Federal Court  Cour fédérale

**Date: 20180315**

**Docket: IMM-3200-17**

**Citation: 2018 FC 302**

**Ottawa, Ontario, March 15, 2018**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**PAULO CESAR CANO GRANADOS**
**(AKA PAULO CESAR CANO)**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP &**
**IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of the decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada [IAD or the Board], dated June 27, 2017

[Decision], which dismissed the Applicant's appeal of a deportation order issued by the Immigration Division [ID] for lack of jurisdiction.

## II. BACKGROUND

[2] The Applicant is a permanent resident of Canada. On May 5, 1998, he was convicted of assault causing bodily harm and sentenced to 9 months of imprisonment. On June 20, 2016, he was convicted of assault with a weapon and sentenced to the 64 days of pre-trial custody he had already served, the equivalent of 96 days of imprisonment, plus one further day of imprisonment.

[3] On November 4, 2016, an officer in the Canada Border Services Agency [CBSA] prepared a report under s 44(1) of the *IRPA* alleging that the Applicant was a person described in s 36(1)(a) of the *IRPA*. The report referred to both the Applicant's 2016 conviction and his 1998 conviction. A referral under s 44(2) of the *IRPA*, for an admissibility hearing at the ID, was signed by the Minister's Delegate on November 7, 2016.

[4] The ID determined that the Applicant was inadmissible for serious criminality under s 36(1)(a) of the *IRPA* and issued a deportation order against him on January 11, 2017. The Applicant appealed the issuance of the deportation order to the IAD. However, before deciding on the merits of the matter, the IAD invited submissions from the parties on whether or not it had jurisdiction to hear the appeal.

## III. DECISION UNDER REVIEW

[5] The IAD determined that it lacks jurisdiction to hear the appeal because the Applicant did not show that he had a right of appeal in the circumstances.

[6] The IAD points out that the Applicant was found inadmissible by the ID on the basis of both his 2016 and 1998 convictions. Subsection 64(1) of the *IRPA* denies appeal to the IAD in cases of serious criminality that satisfy the condition in s 64(2) that "[f]or 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." The Applicant received a 9 month sentence for his 1998 conviction.

[7] The Applicant submitted that applying s 64(2) to his 1998 conviction offends the presumption against retroactivity and argued that the transitional provisions related to s 64(2) indicate that Parliament did not intend the provision to operate retroactively or retrospectively. The IAD finds, however, that the description of the transitional provisions provided in Operational Bulletin 525 (Modified) – September 10, 2013 (Changes in Appeal Rights to the Immigration Appeal Division as a Result of Bill C-43 – the *Faster Removal of Foreign Criminals Act*) [Operational Bulletin 525], does not support the Applicant's argument. Operational Bulletin 525 states that "if a request for an admissibility hearing is sent after June 19, 2013 to the ID, including a referral signed before June 19, 2013, and the person had a right of appeal under subsection 63(3) before June 19, 2013, that person would maintain their right of appeal" (emphasis in original). It also clarifies that for "persons whose referral to the ID for

serious criminality was signed by the [Minister's Delegate] after June 19, 2013, the new definition of serious criminality as defined in subsection 64(2) will apply and they do not have the right to appeal" (emphasis in original).

[8] The IAD notes that the referral under s 44(2) pertaining to the Applicant was signed on November 7, 2016. Since this is after June 19, 2013, the IAD finds that it lacks jurisdiction over the appeal pursuant to the transitional provisions. If Parliament had intended the IAD to maintain jurisdiction to hear an appeal when a sentence is over a certain age, it could have achieved this through different statutory language or a limitations clause.

[9] The IAD also notes that the Applicant made an abuse of process argument and that the Applicant is correct that the Minister of Public Safety and Emergency Preparedness [Minister] waited nearly 19 years to attach the Applicant's 1998 conviction to the s 44(2) report. But the IAD finds that the matter it is deciding is a No Right of Appeal application and that the Minister would have no reason to pursue this argument in 1998, because the Applicant did have a right of appeal at that time. The IAD states that the proper forum to raise the issue of abuse of process is the Federal Court and dismisses the Applicant's appeal.

