Federal Court  Cour fédérale

Date: 20161108

Docket: IMM-1372-16

Citation: 2016 FC 1245

Ottawa, Ontario, November 8, 2016

PRESENT: The Honourable Mr. Alan Diner

BETWEEN:

CHUN YIP MA

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act or IRPA], of a March 7, 2016 decision by the Immigration Appeal Division [IAD or Tribunal] finding that it did not have jurisdiction to hear the Applicant's appeal of his removal order pursuant to section 64 of the Act [Decision].

[2] The key issue raised in this case is whether the Tribunal erred in finding that the Applicant's nine-month conditional sentence order [CSO] was "a term of imprisonment of at least six months" as per subsection 64(2) of the Act, meaning that the Applicant lost his IAD appeal rights on the basis of serious criminality.

I. Background

[3] The Applicant, Chun Yip Ma, was born in Hong Kong in 1981 and is a citizen of the People's Republic of China. He was landed as a permanent resident of Canada in 1994 at the age of thirteen. His seven-year-old son, his wife, and his extended family now live in Canada.

[4] In 2003, the Applicant was convicted of trafficking cocaine in violation of subsection 5(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19. He was sentenced to a nine-month CSO. In 2004, a report was prepared under s 44 of the Act for his inadmissibility under paragraph 36(1)(a) and he received a "stern warning letter" indicating that further involvement in criminal activity could result in his removal from Canada.

[5] In 2010, the Applicant was convicted for driving while prohibited in violation of subsection 95(1) of British Columbia's *Motor Vehicle Act*, RSBC 1996, c 318. He received a five month CSO and one year probation. On September 4, 2014, he was convicted of identity theft under subsection 402.2(1) of the *Criminal Code*, RSC 1985, c C-46. He received a nine month CSO and one year probation.

[6] It was after this conviction that a second s 44 report was written for his 2003 conviction. An admissibility hearing was held on February 26, 2015 and the Applicant was deemed inadmissible pursuant to paragraph 36(1)(a) for having been convicted of an offence punishable by a maximum term of ten years, with respect to the 2003 conviction. A deportation order was issued against him.

[7] The Applicant filed an appeal to the IAD on February 26, 2015. The IAD requested submissions as to whether it had jurisdiction to hear the appeal under s 64 of the Act.

[8] On October 30, 2015, the Federal Court of Appeal released *Canada (Public Safety and Emergency Preparedness) v Tran*, 2015 FCA 237 [*Tran FCA*], which found that a CSO could be interpreted as a "term of imprisonment" for the purposes of paragraph 36(1)(a) of the Act.

[9] On March 7, 2016, the IAD decided it did not have jurisdiction to hear the Applicant's appeal. The IAD found at that it was "bound in this matter by our system of common law and, in particular, the recent Court decision" (Decision at para 8, referring to *Shehzad v Canada (Citizenship and Immigration)*, 2016 FC 80 [*Shehzad*]). The Tribunal found that *Tran FCA* and *Shehzad* were identical on the relevant points, with the only difference being the length of the CSOs – a difference that did render the cases "legally distinguishable" (Decision at para 8).

[10] The IAD proceeded to summarize *Shehzad* and cited the following three key paragraphs:

> In its decision, the IAD examined, which were then, conflicting lines of jurisprudence; and, followed the line of jurisprudence which it thought commended itself most to this case. The IAD held that a one-year conditional sentence is a term of imprisonment of

> at least six months; and, pursuant to paragraph 64(2) of the [Act], it did not have the jurisdiction to hear the appeal of the Removal Order.
>
> Given the recent decision of the Federal Court of Appeal in Tran, above, the IAD's decision is reasonable.
>
> Consequently, the application for judicial review is dismissed.
>
> (*Shehzad* at paras 17-19).

[11] The IAD concluded it was bound by *Shehzad* in that it lacked appellate jurisdiction, and thus dismissed the appeal (Decision at paras 11-13).

II. Issues

[12] The Applicant raises two substantive issues in this case, other than the applicable standard of review (which is discussed in the Analysis section below):

(i) whether the Tribunal erred in finding itself bound by *Shehzad*, rather than fully considering whether a CSO constituted a term of imprisonment in this particular case, given the reasons in *Tran FCA*; and

(ii) whether the Tribunal erred in failing to consider important factors, including that the conviction was from 2003, and could not have resulted in a loss of appeal until the law was amended in 2012.

[13] These two issues can rather be stated as a single question: did the IAD fetter its discretion by finding itself bound by *Shehzad*, thereby failing to conduct an independent assessment of the facts and law?

III. Analysis

[14] An administrative tribunal cannot use a previous decision to fetter its discretion (*Hopedale Developments Ltd v Oakville (Town)* (1965), 47 DLR (2d) 482 (ONCA) at 486, cited in *Bell Canada v Canada (AG)*, 2011 FC 1120 at paras 88-89). While permitted to rely on previous decisions, it must "give the fullest hearing and consideration to the whole of the problem before it." As stated in *Stemijon Investments Ltd v Canada (AG)*, 2011 FCA 299 at para 24, "[a] decision that is the product of a fettered discretion must per se be unreasonable".

[15] Otherwise said, the fettering of discretion is a reviewable error under either a correctness or reasonableness standard of review; it will result in the decision being quashed, regardless of the standard of review applied (*Gordon v Canada (AG)*, 2016 FC 643 at paras 27-28).

[16] Looking to *Shehzad* was certainly justifiable, but it was only part of the IAD's task in exercising its discretion. The IAD omitted another part of its task, namely to consider the facts and circumstances of the case before it -- even if briefly. Instead, the Tribunal simply adopted the previous decision of *Shehzad*, without any examination of the Applicant's underlying facts or circumstances. The Tribunal unreasonably failed to turn its mind to any of the facts that underlay the Applicant's 2003 CSO, and apply them to the law, even in a minimal way, as was the Tribunal's duty in light of Justices Gauthier's decision in *Tran FCA*, as well as Chief Justice McLachlin's decision in *Febles v Canada (Citizenship and Immigration)*, 2014 *SCC* 68.

[17] First, in *Tran FCA*, Justice Gauthier signalled that the IAD had discretion in these matters, when it raised the concept "flexibility" in determining whether a CSO constitutes a term of imprisonment of more than six months:

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

[18] Second, in her majority decision in *Febles v Canada (Citizenship and Immigration)*, 2014 *SCC* 68, Chief Justice McLachlin also pointed to the notion of a range of possibilities, in the context of sentencing outcomes. Although *Febles* addressed different elements in the intersection between immigration and criminal law, the Chief Justice's words are nonetheless instructive to show that in the context of exclusion (Article 1F(*b*)), assessments of a serious crime under immigration law can depend on the nature of the sentence meted out. Those words are emphasized below:

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

> are sufficiently serious to presumptively warrant exclusion from refugee protection. However, as indicated, the presumption may be rebutted in a particular case. While consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner.
>
> *Febles* at para 62.

[19] In another recent case, coincidentally of the same name, *Tran c Canada (Citoyenneté et Immigration)*, 2016 FC 1065 [*Tran 2016*], Justice Shore of this Court followed this dictum of *Tran FCA*, holding that the reasoning underlying the exercise of discretion must be sufficient (at para 23):

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

[20] While Justice Shore framed *Tran 2016* as being about sufficiency of reasons, it hinged on the IAD fettering its discretion. Justice Shore's bottom line was that the IAD had to look at the specific facts before it could properly exercise its discretion:

> The IAD should have allegedly considered the applicant's specific case and provided sufficient reasons for its decision in order to ensure procedural fairness.
>
> *Tran 2016* at para 25.

[21] In *Tran FCA*, although ultimately finding that the decision-maker's conclusion regarding the CSO as a term of term of imprisonment was a reasonable outcome, the FCA pointed out an example of the inconsistent circumstances referred to in the para 87 quotation above, namely

"when one considers that the IRPA treats a conditional sentence of imprisonment of seven months more severely than a five months jail term." (*Tran FCA* at para 81). This is why Justice Gauthier found that other interpretations of a CSO were possible.

