Federal Court  Cour fédérale

Date: 20170831

Docket: IMM-3020-17

Citation: 2017 FC 795

Vancouver, British Columbia, August 31, 2017

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

SARBJEET SINGH

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a motion by the Applicant seeking an order pursuant to Rule 22(1) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 (*FCCIRP Rules*) and Rule 8 of the *Federal Courts Rules*, SOR/98-106, to extend the time within which the Applicant may perfect his application for leave under Rule 10 of the *FCCIRP Rules*, until 30 days after the Supreme Court of Canada (SCC) renders a decision in *Tran v Canada (MPSEV)* (SCC

File No. 36784) (*Tran*), and upon such further and other grounds as the Court considers just and appropriate.

II. Background

[2] The facts are not in dispute:

(a) The Applicant is a national of the Republic of India. He was sponsored to Canada by his spouse and became a permanent resident of Canada on March 15, 2009.

(b) On May 11, 2011, the Applicant was convicted in London, Ontario, of two counts of "luring a child under sixteen years of age," contrary to section 172.1 of the *Criminal Code,* RSC 1985, c C-46. He was sentenced to 15 months imprisonment and three years' probation.

(c) By letter dated March 8, 2016, the Canada Border Services Agency (CBSA) gave the Applicant notice of a section 44 report and an opportunity to provide submissions as to why the report should not be referred to the Immigration Division of the Immigration and Refugee Board (IRB).

(d) The Immigration Division held a hearing concerning the section 44 on December 21, 2016, and determined the Applicant was inadmissible, for serious criminality under paragraph 36(1)(a) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 (*IRPA*): a permanent resident who is inadmissible to Canada

> for serious criminality for having been convicted of a federal offence punishable by a maximum term of imprisonment of at least 10 years for which a form of imprisonment of more than six months has been imposed, and issued a deportation order against him.

[3] The Applicant appealed to the Immigration Appeal Division ("IAD") and asked the IAD to stay their proceedings pending a decision from the Supreme Court of Canada in *Tran*. The IAD decided not to stay their proceedings and stated, "the panel finds no infringement of natural justice or procedural fairness in deciding its jurisdiction at this time, because there are safeguards that would permit the Appellant to pursue his appeal at the IAD in the event the SCC hands down a decision that supports the Appellant's argument".

[4] The Applicant subsequently requested disclosure from the CBSA for evidence regarding when it was initially informed the Applicant had been charged with the criminal offences in 2010 and it had first learned of the Appellant's 2011 conviction.

[5] The CBSA advised the Applicant's counsel it would not disclose the information and advised that he had to make an application pursuant to the *Access to Information Act*, RSC 1985, c A-1 or the *Privacy Act*, RSC 1985, c P-21.

[6] The Applicant filed a further application with the IRB on April 26, 2017, seeking orders from the Board for disclosure of information from the CBSA and the London Police Service related to the Applicant's arrest, charges and conviction.

[7] In support of the application was an affidavit from the Applicant in which he recalled being told by a London Police Service officer when he was arrested in 2010 that the CBSA would be informed of the charges. The issue of a possible abuse of process was raised in seeking the disclosure of information.

[8] The IAD went on to determine that it lacked jurisdiction to hear the appeal because the Applicant was barred by subsection 64(2) of the *IRPA*, given that he had been sentenced to more than six months imprisonment.

[9] The Applicant then commenced an application for leave and judicial review.

[10] The Applicant argues that the Court has the discretion to stay a leave application for judicial review pending the outcome of *Tran*, which could be binding on the Court. The Applicant states that *Tran* is considering the same issues as in this case, namely, whether legislation affecting the appellant's rights is to be determined as of the date he was convicted of a criminal offence giving rise to his admissibility, or the law as it stands at the date his section 44 report was referred to the IRB.

III. Issue

[11] The issue for the Court is whether, in all the circumstances, it is in the interests of justice to delay the Applicant's application for a two month extension, in anticipation of the Supreme Court of Canada's decision in *Tran* (*Mylan Pharmaceuticals ULC v AstraZeneca Canada, Inc et al*, 2011 FCA 312 (*Mylan*), at para 14). I agree with the Respondent that while the motion

characterizes this application as an extension request, in reality it is an application for a stay of the proceeding pending the Supreme Court of Canada decision in *Tran*.

[12] The standard of review of the impugned decision of the IAD not to extend the time for the hearing in respect of the ID decision, pending the appeal to the SCC of the FCA decision in *Tran*, is reasonableness.