## IV. ISSUES

[10] The Applicant submits that the following issue arises in this application:

1. Does the IAD have jurisdiction to hear the Applicant's appeal of the deportation order issued against him by the ID?

## V. STANDARD OF REVIEW

[11] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[12] The standard of review applicable to the IAD's interpretation of its jurisdiction to hear an appeal from the ID has been determined to be reasonableness. See *Flore v Canada (Citizenship and Immigration)*, 2016 FC 1098 at para 20.

[13] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, para 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that

it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

## VI. STATUTORY PROVISIONS

[14] The following provisions of the *IRPA* are relevant in this application:

| | |
|---|---|
| **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). |

[15] The following provisions of the *Faster Removal of Foreign Criminals Act*, SC 2013, c 16 [*FRFCA*], which came into force on royal assent on June 19, 2013 by operation of the *Interpretation Act*, RSC 1985, c I-21, s 5(4), are relevant in this application:

**24. Subsection 64(2) of the Act is replaced by the following:**

**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).

…

**Appeal**

32. Subsection 64(2) of the Act, as it read immediately before the day on which section 24 comes into force, continues to apply in respect of a person who had a right of appeal under subsection 63(1) of the Act before the day on which section 24 comes into force.

**Appeal**

33. Subsection 64(2) of the Act, as it read immediately before the day on which section 24 comes into force, continues to apply in respect of a person who is the subject of a report that is referred to the Immigration Division under subsection 44(2) of the Act before the day on which section 24 comes into force.

**24. Le paragraphe 64(2) de la même loi est remplacé par ce qui suit :**

**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).

…

**Appel**

32. Le paragraphe 64(2) de la Loi, dans sa version antérieure à l'entrée en vigueur de l'article 24, continue de s'appliquer à l'égard de quiconque avait un droit d'appel au titre du paragraphe 63(1) de cette loi avant l'entrée en vigueur de l'article 24.

**Appel**

33. Le paragraphe 64(2) de la Loi, dans sa version antérieure à l'entrée en vigueur de l'article 24, continue de s'appliquer à l'égard de toute personne visée par une affaire déférée à la Section de l'immigration au titre du paragraphe 44(2) de cette loi avant l'entrée en vigueur de l'article 24.

[16] On June 18, 2013, the day before s 24 of the *FRFCA* came into force, the *IRPA* read as follows:

| | |
|---|---|
| **Right to appeal — visa refusal of family class** | **Droit d'appel : visa** |
| 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. | 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. |
| … | … |
| **Right to appeal — removal order** | **Droit d'appel : mesure de renvoi** |
| (3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them. | (3) Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise au contrôle ou à l'enquête. |
| … | … |
| **Serious criminality** | **Grande criminalité** |
| 64 (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 two years. | 64 (2) L'interdiction de territoire pour grande criminalité vise l'infraction punie au Canada par un emprisonnement d'au moins deux ans. |

## VII. ARGUMENT

### A. *Applicant*

[17] The Applicant submits that denial of his appeal rights to the IAD based on a conviction predating the coming into force of the amended version of s 64(2) of the *IRPA* by over 15 years, and which predates the writing of the s 44 report and referral by over 18 years, is capricious, arbitrary and offends the rule of law, the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Charter*], and the *Canadian Bill of Rights*, SC 1960, c 44. The Applicant says that this interpretation and administration of the *IRPA* is akin to an abuse of process and violates the presumption against retrospective or retroactive operation of statutes.