[22] Turning back to *Tran 2016*, it suggests, in a similar vein, that to properly exercise discretion under subsection 64(2) of the Act, the IAD must consider whether the CSO meted out by the Criminal Court could reasonably be construed as "a term of imprisonment of at least six months or that is described in paragraph 36(1)(b) or (c)". In this respect, in *Tran 2016*, Justice Shore not only relied on *Tran FCA*, but also on *Febles*. Similarly, in this case, the IAD erred in blindly applying the outcome in *Shehzad*, without considering the actual facts of the case before it, including whether the CSO constituted the requisite term of imprisonment. To do so amounted to fettering its discretion.

[23] The Respondent, in post-hearing submissions that considered both *Tran 2016* and *Flore v Canada (Citizenship and Immigration)*, 2016 FC 1098 [*Flore*], another very recent case of this Court, asserted that the IAD's finding in this case was entirely reasonable. In *Flore* at paras 30-31, Justice Tremblay-Lamer rejected that it was necessary to take humanitarian and compassionate factors into account:

> 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.
>
> 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.

[24] However, there is a fundamental distinction between the IAD's process in coming to a decision in *Flore*, and in this case. In *Flore*, the IAD invited "fresh submissions" from the parties in light of *Tran FCA*. The IAD engaged with these submissions and decided, only after considering them, that the eighteen-month CSO was a term of imprisonment of more than 6 months for the purposes of subsection 64(2), thus excluding appeal rights. This was all reviewed on a reasonableness standard by Justice Tremblay-Lamer.

[25] In the present case, the IAD chose not to analyse the underlying facts. Rather, the Tribunal simply said it was bound by the common law and *Shehzad*. This was an improper approach. As explained above, each case involving a CSO must be assessed individually. If this were not the case, *Tran FCA* would not have held (as quoted above per para 87) that there may be other defensible interpretations of the CSO equivalency issue, and it is thus open to the IAD to adopt another interpretation should they believe that it is warranted by "inconsistent consequences".

[26] In short, after *Tran (FCA)*, the Tribunal must do more than simply apply a CSO precedent case without alluding to the factual backdrop or circumstances of the case before it. Indeed, in this case, the conviction and resulting CSO were handed down nearly 15 years ago. At that time, there would have been no loss of appeal rights given the legislation of the day; the IAD amendments occurred a decade after the conviction.

[27] Furthermore, the Applicant provided detailed submissions as to why any loss of IAD appeal rights from that 2003 offense and CSO would be "inconsistent and absurd" (Certified Tribunal Record at 62-84). By failing to engage in any meaningful way with these submissions, or otherwise with the underlying facts and circumstances, by rather merely applying *Shehzad*, the IAD fettered its discretion, and in doing so, committed the same fatal flaw as in *Tran 2016*.

IV. Proposed Questions for Certification

[28] The Applicant proposed the following three questions:

1. Is a conditional sentence order imposed under the *Criminal Code*, RSC 1985, C-46 "a term of imprisonment" under subsection 64(2) of IRPA when interpreted on a correctness standard of review?
2. Is the Immigration Appeal Division legally bound by a decision of the Federal Court, which has upheld another decision of the IAD on the same issue on a standard of reasonableness (i.e. does it not then have discretion), in particular when the Federal Court of Appeal has stated "there may clearly be other defensible interpretations"?
3. Where the Immigration Appeal Division has determined that it does not have jurisdiction over an appeal based on its interpretation of a term in s. 64 of IRPA (here, "term of imprisonment"), is this a true question of jurisdiction that should be decided on a standard of correctness?

[29] These questions, all based on standard of review, are not dispositive of my Reasons provided above, and will therefore not be certified.

V. Conclusion

[30] In light of the above, this application for judicial review is granted. The matter will be returned for reconsideration by a different decision-maker, to the extent one is available.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, the matter will be returned for reconsideration by a different decision-maker, to the extent one is available.

2. There are no questions for certification;

3. No costs will be issued.

"Alan Diner"
Judge

Annex A: Legislative Framework

Immigration and Refugee Protection Act SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés, LC 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; […]
No appeal for inadmissibility	**Restriction du droit d'appel**
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.	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	**Grande criminalité**
(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).	(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).

FEDERAL COURT

SOLICITORS OF RECORD

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