Federal Court of Appeal

Cour d'appel fédérale

Date: 20151030

Docket: A-531-14

Citation: 2015 FCA 237

CORAM: **GAUTHIER J.A.**
RYER J.A.
NEAR J.A.

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellant

and

THANH TAM TRAN

Respondent

Heard at Vancouver, British Columbia, on May 12, 2015.

Judgment delivered at Ottawa, Ontario, on October 30, 2015.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: RYER J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] This is an appeal by the Minister of Public Safety and Emergency Preparedness (the Minister) from a decision of Justice James O'Reilly of the Federal Court (the judge) allowing an application for judicial review brought by Thanh Tam Tran. This decision is reported under the neutral citation 2014 FC 1040.

[2] Mr. Tran is a citizen of Vietnam who has been a permanent resident in Canada since 1989. In 2012, he was convicted on a charge of producing marijuana and later received a 12-month conditional sentence of imprisonment.

[3] The decision under review before the judge was a decision of a delegate of the Minister, under subsection 44(2) of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27 (IRPA), referring Mr. Tran to a hearing before the Immigration Division of the Immigration and Refugee Protection Board (ID) to determine whether he should be found inadmissible to Canada on account of serious criminality as defined in paragraph 36(1)(*a*) of the IRPA.

[4] The judge certified the following two questions:

1. Is a conditional sentence of imprisonment imposed pursuant to the regime set out in ss. 742 to 742.7 of the *Criminal Code* [R.S.C. 1985, c. C-46] "a term of imprisonment" under s. 36 (1)(*a*) of the IRPA?

2. Does the phrase "punishable by a maximum term of imprisonment of at least 10 years" in s. 36(1)(*a*) of the IRPA refer to the maximum term of imprisonment available at the time the person was sentenced or to the maximum term of imprisonment under the law in force at the time admissibility is determined?

[5] Before this Court, the Minister also challenges the finding of the judge that the decision was unreasonable because the decision maker relied, in part, on unproven allegations - arrests, charges and police reports.

[6] For the reasons that follow, I would allow the appeal.

I. Background

[7] In March 2011, Mr. Tran was involved with others in operating a marijuana grow operation (grow op), which involved about 915 marijuana plants and the theft of electricity worth almost $100,000. On November 29, 2012, Mr. Tran was convicted of production of a controlled substance, contrary to subsection 7(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (CDSA).

[8] On January 18, 2013, Mr. Tran was sentenced. At the time Mr. Tran committed the offence, it was punishable by a maximum term of imprisonment of 7 years. On November 6, 2012, that is prior to his conviction and his sentencing, legislation came into effect which increased the maximum punishment for the offence to 14 years of imprisonment and provided for a new minimum sentence of 2 years of imprisonment. However, the sentencing judge could only impose the lesser penalty applicable to the offence pursuant to subsections 11(*g*) and (*i*) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (*Charter*) (see Appendix A). In this case, this meant that the maximum penalty that could have been imposed on Mr. Tran was 7 years of imprisonment.

[9] On July 26, 2013, an officer of the Canada Border Services Agency (CBSA) made a report under subsection 44(1) of the IRPA (see Appendix A) stating that Mr. Tran was inadmissible for serious criminality under paragraph 36(1)(*a*). It appears that Mr. Tran's file was referred to an admissibility hearing.

[10] However, as section 64 of the IRPA (see Appendix A) had just been amended (*Faster Removal of Foreign Criminals Act*, S.C. 2013, c. 16), CBSA withdrew the referral because it was of the opinion that Mr. Tran would no longer have a right to appeal a removal order (Appeal Book, Vol. 1, Tab 37, pp. 271-272 and Tab 38, p. 273). Mr. Tran was permitted to file additional submissions. In the said submissions, Mr. Tran's legal counsel fully canvassed the following two arguments that Mr. Tran raised before the judge and before this Court (Appeal Book, Vol. 1, Tab 14, pp. 144-157).

[11] First, that Mr. Tran did not fall within the ambit of paragraph 36(1)(*a*) of the IRPA because, at the time of his sentencing, the maximum punishment that could be applied to him was 7 years, pursuant to sections 11(*g*) and (*i*) of the *Charter*. Second, that his 12-month conditional sentence of imprisonment did not fall within the ambit of paragraph 36(1)(*a*), and thus subsection 64(2) of the IRPA, because the words "term of imprisonment" therein should be read as referring only to a "carceral term of imprisonment" so as to exclude a "conditional term of imprisonment."

[12] Both parties agree that the Minister's delegate had some discretion, albeit a limited one, not to refer a permanent resident such as Mr. Tran to an admissibility hearing even if he was found to meet the criteria set out in paragraph 36(1)(*a*) (*Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 429, [2006] 1 F.C.R. 3, and chapter ENF 6 – Review of reports under A44(1) of the Citizenship and Immigration Canada (CIC), Enforcement Manual (Enforcement Manual) (Joint Book of Authorities, Vol. 4, Tab 113)). As this was not an issue before the judge or this Court, I will assume for the purposes of this appeal only that this is so. I

note however that this is an issue that will need to be resolved at some point in the future given our Court's decision in *Canada (Minister of Public Safety and Emergency Preparedness) v. Cha*, 2006 FCA 126 at para. 41, [2007] 1 F.C.R. 409.

[13] Thus, in accordance with directions provided to him from CBSA, Mr. Tran raised various facts which, in his opinion, would justify the exercise of this discretion in his favour. In particular, Mr. Tran relied on the length of his residency in Canada and the fact that he had been in Canada for more than 22 years "without incident" (24 years when one considers the period after his conviction) (Appeal Book, Vol. 1, Tab 14, p. 163). He also submitted that removing him would be against the best interests of his five children who were all born in Canada from separate relationships. The mothers and the children all live in British Columbia. Mr. Tran added that his current common law spouse was a Canadian citizen and that he had other family members also residing in Canada. In contrast, he had absolutely no family or network of support in Vietnam where the living conditions are poor.

[14] Mr. Tran relied on the fact that he works extremely hard as a roofer to support his extended family, which is often difficult due to the seasonal nature of the roofing industry. However, the only evidence on file is that he pays $560 per month for 2 of his children. As noted by the sentencing judge in his reasons, according to Mr. Tran, it was his financial needs that prompted his implication in the grow op which resulted in his conviction. He also raised the fact that the offence for which he was convicted was a non-violent one.

II. The decision of the Minister's delegate

[15] On October 10, 2013, the Minister's delegate endorsed the opinion of the CBSA officer, summarized in the "Subsection 44(1) and 56 Highlights – Inland cases (Short)" dated October 7, 2013 (the Report), that the matter should be referred to the ID (see Appeal Book, Vol. 1, Tab 5, pp. 25-27).

