Federal Court Cour fédérale

Date: 20161003

Docket: IMM-1329-16

Citation: 2016 FC 1098

Ottawa, Ontario, October 3, 2016

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

VASILE FLORIN FLORE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

REASONS AND JUDGMENT

I. Overview

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act] of a decision of the Immigration Appeal Division of the Immigration and Refugee Board [IAD].

[2] Finding that a Conditional Sentence Order [CSO] was a “term of imprisonment” for the purposes of section 64 of the Act, the IAD determined that the applicant had no right to appeal his removal order before the IAD.

II. Facts

[3] The applicant – a citizen of Romania – became a permanent resident of Canada in February 2011. He was arrested during the execution of a search warrant of a marijuana grow operation in Hixon, British Columbia, in June 2011 and was convicted of possession of a controlled substance for the purpose of trafficking as well as of production of a controlled substance contrary to subsections 5(2) and 7(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19, in November 2013.

[4] The applicant was sentenced in May 2014, to a CSO of 18 months.

[5] Following a section 44 report, the applicant was issued a removal order by the Immigration Division, in February 2015. The report stated – and the Immigration Division agreed – that the applicant was inadmissible to Canada for reason of serious criminality under paragraph 36(1)(a) of the Act.

[6] The applicant then filed a notice of appeal of the Immigration Division’s removal order with the IAD, in February 2015.

[7] The IAD rejected the applicant's appeal on March 7, 2016. It determined that the appellant had no right of appeal to the IAD, pursuant to section 64 of the Act.

III. Decision under Review

[8] The IAD set out the issue in the context of *Canada (Public Safety and Emergency Preparedness) v Tran*, 2015 FCA 237 [*Tran*] which was under appeal before the Federal Court of Appeal, during the applicant's appeal to the IAD.

[9] Considering the result in *Tran*, the IAD gave the parties the opportunity to make fresh submissions regarding the IAD's jurisdiction, which the applicant did, in December of 2015.

[10] Given the Federal Court of Appeal decision in *Tran*, the IAD ultimately concluded that the applicant's 18 month CSO constituted a "term of imprisonment of at least six months" for the purposes of subsection 64(2) of the IRPA. Therefore, the applicant had no right of appeal of his removal order to the IAD, pursuant to subsection 64(2) of the Act, because he was inadmissible from Canada for reasons of serious criminality.

IV. Issues

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

i. What is the applicable standard of review?;

ii. Was the IAD conclusion that a CSO constitutes a term of imprisonment for the purpose of subsection 64(2) of the Act unreasonable?

V. Relevant Statutory Provisions

[12] The provisions relevant to this matter are subsections 64(1) and (2) of the Act:

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. 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).	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. 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) etc).

VI. Analysis

A. *Standard of review*

[13] The applicant submits that the issue in the case at bar is a pure question of jurisdiction.

Thus the IAD's decision should be reviewed on a standard of correctness. I disagree.

[14] As explained by the Supreme Court of Canada in *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 at para 23 [*Wilson*], the correctness standard is applied when only a single defensible answer is available:

> The other approach, called correctness, was applied when only a single defensible answer is available. As set out in *Dunsmuir*, this applied to constitutional questions regarding the division of powers (para. 58), "true questions of jurisdiction or *vires*" (para. 59), questions of general law that are "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (para. 60), and "questions regarding the jurisdictional lines between two or more competing specialized tribunals" (para. 61).

[15] In my opinion, the question before the Court is not a pure question of jurisdiction or *vires*. In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 59 [*Dunsmuir*], the Supreme Court defined jurisdiction as such:

> "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction. [emphasis added]

[16] A true question of jurisdiction or *vires*, as understood in *Dunsmuir*, is whether or not the tribunal could even hear the issue. A question of jurisdiction would arise if, for example, a Federal labour arbitrator had decided, in place of the IAD, that the Applicant had no right of appeal.

[17] Rather, the question before the Court is one of the interpretation and application of the IAD's home statute which presumptively attracts reasonableness (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 34, 39; see also *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 32, 33).

