Federal Court  Cour fédérale

Date: 20160920

Docket: IMM-1429-16

Citation: 2016 FC 1065

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 20, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

HONG NHAN TRAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board to dismiss the applicant's appeal for lack of jurisdiction, on March 15, 2016.

II. Facts

[2] The applicant, age 32, is a citizen of Vietnam. She became a permanent resident of Canada on March 8, 2003.

[3] On May 24, 2011, the applicant was found guilty of conspiracy (paragraph 465(1)(c) of the *Criminal Code*) and drug trafficking (subsection 5(1) of the *Controlled Drugs and Substances Act*). On September 14, 2011, she received a conditional sentence of two years less a day.

[4] Following a hearing before the Immigration Division (ID) on June 18, 2015, the applicant was inadmissible in Canada for serious criminality under paragraph 36(1)(a) of the IRPA and a removal order was issued against her.

[5] On June 18, 2015, the applicant submitted a Notice of Appeal to the IAD.

[6] On December 22, 2015, the IAD asked the parties to file their written representations regarding its jurisdiction, pursuant to subsections 64(1) and 64(2) of the IRPA, with respect to the appeal in the case of serious criminality, given the applicant's sentence.

[7] On January 11, 2016, the applicant submitted her written representations to the IAD through her counsel.

[8] On March 15, 2016, the IAD declined jurisdiction and dismissed the appeal.

III. Decision

[9] In its decision, the IAD considers that the applicant lost her right to appeal because she was convicted of two offences under paragraph 36(1)(a) of the IRPA and because she falls under subsections 64(1) and 64(2) of the IRPA, given that she received a sentence of imprisonment of at least six months.

[10] The IAD equates the conditional sentence of two years less a day to a sentence of imprisonment within the meaning of paragraph 36(1)(a) of the IRPA, based on the Federal Court decision, *Canada (Public Safety and Emergency Preparedness) v. Tran*, 2015 FCA 237 [*Tran FCA*], at paragraph 88 (the Court underscores that there is no connection between the case of the applicant, Hong Nhan Tran, and the decision cited).

> A conditional sentence of imprisonment imposed pursuant to the regime set out in ss. 742 to 742.7 of the Criminal Code may reasonably be construed as a term of imprisonment under paragraph 36(1)(a) of the IRPA.

[11] Consequently, the IAD finds that it does not have the required jurisdiction to hear the applicant's appeal and dismisses it.

IV. Relevant Provisions

[12] In this matter, provisions 36(1)(a), 64(1) and 64(2) of the IRPA apply. They were considered by the Federal Court in *Tran v. Canada (Public Safety and Emergency Preparedness*), 2014 FC 1040, then by the Federal Court of Appeal in *Tran FCA*, cited above.

V. Parties' Representations

[13] The applicant submits that the IAD's decision to consider the sentence of imprisonment of two years less a day to be served in the community as equivalent to a sentence of imprisonment of at least six months within the meaning of paragraph 36(1)(a) of the IRPA is unreasonable. She argues that the Federal Court of Appeal, in spite of its findings, wanted to leave the ID and IAD decision-makers some latitude.

> Obviously the deference granted to administrative decision makers is in part meant to give them flexibility to adjust to new arguments and circumstances. It is thus obviously open to the ID and the IAD to adopt another interpretation should they believe that it is warranted by the inconsistent consequences described above.
>
> (*Tran FCA*, cited above, at paragraph 87)

Thus, according to the applicant, it was unreasonable for the IAD not to present its own analysis regarding the inconsistent consequences that this interpretation of paragraph 36(1)(a) of the IRPA was likely to entail. In effect, a sentence of imprisonment of a little less than six months would be treated less severely than a conditional sentence of a little more than six months.

[14] Furthermore, the applicant maintains that the IAD committed an error by refusing to suspend the review of her file, considering that an application for leave to appeal the *Tran FCA* decision was filed with the Supreme Court on December 29, 2015, and granted on April 14, 2016. The applicant argues that the IAD's decision not to wait for the Supreme Court's decision is unreasonable because it does not take into account the three-year time limit for appealing before the IAD and it demonstrates a lack of comity towards the Supreme Court.

[15] Conversely, the respondent maintains that the IAD was required to apply the principle of *stare decisis* and follow the findings established by the Federal Court of Appeal in *Tran FCA*, rather than re-interpreting them. Moreover, the respondent notes that the IAD is free (but not required) to propose an interpretation that differs from that of the Federal Court of Appeal if new arguments or new circumstances warrant it, which is not the situation in this case.

[16] Finally, the respondent says that it is not in the interests of justice to suspend the applicant's appeal book for more than a year, citing the decisions of this Court that established that lower courts are required to continue to apply the law until it is overturned even when there is a pending appeal (*Ospina Velasquez v. Canada (Citizenship and Immigration)*, 2013 FC 273, at paragraph 9, and *Mata Mazima v. Canada (Citizenship and Immigration)*, 2012 FC 698, at paragraph 12).

VI. Issues in dispute

[17] The Court identified the following questions in this matter:

1) Were there sufficient grounds for the IAD's decision to decline jurisdiction and dismiss the applicant's appeal?
2) Did the IAD err in fact and in law by deciding not to suspend the review of the applicant's case while waiting for the Supreme Court's decision in *Tran FCA*?

[18] The applicable standard of review for the first issue in dispute is that of correctness. It involves a principle of procedural fairness, specifically the requirement that administrative decision-makers give reasons for their decision (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817).

[19] If the Court answers the first question in the affirmative and turns to the second issue in dispute, the applicable standard of review is that of reasonableness (*Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9).

VII. Analysis

[20] The application for judicial review should be allowed. The IAD's decision is unfair in that the IAD breached its duty to provide sufficient reasons for its decision, in particular, its interpretation of paragraph 36(1)(a) of the IRPA.

A. *Reasons for the IAD's decision*

[21] In *Tran FCA*, at paragraphs 81 and 86, the Federal Court of Appeal points out that a certain interpretation of paragraph 36(1)(a) of the IRPA might produce inconsistent

consequences, but that the legislative history shows that Parliament was aware of and wanted this state of affairs:

> [81]. The legislative history is particularly relevant in this case to assessing what I consider the most serious argument militating against the interpretation adopted by the Minister's delegate: the inconsistent consequences and even absurdity when one considers that the IRPA treats a conditional sentence of imprisonment of seven months more severely than a five months jail term.
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> . . .
>
> [86] The opinion that Parliament still views terms of imprisonment of more than six months served in the community as serious enough to warrant losing one's right of appeal of a finding of inadmissibility is certainly supported by the legislative history when subsection 64(2) was amended in 2013 allegedly to put it in line with paragraph 36(1)(a). Although such interpretative tools are typically given less weight than others, I simply cannot conclude that the interpretation of the Minister's delegate, which the legislative history appears to support, should be found unreasonable on the basis that it produces inconsistent consequences which might be regarded as absurd. These inconsistencies were clearly spelled out and considered before the adoption of subsection 64(2) and no change was made to exclude those inconsistent consequences.

[22] Nevertheless, as previously mentioned, the Federal Court of Appeal wanted to give the Courts latitude in applying this provision:

> Obviously the deference granted to administrative decision makers is in part meant to give them flexibility to adjust to new arguments and circumstances. It is thus obviously open to the ID and the IAD to adopt another interpretation should they believe that it is warranted by the inconsistent consequences described above.
>
> (*Tran FCA*, cited above, at paragraph 87)

[23] In this case, although the IAD is not required to interpret this provision differently, its decision-makers must nevertheless provide sufficient reasons for their decisions.

[24] In *Febles v. Canada (Citizenship and Immigration)*, [2014] 3 SCR 431, 2014 SCC 68, in a decision written by Chief Justice McLachlin, the Supreme Court describes the determination of the severity of a crime as follows:

> [62] The Federal Court of Appeal in *Chan v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 390 (C.A.), and *Jayasekara*, was of the view that the crime is generally considered serious if a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada. I agree. However, this generalization should not be understood as a rigid presumption that is impossible to rebut. Where a provision of the Canadian Criminal Code, R.S.C. 1985, c. C-46 has a large sentencing range, the upper end being ten years or more and the lower end being quite low, a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded. Article 1F(b) is designed to exclude only those whose crimes are serious. The UNHCR has suggested that a presumption of serious crime might be raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery (Goodwin-Gill, at p. 179). These are good examples of crimes that are sufficiently serious to presumptively warrant exclusion from refugee protection. However, as indicated, the presumption may be rebutted in a particular case. While consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner. [Emphasis of the Court]

[25] The IAD should have allegedly considered the applicant's specific case and provided sufficient reasons for its decision in order to ensure procedural fairness.

B. *Suspension of the appeal while awaiting the Supreme Court's decision.*

[26] Given the Court's finding on the matter of procedural fairness, the question of whether or not to suspend the appeal book until the Supreme Court renders a final ruling on *Tran FCA* becomes theoretical.

[27] However, it should be pointed out that a modern decision rendered by Justice Yves de Montigny, Federal Court judge at the time, found that the IAD could have allegedly suspended the case being appealed, given the significance of the questions raised and in the interests of justice to avoid inconsistent decisions. Under such circumstances, deference to the Supreme Court allows a proceeding to be suspended:

> [11] In the meantime (on July 4, 2013), the Supreme Court granted leave to appeal in *Febles v Canada (Citizenship and Immigration)*, 2012 FCA 324 [*Febles FCA*]. On November 12, 2013, the Applicant requested a stay of this proceeding pending the SCC decision in *Febles*. The Applicant also requested to make further submissions after the Febles SCC decision was rendered.
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> 12. On November 26, 2013, Chief Justice Crampton granted the request. The SCC decision in *Febles* was rendered on October 30, 2014. On January 13, 2015, Justice Beaudry ordered that the parties make submissions on the impact of the Supreme Court's decision in *Febles*. [Emphasis of the Court]
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> (*Jung v. Canada (Citizenship and Immigration)*, 2015 FC 464

[28] Consequently, the Court is of the opinion that the IAD's decision not to suspend the applicant's appeal until the Supreme Court renders a decision in *Tran FCA* merits consideration by the IAD.

VIII. Conclusion

[29] The Court finds that there was a breach of the duty of procedural fairness as a result of the IAD's failure to present sufficient grounds for its decision. The application for judicial review is allowed. The Court refers the case to the IAD for reconsideration by a different panel of the restriction on the right of appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and that the case is referred back to the IAD for reconsideration by a different panel of the restriction on the right of appeal. There is no question of importance to certify.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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