[13] The Applicant's position is that the Court needs to determine if:

i. the Board erred in refusing to defer its decision pending a decision by the SCC in *Tran*;
ii. the Board erred in failing to consider the Applicant's motion for disclosure of information relating to issues concerning abuse of process;
iii. the Board erred in determining that it had no jurisdiction to hear the appeal, because his case was referred to a hearing before the IRB, after the current subsection 64(2) of the *IRPA* came into effect in June, 2013;
iv. the Court should exercise its discretion to stay the proceeding based on broad discretionary considerations, including the public interest, given the factual circumstances here: *Mylan*, above, at para 5; and *Sanchez v Canada (MCI)*, 2014 FCA 19 (*Sanchez*), at para 8; and
v. particularly, unlike the cases relied upon by the Respondent, dealing with delay not being in the public interest, the SCC decision in *Tran* is imminent, having been heard in January 2017.

[14] The Applicant acknowledges that while the *Mylan* and *Sanchez* cases considered section 50(1) of the *Federal Courts Act*, RSC 1985, c F-7, and there is no express equivalent to

section 50 of the *Federal Courts Act* in the *IRPA* or the *Immigration Appeal Division Rules*, SOR/2002-230, nevertheless there is a broad discretion for all decisions at the IRB under subsection 162(2) of the *IRPA* and Rule 57 of the *Immigration Appeal Division Rules*:

> Procedure
>
> 162(2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.
>
> No applicable rule
>
> 57 In the absence of a provision in these Rules dealing with a matter raised during an appeal, the Division may do whatever is necessary to deal with the matter.

[15] As such, the Applicant argues that the Court should consider, as in *Mylan* and *Sanchez*, the length of delay, whether there is a strong nexus between the matter before the IAD and the higher court (i.e. *Tran* in the SCC), and whether a delay would prejudice the public interest in the prompt determination of immigration proceedings.

[16] The Respondent replies that it is not in the interests of justice to stay the proceedings pending the Supreme Court's decision in *Tran*, because:

a) Tran is not interactive to the Applicant's application;

b) it is contrary to principles of judicial review; and

c) there is no merit to the underlying application.

[17] The Respondent argues that unlike the *Tran* proceedings, which involved amendments to the *Controlled Drugs and Substance Act*, SC 1996, c 19, which did not have transitional provisions, this case relates to amendments to the *IRPA*, which include a transitional provision.

[18] Moreover, the Respondent argues that given the need for finality, the summary and expeditious nature of judicial review and the duty to apply the law as it stands, even if the *Tran* decision could have some relevance, the stay should nevertheless be refused.

[19] The Respondent's position is that the decision in *Tran*, while heard in January, 2017, may or may not be imminent and the timing is purely speculative, and may or may not provide a definitive answer to the Applicant's underlying issues in his application for judicial review. The public interest will only be served with a prompt determination of these proceedings and it is in the interests of justice to follow the current state of the law – several recent decisions have confirmed that the Federal Court of Appeal's decision in *Tran*, *Canada (MPSEV) v Tran*, 2015 FCA 237, is currently the determinative state of law that binds the Court: *Nguyen v Canada (Citizenship and Immigration)*, 2016 FC 305, at para 11; *Shehzad v Canada (Citizenship and Immigration)*, 2016 FC 79 at paras 11 to 14; and *Kidd v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1044, at para 23.

[20] Finally, the Respondent state that it is not in the interest of justice to stay the Applicant's proceedings pending the outcome in Tran, because the Applicant's underlying application is without merit. The IAD decision to stay their own proceedings is entirely discretionary and the Court should defer to them on that matter. There is also no merit to the argument that the IAD decision refusing jurisdiction is unreasonable, because the applicable transition provision foreclosed appeal and they followed the law as it stood at the time.

[21] I agree with the Respondent that while the *Tran* decision in the SCC may be issued sometime in the next few months, that timing is at best speculative and there is no certainty that the outcome of that decision will be determinative of the Applicant's rights in this case.

[22] Moreover, I also agree that the applicable transition provision with respect to subsection 64(2) was followed by the IAD and is currently determinative of the state of the law that binds this Court. The interests of justice do not support the delay sought by the Applicant.

JUDGMENT in IMM-3020-17

THIS COURT'S JUDGMENT is that:

1. The motion is dismissed.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3020-17
STYLE OF CAUSE:	SARBJEET SINGH V THE MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION IN WRITING CONSIDERED AT VANCOUVER, BRITISH COLUMBIA, PURSUANT TO RULE 369

JUDGMENT AND REASONS:	MANSON J.
DATED:	AUGUST 31, 2017

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