[18] In the event the application of this presumption was contested, in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 57, the Supreme Court held that the IAD's interpretation of the scope of an IRPA provision within its jurisdiction, and its application, considering the four factors set out in *Dunsmuir*, attracts reasonableness.

[19] Permanent residents subject to a removal order generally have a right of appeal to IAD per section 63 of IRPA. However, Parliament has eliminated access to IAD where a permanent resident is found inadmissible for "serious criminality" pursuant to paragraph 36(1)(a) of the IRPA and punished by a "term of imprisonment" of a least 6 months. The person is then barred by subsection 64(2) of the IRPA from an appeal to the IAD.

[20] On the facts of this case, the IAD determined that the applicant had no right of appeal before it pursuant to subsection 64(2) of the Act. Thus, the IAD had already established jurisdiction and then made a determination within that jurisdiction that the applicant had no right of appeal, based on its interpretation of subsection 64(2) of the Act. This is a question of the interpretation of the IAD's home statute which is reviewed on reasonableness (*Tran* at para 22, 30, 31, 86, and 87; *Shehzad v Canada (Citizenship and Immigration)*, 2016 FC 80 at para 11).

[21] On this standard, the Court will only intervene if the IAD's interpretation of subsection 64(2) of the Act was not within the range of reasonable interpretations open to it (*Dunsmuir* at para 47; *Wilson* at para 21).

B. *Was the IAD's conclusion that a CSO constitutes a term of imprisonment for the purposes of subsection 64(2) of the Act unreasonable?*

[22] In my opinion, the IAD's conclusion that the applicant's 18 month CSO was indeed a term of imprisonment of more than six months for the purposes of subsection 64(2) of the Act was reasonable for the following reasons.

[23] In *Tran* at para 87, the Federal Court of Appeal [FCA] expressly held that a "term of imprisonment" pursuant to paragraph 36(1)(a) of the IRPA "may reasonably" be construed to include a CSO. The same was found for subsection 64(2) of the Act. The Court was of the view that the three provisions in the IRPA that use the language "term of imprisonment" – sections 36, 50 and 64 – should be interpreted consistently. For the FCA, the legislative history of subsection 64(2) "certainly" supported the conclusion that Parliament views conditional sentences of at least six months as serious enough to warrant losing one's right of appeal to the IAD:

> [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).

[24] The applicant submits that the FCA recognized that an interpretation of "term of imprisonment" that excludes a CSO sentence could lead to inconsistent consequences and even absurdity as some CSO's may be considered more serious than some jail terms.

[25] The FCA was well aware of the political debate over whether the subsection 64(2) appeal bar should or should not exclude a CSO and should be found unreasonable on the basis that it produces inconsistent consequences. Nevertheless it concluded at para 86:

> 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. [Emphasis added]

[26] This point was clearly addressed by the IAD in the present case, but it found that the FCA dealt extensively with the issue and that there was no reason to depart from its interpretation. The inconsistencies advanced by the applicant had been foreseen and deemed acceptable by the legislature at the time of drafting.

[27] Ultimately, the IAD relied on *Tran* and the following passage from the Supreme Court's decision in *R v Proulx*, 2000 SCC 5 at para 29:

> The conditional sentence is defined in the Code as a sentence of imprisonment. The heading of s. 742 reads "Conditional Sentence of Imprisonment". Furthermore, s. 742.1(a) requires the court to impose a sentence of imprisonment of less than two years before considering whether the sentence can be served in the community subject to the appropriate conditions. Parliament intended imprisonment, in the form of incarceration, to be more punitive than probation, as it is far more restrictive of the offender's liberty. Since a conditional sentence is, at least notionally, a sentence of

> imprisonment, it follows that it too should be interpreted as more punitive than probation.

[28] It was open to the IAD, in the interpretation of its home statute and applying the principles developed in the jurisprudence, to come to the reasonable conclusion that a CSO was a term of imprisonment for the purposes of subsection 64(2) of the Act.

[29] In sum, *Tran* affirms the reasonableness of the conclusion that a "term of imprisonment" under subsection 64(2) of the Act includes all forms of imprisonment whether served in a community or a carceral setting.

