

R. v. ABDULLE (2014)

Facts

The defendant was accused of organizing or attempting to organize, between May 2006 and January 2011, the coming to Canada of ten or more Somali irregular migrants (potential refugees). Specifically, the defendant allegedly obtained fraudulently documentation from the Citizenship and Immigration Services of Canada. The defendant maintained to have acted in view of the serious dangers faced by the migrants in Somalia.

The defendant was charged with migrant smuggling in its modality of facilitating illegal entry into Canada. He was further accused of (i) misrepresentation, (ii) submitting false information and bribery under the Immigration and Refugee Protection Act (IRPA), (iii) frauds on the government, (iv) forgery, (v) use of fraudulent documents, and (vi) possession of identity.

The defendant filed an application for an order declaring that section 117 of IRPA - dealing with migrant smuggling - is overbroad and, as a consequence, unconstitutional.

Elements of success

- Acknowledgement of humanitarian exemption

Challenges

- 'Financial or other material element' not constituent element of crime

Background

The defendant knew some of the irregular migrants he assisted, as they were his family members, friends, or acquaintances. He did not personally know many of them. Due to his own personal experience, the defendant was well aware of the extremely difficult humanitarian situation and high dangers faced by the migrants in Somalia.

Key issues

- ❖ Financial or other material benefit
- ❖ Humanitarian exemption
- ❖ Evidence (onus of proof re unconstitutionality claims)

Investigation

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

Reasoning

On its application for a declaration of unconstitutionality of Section 117 IRPA, the Defence argued the defendant had acted on humanitarian grounds. Section 117 IRPA - as it stood at the time of events - was worded in overbroad terms because it comprised, within its scope of application, individuals who assisted migrants to enter Canada for humanitarian reasons. The Defence directly invoked Article 3 (a) Protocol

against the Smuggling of Migrants by Land, Sea and Air, which - by including as a constitutive element of the crime the intent of obtaining a financial or other material benefit - excluded from its scope of application conduct pursued on humanitarian grounds.

The relevant passage of section 117 IRPA stipulated the following: “(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*”.* The purpose of obtaining “*profit*” is an aggravating circumstance. The issue with the broadness of Section 117 IRPA relates to the fact that, in its terms, there is no consideration of any sort of motive. It creates no form of sub-category for individuals who would facilitate and assist irregular migrants for legitimate humanitarian reasons.

The onus of proof in showing broadness lies with the Defence, which has not occurred in the instant case. Motive cannot be confused with intent. Motive may be a sentencing factor. Yet, the offence of section 117 IRPA can be established without the specific motive being determined.

Section 117 IRPA crystallises an important preventative measure and disincentive against the smuggling of migrants into Canada. However, the analysis would be incomplete if it did not consider any humanitarian incentives associated with facilitating the entry of refugees into Canada. Otherwise, it would include, for instance, humanitarian workers and family members attempting to reunify their family in Canada. This notwithstanding,

the purpose of protecting national borders must be taken into consideration; that is, the nature and importance of the societal interests in preserving Canada’s sovereignty, the integrity of Canada’s borders, and the safety of the Canadian public. Section 117 IRPA is intentionally broad in scope, with the purpose of containing no “*loopholes*” that could undermine border security.

There might be difficult and sensitive cases in which prosecution under section 117 IRPA would be unpalatable. Such cases, however, defy comprehensive definition. Accordingly, centralized charge approval by the Attorney General is to ensure that all circumstances, including motive, are duly assessed before charges are laid under section 117 IRPA. Section 117 IRPA aims to address the criminals and criminal networks dedicated to the smuggling of migrant as opposed to those that act upon legitimate humanitarian concerns.

Verdict/Decision

Application dismissed.

Opinion

The case provides important insight into the operation of the so-called humanitarian exemption and its relationship with the ‘purpose of obtaining a financial or other material benefit’. This is all more relevant given that the intent of obtaining a material advantage is not, under Canadian law, a constituent element of the crime of migrant smuggling.

Notes

* In December 2012, section 117 *IRPA* was amended to read as follows: “*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*”.