[16] In the Report, the CBSA officer, in accordance with the Enforcement Manual, considered all of the factors raised by Mr. Tran, his criminal history, past compliance, current attitude, his potential for rehabilitation, the circumstances surrounding the offence for which he was convicted and the sentence imposed.

[17] The CBSA officer noted in particular that contrary to what was represented to the sentencing judge, the CDSA conviction was not Mr. Tran's first and only criminal conviction as he had been convicted a few days before the sentencing hearing of impaired driving (Appeal Book, Vol II, Tab 61). The officer indicated that it is not the nature of the other conviction that is relevant but rather the fact that Mr. Tran had knowingly refrained from telling the whole truth to the court who relied on this very fact to give him a conditional sentence of imprisonment as opposed to the term of incarceration requested by the Crown prosecutor.

[18] In addition, after noting that none of Mr. Tran's other arrests and stayed charges listed in the Report since 1998 had resulted in a conviction, the officer wrote that he considered the evidence relating to these events (such as police reports) to assess Mr. Tran's prospect of

rehabilitation and his overall credibility. This was, in his view, relevant as Mr. Tran presented himself as a highly moral character who had lived in Canada for 24 years "without incident". He concluded that Mr. Tran's behaviour could not be described "as pristine or upstanding in the context of these arrests, some for serious offences."

[19] Although the officer acknowledged that the CDSA offence for which Mr. Tran was convicted and sentenced did not involve any violence, he noted that the level of production of marijuana involved contributes to a larger and very violent problem involving the production of controlled substances in British Columbia. In his view, the size of the grow op suggested an element of organization as the quantity would have been difficult to produce and manage on one's own. He wrote that, in Lower Mainland British Columbia, such a grow op does not happen in a vacuum and is often linked to more serious crimes including gang violence.

[20] The officer noted that the recent changes in the CDSA regarding the sentence for this type of offence also indicate how seriously Parliament views them. While the increased sentence could not be imposed upon Mr. Tran, it certainly did not mean that Parliament did not view this offence as serious in 2011; it simply had yet to enact the legislative amendments. After again acknowledging that in the absence of a conviction, prior arrests and stayed charges would have been given little weight by the sentencing judge, the officer stated that his own assessment was based on more informal factors than criminal justice including the letters from friends and family. Therefore, he believed that it was appropriate for him to consider the reliable evidence provided by the police. Having noted that the period to be considered for rehabilitation was rather short, the officer added:

> TRAN has now been crime-free for a year and a half, his history shows that he tends to get arrested every couple of years. By failing to acknowledge any of his past problems, particularly his very recent conviction, it is my opinion that TRAN is not accepting responsibility for his actions. Based on the little information before me, I can only assume he will reoffend because he has done so in the past and because he has not demonstrated any inclination to take responsibility for anything beyond what he thinks immigration officials are aware of. Counsel states that "[he] was never an addict and therefore does not undergo AA or other similar programs". The existence of 3 arrests and 1 conviction for operation while impaired suggests this may not be the case.
>
> (Emphasis added)

[21] There is no need here to refer to the officer's comments with respect to the mitigating factors put forth by Mr. Tran, such as the best interests of the children, as these are not directly relevant to the issues before us in this appeal. Before us, Mr. Tran did not argue that there was a reviewable error in this respect. Thus, it is sufficient to say that the report concludes as follows:

> Based on all of the above information, and in consideration of the submissions made by counsel, it is my opinion that this report should be referred to a hearing. TRAN has been involved in a serious criminal offence. The evidence provided is that he has been involved in criminal activity in the past and that he is not taking full responsibility for his actions. The mitigating factors (establishment, family, hardship in Vietnam, etc) are overshadowed by the seriousness of the offence, TRAN's conduct in society, and the lack of any indication his behavior will improve.

III. The Federal Court's decision

[22] The judge chose reasonableness as the standard of review applicable to all of the questions before him - the interpretation of paragraph 36(1)(*a*) of the IRPA and the overall merits of the decision.

[23] With respect to the interpretation of paragraph 36(1)(*a*), the judge found that it was unreasonable to construe the words "term of imprisonment" as including a conditional sentence of imprisonment because:

i. In *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61 [*Proulx*] and *R. v. Middleton*, 2009 SCC 21, [2009] 1 S.C.R. 674 [*Middleton*], the Supreme Court of Canada confirmed that the meaning of these words depended on the context and did not always include conditional sentences across the whole federal statutes book;

ii. Relying on *Proulx*, at paragraph 21, where the Court stated that a conditional sentence "is a meaningful alternative to incarceration for less serious and non-dangerous offenders", the judge found that to include them would be at odds with the purpose of paragraph 36(1)(*a*) which deals with serious criminality;

iii. In *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539 [*Medovarski*], the Supreme Court of Canada, referring to paragraph 36(1)(*a*), said at paragraph 11:

> In keeping with these objectives, the *IRPA* creates a new scheme whereby persons sentenced to more than six months in prison are inadmissible: *IRPA*, s. 36(1)(*a*). If they have been sentenced to a prison term of more than two years then they are denied a right to appeal their removal order: *IRPA*, s. 64.
>
> (Emphasis added)

[24] On the second issue – meaning of "offence punishable by a maximum term of at least 10 years", the judge distinguished this Court's decision in *Sanchez v. Canada (Citizenship and Immigration)*, 2014 FCA 157, 464 N.R. 333 [*Sanchez*], noting that, contrary to Article 1F(*b*) of the *Convention Relating to the Status of Refugees, 1951*, 28 July 1951, 189 U.N.T.S. 137, at issue in that case, paragraph 36(1)(*a*) refers to the maximum punishment available at the time of conviction (judge's reasons at para. 19, emphasis added).

[25] Then, the judge mistakenly stated that Mr. Tran was not convicted of a crime punishable by at least 10 years as "[t]he maximum sentence <u>at the time of his conviction</u> was 7 years" (judge's reasons at para. 20, emphasis added). Furthermore, the judge noted that while the maximum sentence was <u>subsequently</u> raised to 14 years, Mr. Tran was not punishable by a sentence of that duration. It is unclear if the judge mistakenly believed that the maximum sentence was raised after Mr. Tran was convicted (his use of the words "subsequently raised"), or if he meant to say that, because of subsections 11(*g*) and (*i*) of the *Charter*, the amendment which was made before his conviction but after he committed the offence would not apply to him (his use of the words "Mr. Tran was not punishable"). However, the judge did not refer to these sections of the *Charter* in his reasons.

[26] Finally, the judge found that the overall decision was unreasonable because the Minister's delegate had relied on arrests and unproven charges to find that Mr. Tran would likely "reoffend because he had done so in the past" (judge's reasons at para. 23).