[30] The applicant further submits that the IAD failed to consider H&C factors and failed to provide the applicant an opportunity to make his case as to the serious nature of the applicant's crime. I disagree.

[31] The seriousness of the crimes was not relevant to the IAD's conclusion that the applicant was not entitled to a right of appeal because subsection 64(2) of the Act expressly states that serious criminality – which is the trigger for inadmissibility of appeal pursuant to subsection 64(1) of the Act – is expressly defined as a crime having warranted a term of imprisonment of at least six months. The crucial determination was that a CSO was a term of imprisonment. I agree with the respondent that loss of an appeal to the IAD means the loss of an opportunity to have that tribunal take into account H&C factors. It is based on objective statutory criteria that does not include considering personal circumstances.

[32] For these reasons, the application for judicial review is dismissed.

[33] The applicant has proposed the following questions to be certified:

A. Where the Immigration Appeal Division has determined that it does not have jurisdiction over an appeal based on its interpretation of section 64 of IRPA (here, "term of imprisonment"), is this a true question of jurisdiction that should be decided on a standard of correctness?

B. Is a conditional sentence order imposed under the *Criminal Code*, RSC 1985, c C-46 "a term of imprisonment" under subsection 64(2) of the IRPA when interpreted on a correctness standard of review?

C. Is it reasonable for the IAD to choose different interpretations of "term of imprisonment" in subsection 64(2) depending on the perceived characteristics of the individual case before it?

[34] The respondent opposes certification of all the questions because they are not dispositive of the application.

[35] The tripartite test for certification was set out by the Federal Court of Appeal in *Liyanagamage v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ No 1637 (FCA):

> "a question must be one which … transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application ... but it must also be one that is determinative of the appeal ..."

[36] The first proposed certified question regarding the choice of standard of review is not dispositive. The question whether “term of imprisonment” pursuant to subsection 64(2) includes a CSO permits only two interpretations: either it does or it does not, regardless of the choice of standard.

[37] The second proposed certified question does not transcend the interest of the immediate parties nor is it any longer of broad significance. The Federal Court of Appeal, in *Tran*, held upon analysis of both paragraph 36(1)(a) and subsection 64(2) of the Act and the interplay between the two that the decision to find a CSO constitutes a “term of imprisonment” was a reasonable interpretation of those provisions of the Act. This is the state of the law as it stands today which may or may not change in the future depending on the Supreme Court of Canada’s ruling in *Tran*. There is no reason to certify this question again as it was already answered by the FCA.

[38] Lastly, the third proposed certified question is not dispositive of the issue.

[39] In *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at 12, the Federal Court of Appeal held that not only must a certified question be dispositive of the appeal, but it must also have been dealt with by the decision marker:

> The corollary of the fact that a question must be dispositive of the appeal is that it must be a question which has been raised and dealt with in the decision below. Otherwise, the certified question is nothing more than a reference of a question to the Court of Appeal. If a question arises on the facts of a case before an applications judge, it is the judge's duty to deal with it. If it does not arise, or if the judge decides that it need not be dealt with, it is not an appropriate question for certification.

[40] The applicant submits that the IAD found that the applicant had no right to appeal based on “perceived characteristics of the individual case before it”. This Court does not agree.

[41] Rather, the IAD found that the applicant had no right to appeal because of the interpretation of subsection 64(2) of the Act that the Federal Court of Appeal held to be reasonable in *Tran*. What the IAD may or may not have concluded regarding the applicant’s “characteristics” is not relevant.

[42] Accordingly, this Court orders that no questions be certified.

JUDGMENT

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

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1329-16
STYLE OF CAUSE:	VASILE FLORIN FLORE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	SEPTEMBER 21, 2016
REASONS AND JUDGMENT:	TREMBLAY-LAMER J.
DATED:	OCTOBER 3, 2016

APPEARANCES:

Peter Edelmann	FOR THE APPLICANT
Mark East	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Edelmann and Company Law Offices Vancouver, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT