficiently clear, and it is therefore unnecessary to certify a question for appeal.

JUDGMENT

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

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6942-13
STYLE OF CAUSE:	FRANCIS MANOHARAN ANTHONIMUTHU APPULONAPPAR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO
DATE OF HEARING:	JUNE 14, 2016
REASONS FOR JUDGMENT AND JUDGMENT:	FOTHERGILL J.
DATED:	AUGUST 11, 2016
AMENDED	OCTOBER 18, 2016

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