[27] I note that the judge never expressly dealt with the interpretation of paragraph 36(1)(*a*) that he used in his certified question (see paragraph 4 above), that is, whether this provision refers to a maximum term of imprisonment available at the time the person <u>was sentenced</u> (see paragraphs 24 and 25 above).

IV. Legislation

[28] Paragraph 36(1) of the IRPA reads as follows:

Immigration and Refugee Protection Act, S.C. 2001, c. 27	*Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, ch. 27
Serious criminality	**Grande criminalité**
36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36.** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	*a)* être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or	*b)* être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.	*c)* commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

[29] Additional relevant legislative provisions are reproduced in Appendix A.

V. Issues

[30] The role of this Court on appeal from a decision of the Federal Court dealing with an application for judicial review is to determine whether the judge chose the appropriate standard of review and applied it properly to the issues before him (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, [2013] 2 S.C.R. 559).

[31] Thus, in the present appeal, where there is no dispute that the judge chose the appropriate standard (see also *Najafi v. Canada (Public Safety and Emergency Preparedness)*, 2014 FCA 262 at para. 56, 379 D.L.R. (4th) 542), the issues are:

i. Was the Minister's interpretation of paragraph 36(1)(*a*) of the IRPA reasonable (see particularly the certified question at paragraph 4 above)?

ii. Was the decision on the merits reasonable?

[32] In his memorandum, the Minister briefly raised a new argument that was not presented to the judge. He said that this Court should not decide the appeal given that the issues raised before the Minister's delegate could be re-argued before the ID at the admissibility hearing. It is thus premature to deal with them now. Mr. Tran submits that this argument is surprising given that the Minister sought an expedited hearing of the appeal on the basis that the judge's decision was creating chaos and confusion. Mr. Tran also objects to this Court dealing with this new argument because he has already incurred legal costs to deal with the Minister's appeal and because CBSA's determination that he does not have a right to appeal (pursuant to subsection 64(2) of the IRPA) will not be reviewed before the ID if it considers that he was convicted of an offence punishable by a maximum term of imprisonment of 10 years or more.

[33] The Minister did not insist on this new argument at the hearing before us. He acknowledged that there are several cases currently pending involving the same issues and that it would be important to deal with these issues as soon as possible. I am aware of at least one application for judicial review that was scheduled for hearing before the Federal Court that has been adjourned pending a decision from this Court on the certified questions. This Court has the discretion to deal with a new issue on appeal but, after careful consideration, I have concluded that it would be inappropriate to do so in this somewhat exceptional case.

VI. Analysis

A. *The interpretation of subsection 36(1) of the IRPA*

[34] The Minister's delegate did not deal expressly with the legal arguments raised by Mr. Tran in the decision. According to the Minister, it is implicit that the Minister's delegate considered that Mr. Tran's case fell within the ambit of subsection 36(1) of the IRPA either because:

i. The offence for which he was convicted was punishable at the time his admissibility was assessed by a term of imprisonment of more than ten years; and/or

ii. He was sentenced to a term of imprisonment of more than six months.

[35] In fact, the CBSA's decision to seek additional submissions because of the absence of an appeal could only be based on the fact that Mr. Tran had been punished by a term of imprisonment of at least 6 months (section 64 of the IRPA).

B. *Offence under an Act of Parliament punishable by a maximum term of imprisonment of at least ten years*

[36] I will start my analysis with the first criteria set out in paragraph 36(1)(*a*) of the IRPA. The first issue to consider is whether this criteria is an objective one, that is: Whether the maximum punishment is to be assessed simply by reference to the terms of the Act of Parliament setting out the offence, or whether it refers only to the maximum punishment that could actually be imposed on the person (subjective criteria). In other words – is it the offence described in the Act of Parliament or Mr. Tran himself that must be punishable by the maximum term set out in paragraph 36(1)(*a*).

[37] The parties agree that if the judge's interpretation, at paragraph 19 of his reasons – that the offence must be punishable by a maximum term of more than ten years <u>at the time Mr. Tran was convicted</u>, refers to the maximum punishment provided for in the CDSA (objective criteria), then Mr. Tran's case is captured by subsection 36(1) because, contrary to the judge's statement in his reasons, the offence was indeed punishable by more than ten years on November 29, 2012.

[38] The Minister submits that not only is this criteria objective, but also that it is the maximum punishment provided for in the legislation in force when the admissibility is assessed that is relevant. In this respect, the Minister relies on, among other things, the fact that this is how this section has been applied in its various iterations since at least 1979 (see *Robertson* referred to in paragraph 54).

[39] Mr. Tran argues that whatever the correct time is to determine whether or not paragraph 36(1)(*a*) applies to him – the date of his conviction or the date his admissibility is assessed, paragraph 36(1)(*a*) never in fact applied to him because it was never open to the court to punish him by imposing a maximum term of imprisonment of ten years or more. In his view, this criteria must be applied taking into account his personal situation – whether the punishment provided for in the CDSA, either at the time he was convicted or his admissibility was assessed, was “available” to use the word of the judge. Here, because of the application of subsections 11(*g*) and (*i*) of the *Charter*, Mr. Tran was never punishable by a term of imprisonment of 10 years or more for this offence.

[40] As to the version of the Act of Parliament that is generally relevant if any, Mr. Tran says that the interpretation adopted by the Minister’s delegate and proposed by the Minister would result in an absurdity. It would mean that any permanent resident ever convicted of an offence, be it twenty-five years ago or more, would be exposed to deportation for a crime which was not considered serious when it was committed or when the person was convicted of it. In addition, he submits that this interpretation effectively gives a retrospective and retroactive effect to the CDSA by employing a retrospective application of immigration law. This is contrary to a fundamental principle of criminal law and violates the presumption against the retrospective and retroactive operation of statutes. In Mr. Tran’s view, paragraph 36(1)(*a*) increases his liability or punishment for his past criminal conduct.

[41] Although the Minister’s delegate clearly disagreed with the arguments put forth by Mr. Tran in his submissions, he appears to have at least taken into consideration the seriousness of

the crime at the time it was committed as part of the factors or relevant surrounding circumstances to be considered before deciding whether the matter should be referred to the ID.

[42] We do not have the benefit of a purposive and contextual analysis of paragraph 36(1)(*a*) from the Minister's delegate. Mr. Tran did not argue that this constituted a breach of procedural fairness; rather, he argued that the decision is unreasonable because the Minister's delegate misconstrued and misapplied this provision.

[43] The absence of reasons in respect of the interpretation of subsection 36(1) may explain why the judge simply gave his own view of the proper interpretation of the relevant provision before concluding that the decision was unreasonable. But, even if the judge's interpretation was correct, this is not what he was mandated to do. Indeed, he had to assess whether the interpretation adopted by the decision maker fell within the range of interpretations defensible on the law and the facts.

[44] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 48, the Supreme Court of Canada stated that the court must look at "the reasons offered or <u>which could be offered in support of a decision</u>" (citation removed, emphasis added). In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at paragraph 12, where no reasons had been given by the original decision maker, Justice Abella, writing for the Court, held that a court reviewing an administrative decision must seek to supplement the reasons before it seeks to subvert them. Thus, I understand

the Supreme Court of Canada to be saying that deference due to a tribunal does not disappear because its decision on a certain issue is implicit.

[45] In cases, like this, where it is not evident that only one interpretation is defensible, it is quite difficult to do what the Supreme Court of Canada mandates us to do given the number of interpretative presumptions and principles that can be considered and applied. Some further guidance would certainly be welcomed in that respect, especially when the relative weight to be given to competing presumptions and interpretative tools has never been clearly dealt with by the Supreme Court of Canada.

[46] The Supreme Court of Canada very recently reminded us that:

> When assessing the reasonableness of an administrative decision maker's interpretation, Driedger's modern rule of statutory interpretation provides helpful guidance:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.(E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87)
>
> Wilson v. British Columbia (Superintendent of Motor Vehicles), 2015 SCC 47 at para. 18, [2015] S.C.J. No. 47 (QL).

[47] I will thus first consider the purpose of the IRPA and of section 36. The Supreme Court of Canada in *Medovarski*, at paragraph 10, described them as follows:

> The objectives as expressed in the *IRPA* indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. […] Viewed collectively, the objectives of the *IRPA* and its provisions

> concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.

[48] Turning now to the wording of paragraph 36(1)(*a*), one notes that it contains two distinct criteria. It is indeed the only paragraph that does so in subsection 36(1) of the IRPA. On my reading of the said paragraph, the word "punishable", both in French and in English, refers to the offence under the Act of Parliament and not to the punishment that could in fact be imposed on the offender. The language does not suggest that it is the particular offender that must be punishable by the maximum term set out therein. Thus, the literal meaning of the words read in the context of the paragraph appears to support the interpretation adopted by the Minister's delegate.

[49] I now turn to the immediate context and note that the same expression, "an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years", is also used in the paragraphs dealing with serious criminality committed outside of Canada that if committed in Canada would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years (paragraphs 36(1)(*b*) and (*c*)). In respect of offences committed abroad, it is clear that the criteria is an objective one. It is even clearer when one considers that a foreign national would not even have to be convicted at all, either in Canada or abroad, to be considered inadmissible under paragraph 36(1)(*c*).

[50] Subsection 36(2) (see Appendix A) deals with other criminality as a ground for inadmissibility. It is relevant to this analysis in that it uses phraseology similar to that of paragraph 36(1)(*a*). Indeed, criminality in paragraph 36(2)(*a*) is defined as "having been

convicted in Canada of <u>an offence under an Act of Parliament punishable</u> by way of indictment or of two offences under any Act of Parliament not arising out of a single occurrence" (emphasis added). Again, this criminality can involve offences committed in Canada as well as outside of Canada (paragraphs 36(2)(*b*)(*c*) and (*d*)). The fact that the criteria set out in this subsection (36(2)) is an objective one is made absolutely clear when one considers paragraph 36(3)(*a*) of the IRPA (see Appendix A) that provides that an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence within the meaning of subsection 36(2) even if it was in fact prosecuted summarily.

[51] At this stage of my analysis, I find that the interpretation adopted by the Minister's delegate (objective criteria) appears to be reasonable. I now turn to the issue of whether the interpretation of the Minister's delegate that Mr. Tran's admissibility should be assessed on the basis of the legislation in force at the time of his assessment is reasonable.

[52] I agree with the judge that the wording of paragraph 36(1)(*a*) itself could support an interpretation that the time at which one must assess whether an offence was punishable under the Act of Parliament by the maximum term set out in paragraph 36(1)(*a*) is the time at which the person was convicted. But the wording in that respect is not as clear as the judge appears to have considered it.

[53] The Minister submits that when one considers the wording of paragraph 36(1)(*a*) in its context, particularly its legislative objective and the wording of section 33 of the IRPA (see Appendix A), the interpretation adopted by the decision maker is reasonable. He notes that in

Edmond v. Canada (Citizenship and Immigration), 2012 FC 674, [2012] F.C.J. no. 688 (Q.L.), Justice Tremblay-Lamer of the Federal Court came to that conclusion after applying the Driedger modern rule of interpretation to construe paragraph 36(1)(*c*) of the IRPA. The Minister adds that, even before the adoption of the IRPA, previous iterations of the provisions dealing with inadmissibility based on an offence committed outside of Canada were consistently construed as requiring one to consider the legislative punishment for the offence as of the date admissibility was assessed or the deportation order was issued (see *Ward v. Canada (Minister of Citizenship and Immigration)*, 125 F.T.R. 1, [1996] F.C.J. No. 1687 (QL) at paras. 16-18; *Weso v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1945 (QL) at paras. 7-8).

[54] I agree that it makes sense to construe paragraph 36(1)(*a*) in that respect in the same manner as paragraphs 36(1)(*b*) or (*c*). In fact, in *Robertson v. Canada (Minister of Employment & Immigration)* (1978), [1979] 1 F.C. 197, 91 D.L.R. (3d) 93 (C.A.) [*Robertson*], the theft of goods valued at $50.00 was punishable by a maximum sentence of 10 years of imprisonment when Mr. Robertson was convicted but was not viewed as deserving such a punishment when his admissibility was assessed. This is clearly the other side of the coin of the argument and example put forth by Mr. Tran and is certainly as potent an argument as the one he raises now – that a person could have been convicted 25 years ago for a crime that was not viewed as serious but which is now assessed as being serious.

[55] But to give effect to both sides of this coin, one would have to adopt an interpretation that for all material purposes gives effect to subsection 11(*i*) of the *Charter*. That section does not

apply in the present context because the proceedings before the Minister's delegate are neither criminal nor penal.

[56] It is also important to consider that, as reaffirmed in *Medovarski* at paragraph 46, the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada (*Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at p. 733, 90 D.L.R. (4th) 289).

[57] The legislative objective here is not to punish or be unfair to an offender but rather to determine whether a person should be granted the privilege of remaining in Canada. The interpretation adopted by the Minister's delegate is, thus, consistent with the legislative purpose of the provision under review.

[58] I agree with the comments of Justice Russell in *Sanchez v. Canada (Citizenship and Immigration)*, 2013 FC 913 at para. 60, 438 F.T.R. 279, aff'd in *Sanchez*, above, that "[i]t is for Canada to decide who it regards as undeserving, and Canada's views on that may well change from time to time as Parliament alters its views on particular crimes. A crime previously regarded with more leniency may well be seen as much more threatening and repugnant as times and governments change." These comments, albeit made in a different context, are apposite here. Unless the legislator clearly provides otherwise, admissibility under subsection 36(1) should logically be tested against Canada's prevailing views of the seriousness of the offence in question.

[59] As noted by the Minister at the hearing, there is little doubt that if an offence was benign at the time the person committed it in Canada, say 25 years ago as proposed by Mr. Tran, and the person had not committed any crime since that time, then there would likely be compelling reasons to not refer the person to the ID.

[60] In view of the foregoing, and although there may well be other defensible interpretations, I cannot conclude that the interpretation adopted by the Minister's delegate is unreasonable. Therefore, the answer to the second certified question is as follows:

> The phrase "punishable by a maximum term of imprisonment of at least 10 years" in paragraph 36(1)(*a*) of the IRPA can reasonably be interpreted as the maximum term of imprisonment under the law in force at the time admissibility is determined.

C. *The meaning of a "term of imprisonment" in paragraph 36(1)(a) of the IRPA*

[61] I will now address the second criteria set out in paragraph 36(1)(*a*) dealing with the actual sentence imposed by a judge on an offender who is a permanent resident or a foreign national. It is what Mr. Tran considers the most important question in this appeal because it can also determine whether he will have the right to appeal to the Immigration Appeal Division (IAD) under section 63 of the IRPA (see Appendix A). In the context of such an appeal, Mr. Tran would have the benefit of an assessment of his case on humanitarian and compassionate grounds by the IAD before any removal order could be executed.

[62] I need not repeat here what I have already said about the legislative objectives of IRPA in paragraph 36(1)(*a*) (see paragraph 47 above). I will note however that in *Medovarski* the Supreme Court of Canada also dealt with the purpose of enacting section 64. It found that the

legislative purpose was the efficient removal from the country of persons who engaged in serious criminality (*Medovarski*, paras. 12-13).

[63] When the IRPA was adopted in 2002, the expression term of "imprisonment" (emprisonnement) was used in three specific provisions – sections 36, 50 and subsection 64(2).

[64] Although for a lay person a term of imprisonment is generally understood as time spent in prison or in incarceration, it has a wider meaning when used in the context of determining what sentence may be imposed for a criminal offence under an Act of Parliament.

[65] It is clear that pursuant to section 742.1 of the *Criminal Code* (see Appendix A), and subject to various exceptions added in 2007 and 2012, a term of imprisonment of less than two years can be served in the community rather than in jail. It is understood that should the conditions imposed by the sentencing judge be breached, the offender may end up serving the rest of his term in jail.

[66] In a series of decisions (*Proulx*, above; *R. v. Wu*, 2003 SCC 73, [2003] 3 S.C.R. 530; *R. v. Fice*, 2005 SCC 32, [2005] 1 S.C.R. 742; *Middleton*, above) the Supreme Court of Canada also made it clear that although generally a sentence of "imprisonment" will be understood to include conditional terms of imprisonment when referring to a sentence under the *Criminal Code*, there may be cases where the Driedger modern rule of interpretation will require that the expression be limited to a carceral term of imprisonment.

[67] However, as noted by the Minister, in *Middleton*, both Justice Fish, writing for the majority (paragraphs 10-11), and Justice Binnie, in his concurring reasons (paragraph 57), acknowledged that the general rule applies unless Parliament <u>clearly</u> indicates to the contrary. In that case, Justice Fish in fact stated that the textual consideration of the provision itself, which expressly referred to "confinement" and "prison", was sufficient and made it plain that conditional sentences of imprisonment could not come within the meaning of "sentence of imprisonment" in section 732(1) of the *Criminal Code*.

[68] Mr. Tran says, and the judge accepted, that here, considering the particular purpose of paragraph 36(1)(*a*) – inadmissibility based on <u>serious</u> criminality as opposed to other criminality (subsection 36(2)), the expression should be construed as referring only to sentences imposing time in jail.

[69] At the hearing, and in the brief written submissions filed thereafter, it became clear that for Mr. Tran the law must always speak (Article 10 of the *Interpretation Act* (R.S.C. 1985, c. I-21)) (see Appendix A). Thus, even if it may have been plausible (albeit not the correct interpretation in his view) to include a conditional term of imprisonment within the meaning of paragraph 36(1)(*a*) in 2002 when the IRPA was adopted, this can no longer be so today. Indeed, in his view, when one considers the amendments to sections 742.1 to 742.7 of the *Criminal Code* made in 2007 and 2012 which now clearly limit the ability of judges to use conditional terms of imprisonment for less serious crimes than when *Proulx* and *Middleton* were decided and the IRPA was adopted and only where the sentencing judge is satisfied that the offender is not a

danger to the community, it would be contrary to the legislative purpose of the provision and of subsection 64(2) to apply them to conditional terms of imprisonment.

[70] However, as will be discussed, the seriousness of a crime or an offence is a matter of opinion.

[71] In fact, the sentencing judge in this case referred to jurisprudence dealing with similar offences and said, at paragraph 31 of his reasons (Appeal Book, Vol. 2, Tab 61, p. 365):

> Intelligent people and informed people disagree about the seriousness of these offences, and they are entitled to. Obviously, it makes it more difficult when judicial officers that are placed, as far as superiority level, above this court, disagree, and they have over the years.

[72] Moreover, to say that a conditional term of imprisonment is more lenient and applies only to less serious crimes than a similar term of incarceration does not necessarily mean that such crimes are not viewed by the legislator as serious enough to warrant being inadmissible pursuant to paragraph 36(1)(*a*). There is still a wide margin between the offences described in subsection 36(2), which even includes offences under the IRPA, and those for which a conditional term of imprisonment can now be imposed.

[73] The parties were agreed that the legislative evolution of paragraph 36(1)(*a*) is not particularly helpful to determining the issue before us. However, the legislative evolution of section 50 of the IRPA does shed some light, and generally one is presumed to intend to use the same words with the same meaning in the sections in which it appears. Prior to the adoption of IRPA, section 50 read as follows:

50 […]	50 […]
(2) A removal order that has been made against a person who was, at the time it was made, an inmate of a penitentiary, jail, reformatory or prison or becomes an inmate of such an institution before the order is executed shall not be executed until the person has completed the sentence or term of imprisonment imposed, in whole or as reduced by a statute or other law or by an act of clemency.	L'incarcération de l'intéressé dans un pénitencier, une prison ou une maison de correction, antérieurement à la prise de la mesure de renvoi ou à son exécution, suspend l'exécution de celle-ci jusqu'à l'expiration de la peine, compte tenu des réductions légales de peine et des mesures de clémence.

[74] It now reads as follows:

Stay	**Sursis**
50. A removal order is stayed	**50.** Il y a sursis de la mesure de renvoi dans les cas suivants :
[…]	[…]
(b) in the case of a foreign national sentenced to a term of imprisonment in Canada, until the sentence is completed;	*b)* tant que n'est pas purgée la peine d'emprisonnement infligée au Canada à l'étranger

[75] It is generally presumed that when the legislator amends a provision to such an extent, it intends to change its ambit. Section 50 of the IRPA is applied to conditional terms of imprisonment by the CBSA who will not enforce a removal order until an offender has served his or her conditional term of imprisonment in the community. This is set out in chapter ENF 10 of the Enforcement Manual dealing with removals (Joint Book of Authorities, Vol. 4, Tab 114). A note at page 31 of the Enforcement Manual ENF 10 indicates that this interpretation was adopted after extensive research and detailed consultation with both the CBSA and CIC Legal Services.

[76] Although neither the CIC Enforcement Manual nor the views expressed by the Immigration Section of the Canadian Bar Association, which I will discuss later on, have much weight, they still suggest that the interpretation of the Minister's delegate is at least plausible after careful consideration by specialists in the field.

[77] Much has been made of the fact that in *Medovarski*, the Court used the words "prison term" when discussing both subsections 64(2) and 36(1).

[78] I note that what was at issue in that case was never the meaning of the words "term of imprisonment" but rather the transitionary provision applicable to subsection 64(2) of the IRPA. At that time subsection 64(2) only applied when a term of imprisonment of two years or more was imposed. Thus, in reality it could only apply to jail time because a term of imprisonment of two years or more could not then be served, and still cannot be served, in the community.

[79] It is worth mentioning that in *Medovarski*, the Court discussed a practical argument presented by Ms. Medovarski as it may be pertinent to assess whether the provision as construed by the Minister's delegate will have the disastrous "result" argued by Mr. Tran. At paragraphs 40 and 41 in *Medovarski*, the Court dealt with the argument that in practice applicants and permanent residents wishing to avoid losing their right of appeal due to a finding of inadmissibility for serious criminality have asked the sentencing judge to consider the impact of section 64 before giving judgement. This means that permanent residents and foreign nationals who wish to avoid the impact of section 64 may convince a court to give them a shorter term of jail time instead of conditional terms of imprisonment of 6 months or longer so as to avoid the

impact of such a sentence on their admissibility and their right of appeal. The Court acknowledged that permanent residents and foreign nationals sentenced before the provision came into force would have been denied the opportunity to make such submissions. However, the Court described this situation as "obvious" and said that Parliament had chosen not to account for it.

[80] That said, and coming back to the interpretation of the section in context, as mentioned earlier, section 64 was amended to reduce the term of imprisonment provided for therein to six months or more in 2013. The fact that it would apply to offenders sentenced to serve their term of imprisonment in the community was expressly raised by the National Immigration Law Section of the Canadian Bar Association who recommended that any amendment to subsection 64(2) should include some language to clarify that a term of imprisonment did not include conditional terms of imprisonment of the duration set out in this provision.

[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.

[82] The Minister has compiled several extracts of the legislative history stating that it is quite instructive in this case. I first recall that Justice Binnie, writing for the Supreme Court of Canada

in *Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)*, 2006 SCC 24 at para. 57, [2006] 1 S.C.R. 865, noted:

> Though of limited weight, Hansard evidence can assist in determining the background and purpose of legislation; […]. In this case, it confirms Parliament's apparent intent to exclude legal titleholders from personal liability for air navigation charges. The legislative history and the statute itself make it clear that Parliament did not intend *CANSCA* to replace or override the existing regulatory framework […].

[83] In that case, the material relied upon by Justice Binnie appeared to be quite persuasive as to the meaning of particular words in the provision under review. In my view, this is equally so here.

[84] According to the Honourable Jason Kenney, then Minister of Citizenship, Immigration and Multiculturalism, the purpose of lowering the threshold for precluding an appeal to the IAD was to prevent those convicted of serious crimes from abusing the system by delaying their deportation for years (House of Commons. Standing Committee on Citizenship and Immigration, Evidence, 1st Sess., 41st Parl., Meeting No. 54, 24 October 2012 at 2, 4 (Joint Book of Authorities, Vol. 4, Tab 118)). Throughout the debates of the House of Commons and Senate and the proceedings before the House of Commons Standing Committee on Citizenship and Immigration and the Standing Senate Committee on Social Affairs, Science and Technology, there was debate as to how to define "serious criminality" and whether equating it with crimes resulting in a sentence of more than six months struck the proper balance: see, for example, House of Commons Debates, 41st. Parl., 1st Sess., No. 199 (29 January 2013) at 13369 (Mylène Freeman (Argenteuil-Papineau-Mirabel, NDP)), 13359-70 (Ted Opitz (Etobicoke Centre, CPC)), 13375 (John Weston (West Vancouver-Sunshine Coast-Sea to Sky Country, CPC)) (Joint Book

of Authorities, Vol. 4, Tab 123); Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology, No. 38 (1-2 May 2013) at 38:13, 38:14, 38:52 (Senator Art Eggleton), 38:46 (Julie Taub, Immigration and Refugee Lawyer) (Joint Book of Authorities, Vol. 4, Tab 126).

[85] Various participants noted that conditional terms of imprisonment fell within the provision as drafted, as well as the potential unfairness of precluding appeals for those on whom a conditional sentence of imprisonment of more than six months had been imposed, whereas those on whom jail terms of lesser lengths were imposed were not so precluded, even though these punitive measures are considered equivalent or harsher: see, for example, House of Commons. Standing Committee on Citizenship and Immigration, Evidence, 1st Sess., 41st Parl., Meeting No. 62, 21 November 2012 at p. 2 (Ahmed Hussen (National President, Canadian Somali Congress)) (Joint Book of Authorities, Vol. 4, Tab 121); Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology, Meeting No. 38 (1-2 May 2013) 38:44 (Gordon Maynard (Past Chair, National Immigration Law Section, Canadian Bar Association)) (Joint Book of Authorities, Vol. 4, Tab 126); Meeting No. 39 (8-9 May 2013) at 39:20 (Senator Art Eggleton) (Joint Book of Authorities, Vol. 4, Tab 127). Several discussions prompted the proposal of three distinct motions to expressly exclude conditional sentences from the provision, each of which was defeated: House of Commons. Standing Committee on Citizenship and Immigration, Evidence, 1st Sess., 41st Parl., Meeting No. 64, 28 November 2012 at 2, 4 (Jinny Jogindera Sims (Newton-North Delta, NDP)), 4, 7 (Kevin Lamoureux (Winnipeg North, Lib.)) (Joint Book of Authorities, Vol. 4, Tab 122); Debates of the Senate, 41st Parl., 1st

Sess., No.168 (30 May 2013) at 4081-4082 (Senator Art Eggleton) (Joint Book of Authorities, Vol. 4, Tab 128).

[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.

[87] In the circumstances, considering the current teachings of the Supreme Court of Canada and although there may clearly be other defensible interpretations, I cannot conclude that the interpretation adopted by the Minister's delegate in this case is unreasonable. 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. But this would likely have to be applied to the three provisions in the IRPA where the expression "term of imprisonment" is used.

[88] Thus, I propose to answer the first certified question as follows:

> 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.

D. *Is the decision to refer reasonable?*

[89] The judge appears to have found that the officer treated arrests, charges and police reports as evidence of criminal behaviour because he found that Mr. Tran would likely reoffend because he has done so in the past. The judge noted that those charges and arrests are not evidence or proof of criminal conduct.

[90] In my view, it is evident that the officer was well aware of the distinction between arrests, stayed charges and criminal convictions. He says so in his report. He simply felt that he could consider this information, as well as the information contained in the police reports, for his broader assessment of Mr. Tran's behaviour and rehabilitation prospects.

[91] I agree with the officer that he was entitled to consider this information to assess certain statements made by Mr. Tran, such as that his behaviour was pristine (without incident) for a long period before his two convictions and whether he was taking full responsibility for his past behaviour. It also put in perspective the relative short period of time since his last conviction.

[92] As to the use of the words “reoffend as he has done so in the past” this must be read in context. Mr. Tran had effectively already two convictions and as mentioned earlier, the officer acknowledged the difference between arrest and conviction.

[93] Although there is no doubt that not all information contained in police reports is to be considered credible evidence simply because it is reported by the police, I have reviewed the actual reports before the officer and they do contain some credible information as to the behaviour of Mr. Tran, particularly his consumption of alcohol and its impact on his behaviour. It would have clearly been preferable if the officer had been more specific in the Report as to which information in the police report he actually considered to be reliable and of value to his assessment. However, I am not satisfied that his failure to do so in this case justifies quashing the decision.

[94] In view of the foregoing, I conclude that the judge did not properly apply the standard of review to the overall conclusion of the Minister’s delegate. The decision to refer Mr. Tran to the ID was within the range of outcomes defensible on the law and the facts.

[95] In light of the foregoing, I propose to allow this appeal.

"Johanne Gauthier"

J.A.

“I agree
C. Michael Ryer”

“I agree
D.G. Near”

APPENDIX A

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11	***Charte canadienne des droits et libertés***, partie I de la *Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R.-U.), 1982, c. 11
Proceedings in criminal and penal matters	**Affaires criminelles et pénales**
11. Any person charged with an offence has the right	**11.** Tout inculpé a le droit :
[…]	[…]
(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;	*g*) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction d'après le droit interne du Canada ou le droit international et n'avait pas de caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations;
[…]	[…]
(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.	*i*) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.
Convention Relating to the Status of Refugees, 1951, 28 July 1951, 189 U.N.T.S. 137	***Convention relative au statut des réfugiés, 1951, 28 juillet 1951, 189 R.T.N.U. 137***
Article 1 definition of the term "refugee"	**Article premier. -- Définition du terme "réfugié"**
F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
[…]	[…]
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that	b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises

country as a refugee;

[…]

comme réfugiés;

[…]

Criminal Code (R.S.C. 1985, c. C-46)

Code criminel (L.R.C. (1985), ch. C-46)

CONDITIONAL SENTENCE OF IMPRISONMENT

CONDAMNATIONS À L'EMPRISONNEMENT AVEC SURSIS

Imposing of conditional sentence

742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if

(a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;

(b) the offence is not an offence punishable by a minimum term of imprisonment;

(c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;

(d) the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more;

(e) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of

Octroi du sursis

742.1 Le tribunal peut ordonner à toute personne qui a été déclarée coupable d'une infraction de purger sa peine dans la collectivité afin que sa conduite puisse être surveillée — sous réserve des conditions qui lui sont imposées en application de l'article 742.3 —, si elle a été condamnée à un emprisonnement de moins de deux ans et si les conditions suivantes sont réunies :

a) le tribunal est convaincu que la mesure ne met pas en danger la sécurité de la collectivité et est conforme à l'objectif essentiel et aux principes énoncés aux articles 718 à 718.2;

b) aucune peine minimale d'emprisonnement n'est prévue pour l'infraction;

c) il ne s'agit pas d'une infraction poursuivie par mise en accusation et passible d'une peine maximale d'emprisonnement de quatorze ans ou d'emprisonnement à perpétuité;

d) il ne s'agit pas d'une infraction de terrorisme ni d'une infraction d'organisation criminelle poursuivies par mise en accusation et passibles d'une peine maximale d'emprisonnement de dix ans ou plus;

e) il ne s'agit pas d'une infraction poursuivie par mise en accusation et passible d'une peine maximale

imprisonment is 10 years, that

(i) resulted in bodily harm,

(ii) involved the import, export, trafficking or production of drugs, or

(iii) involved the use of a weapon; and

(f) the offence is not an offence, prosecuted by way of indictment, under any of the following provisions:

(i) section 144 (prison breach),

(ii) section 264 (criminal harassment),

(iii) section 271 (sexual assault),

(iv) section 279 (kidnapping),

(v) section 279.02 (trafficking in persons — material benefit),

(vi) section 281 (abduction of person under fourteen),

(vii) section 333.1 (motor vehicle theft),

(viii) paragraph 334(a) (theft over $5000),

(ix) paragraph 348(1)(e) (breaking and entering a place other than a dwelling-house),

(x) section 349 (being unlawfully in a dwelling-house), and

(xi) section 435 (arson for fraudulent purpose).

1992, c. 11, s. 16; 1995, c. 19, s. 38, c. 22, s.

d'emprisonnement de dix ans, et, selon le cas :

(i) dont la perpétration entraîne des lésions corporelles,

(ii) qui met en cause l'importation, l'exportation, le trafic ou la production de drogues,

(iii) qui met en cause l'usage d'une arme;

f) il ne s'agit pas d'une infraction prévue à l'une ou l'autre des dispositions ci-après et poursuivie par mise en accusation :

(i) l'article 144 (bris de prison),

(ii) l'article 264 (harcèlement criminel),

(iii) l'article 271 (agression sexuelle),

(iv) l'article 279 (enlèvement),

(v) l'article 279.02 (traite de personnes : tirer un avantage matériel),

(vi) l'article 281 (enlèvement d'une personne âgée de moins de quatorze ans),

(vii) l'article 333.1 (vol d'un véhicule à moteur),

(viii) l'alinéa 334a) (vol de plus de 5 000 $),

(ix) l'alinéa 348(1)e) (introduction par effraction dans un dessein criminel : endroit autre qu'une maison d'habitation),

(x) l'article 349 (présence illégale dans une maison d'habitation),

(xi) l'article 435 (incendie criminel : intention frauduleuse).

1992, ch. 11, art. 16; 1995, ch. 19, art. 38, ch.

6; 1997, c. 18, s. 107.1; 2007, c. 12, s. 1; 2012, c. 1, s. 34.

22, art. 6; 1997, ch. 18, art. 107.1; 2007, ch. 12, art. 1; 2012, ch. 1, art. 34.

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Loi sur l'immigration et la protection des réfugiés, L.C. 2001, ch. 27

Humanitarian and compassionate considerations — request of foreign national

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

Séjour pour motif d'ordre humanitaire à la demande de l'étranger

25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

Rules of interpretation

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

Interprétation

33. Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

Serious criminality

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

Grande criminalité

36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

Criminality

(2) A foreign national is inadmissible on grounds of criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

(c) committing an act outside Canada that is an offence in the place where it

Criminalité

(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au

was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation;

(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

d) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.

Application

Application

(3) The following provisions govern subsections (1) and (2):

(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :

(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;

a) l'infraction punissable par mise en accusation ou par procédure sommaire est assimilée à l'infraction punissable par mise en accusation, indépendamment du mode de poursuite effectivement retenu;

(b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a record suspension has been ordered and has not been revoked or ceased to have effect under the Criminal Records Act, or in respect of which there has been a final determination of an acquittal;

b) la déclaration de culpabilité n'emporte pas interdiction de territoire en cas de verdict d'acquittement rendu en dernier ressort ou en cas de suspension du casier — sauf cas de révocation ou de nullité — au titre de la *Loi sur le casier judiciaire*;

(c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;

c) les faits visés aux alinéas (1)*b)* ou *c)* et (2)*b)* ou *c)* n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

(d) a determination of whether a permanent resident has committed an act described in paragraph (1)(c) must be based on a balance of probabilities; and

d) la preuve du fait visé à l'alinéa (1)*c)* est, s'agissant du résident permanent, fondée sur la prépondérance des probabilités;

(e) inadmissibility under subsections (1) and (2) may not be based on an offence

(i) designated as a contravention under the *Contraventions Act*,

(ii) for which the permanent resident or foreign national is found guilty under the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, or

(iii) for which the permanent resident or foreign national received a youth sentence under the *Youth Criminal Justice Act*.

e) l'interdiction de territoire ne peut être fondée sur les infractions suivantes :

(i) celles qui sont qualifiées de contraventions en vertu de la *Loi sur les contraventions*,

(ii) celles dont le résident permanent ou l'étranger est déclaré coupable sous le régime de la *Loi sur les jeunes contrevenants*, chapitre Y-1 des Lois révisées du Canada (1985),

(iii) celles pour lesquelles le résident permanent ou l'étranger a reçu une peine spécifique en vertu de la *Loi sur le système de justice pénale pour les adolescents*.

Preparation of report

44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

Rapport d'interdiction de territoire

44 (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

Referral or removal order

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

Suivi

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

Stay

50. A removal order is stayed

(*a*) if a decision that was made in a judicial proceeding — at which the Minister shall be given the opportunity to make submissions — would be directly contravened by the enforcement of the removal order;

(*b*) in the case of a foreign national sentenced to a term of imprisonment in Canada, until the sentence is completed;

(*c*) for the duration of a stay imposed by the Immigration Appeal Division or any other court of competent jurisdiction;

(*d*) for the duration of a stay under paragraph 114(1)(b); and

(*e*) for the duration of a stay imposed by the Minister.

Right to appeal — visa refusal of family class

63. (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.

Right to appeal — visa and removal order

(2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing.

Sursis

50. Il y a sursis de la mesure de renvoi dans les cas suivants :

a) une décision judiciaire a pour effet direct d'en empêcher l'exécution, le ministre ayant toutefois le droit de présenter ses observations à l'instance;

b) tant que n'est pas purgée la peine d'emprisonnement infligée au Canada à l'étranger;

c) pour la durée prévue par la Section d'appel de l'immigration ou toute autre juridiction compétente;

d) pour la durée du sursis découlant du paragraphe 114(1);

e) pour la durée prévue par le ministre.

Droit d'appel : visa

63. (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.

Droit d'appel : mesure de renvoi

(2) Le titulaire d'un visa de résident permanent peut interjeter appel de la mesure de renvoi prise en vertu du paragraphe 44(2) ou prise à l'enquête.

Right to appeal removal order

(3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing.

Droit d'appel : mesure de renvoi

(3) Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise en vertu du paragraphe 44(2) ou prise à l'enquête.

Right of appeal — residency obligation

(4) A permanent resident may appeal to the Immigration Appeal Division against a decision made outside of Canada on the residency obligation under section 28.

Droit d'appel : obligation de résidence

(4) Le résident permanent peut interjeter appel de la décision rendue hors du Canada sur l'obligation de résidence.

Right of appeal — Minister

(5) The Minister may appeal to the Immigration Appeal Division against a decision of the Immigration Division in an admissibility hearing.

Droit d'appel du ministre

(5) Le ministre peut interjeter appel de la décision de la Section de l'immigration rendue dans le cadre de l'enquête.

No appeal for inadmissibility

64. (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

Restriction du droit d'appel

64. (1) L'appel ne peut être interjeté par le résident permanent ou l'étranger qui est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée, ni par dans le cas de l'étranger, son répondant.

Serious criminality

(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(*b*) or (*c*).

Grande criminalité

(2) L'interdiction de territoire pour grande criminalité vise, d'une part, l'infraction punie au Canada par un emprisonnement d'au moins six mois et, d'autre part, les faits visés aux alinéas 36(1)*b*) et *c*).

Misrepresentation

(3) No appeal may be made under subsection 63(1) in respect of a decision that was based on a finding of

Fausses déclarations

(3) N'est pas susceptible d'appel au titre du paragraphe 63(1) le refus fondé sur l'interdiction de territoire

inadmissibility on the ground of misrepresentation, unless the foreign national in question is the sponsor's spouse, common-law partner or child.

pour fausses déclarations, sauf si l'étranger en cause est l'époux ou le conjoint de fait du répondant ou son enfant.

***Interpretation Act* (R.S.C., 1985, c. I-21)**

***Loi d'interprétation* (L.R.C. (1985), ch. I-21)**

Law always speaking

10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

Principe général

10. La règle de droit a vocation permanente; exprimée dans un texte au présent intemporel, elle s'applique à la situation du moment de façon que le texte produise ses effets selon son esprit, son sens et son objet.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED NOVEMBER 4, 2014, DOCKET NUMBER IMM-7208-13 (2014 FC 1144)

DOCKET:	A-531-14
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v. THANH TAM TRAN
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 12, 2015
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	RYER J.A. NEAR J.A.
DATED:	OCTOBER 30, 2015

APPEARANCES:

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