[18] The Applicant says that the presumption against retrospective or retroactive operation of statutes can only be rebutted if such application is expressly required by the language of the act. See *Gustavson Drilling (1964) Ltd v Minister of National Revenue* (1975), [1977] 1 SCR 271 at 279 and *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at para 71 [*Imperial Tobacco*]. The Applicant omits "or by necessary implication." In addition to the words of an act, courts must consider the intention of Parliament with respect to whether a statute should have retrospective effect. See *Singh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 417 at para 33. The examination of Parliament's intent can take into account any costs and unfairness that would result from a retrospective or retroactive interpretation. See *Imperial Tobacco*, above, at para 71 and *MacKenzie v British Columbia (Commissioner of Teachers' Pensions)* (1992), 94 DLR (4th) 532 at 540 (BCCA).

[19] The Applicant offers the following definition of retrospectivity: “A retrospective statute… changes the law only for the future, but it looks to the past and attaches new prejudicial consequences to a completed transaction” (Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 186). He says that a retroactive provision is “one that applies to facts that were already past when the legislation came into force [and] changes the law applicable to past conduct or events; in effect, it deems the law to have been different from what it actually was” (Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed (Toronto: Butterworths, 1994) at 513). A retroactive effect has also been described as one which “increase[s] a party’s liability for past conduct”: *Landgraf v USI Film Products*, 511 US 244 at 280 (1994). The Applicant submits that the Respondent’s interpretation of s 64(2) of the *IRPA* meets either definition.

[20] The Applicant notes that the Supreme Court of Canada’s recent decision in *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 [*Tran*], comments extensively on the issue of retrospectivity in the immigration law context. The Court concluded that as the decision to refer Mr. Tran for an admissibility hearing “was premised on an untenable interpretation of the grounds for inadmissibility under s. 36(1)(a), [the] decision to refer the Report cannot be sustained”: *Tran*, above, at para 54. In doing so, the Court rejected the Minister’s reliance on *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 [*Medovarski*], and held that “the relevant date for assessing serious criminality under s. 36(1)(a) is the date of the commission of the *offence*, not the date of the admissibility decision”: *Tran*, above, at para 42, emphasis in original.

[21] The Applicant also submits that the transitional provisions of the *FRFCA* should be interpreted in a manner consistent with the *Charter*.

[22] The Applicant says that the transitional provision in s 32 of the *FRFCA* shows that Parliament did not intend the amendment of s 64(2) of the *IRPA* to have retroactive or retrospective effect. Section 32 says that "[s]ubsection 64(2) of the [*IRPA*], as it read immediately before the day on which section 24 comes into force, continues to apply in respect of a person who had a right of appeal under subsection 63(1) of the [*IRPA*] before the day on which section 24 comes into force" (emphasis added). The Applicant submits that he had a right to appeal on the day s 24 came into force and the intent of Parliament in s 32 was to draw a temporal and administrative marker as to when the new provision should apply from.

[23] The Applicant also says that the transitional provision in s 33 of the *FRFCA* may have been intended for clarity, but its reference to the timing of the writing of a report has created confusion. The Applicant says that Parliament could not have anticipated that a report could be written 18 years after he was sentenced and that the lack of clarity has created absurdity. In *Tran*, the Supreme Court of Canada reiterated that "an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, [or] if it is extremely unreasonable or inequitable": quoting *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 27. The Applicant submits that the time that a report is written cannot be an equitable basis for deciding whether he has appeal rights to the IAD. The presumption against retrospectivity exists to protect rule of law values that guarantee citizens and residents of Canada a stable, predictable and ordered society. See *Tran*, above, at para 44. The Applicant also notes that the unfairness of the retrospective application of

immigration law undermines “the decision of the sentencing judge who decades ago crafted an appropriate sentence without knowledge of additional deportation consequences”: *Tran*, above, at para 45.

[24] The Applicant submits that, even though the intent of Parliament was for the amendment of s 64(2) of the *IRPA* to not apply retroactively, the technical reading proposed by the Respondent circumvents Parliament’s intent in an attempt to rectify the Minister’s failure to pursue a report earlier. The Applicant says that the giving or taking away of appeal rights through an arbitrary exercise of discretion by the Minister invites abuse of that discretion, which is what has occurred in this case.

B. *Respondent*

[25] The Respondent submits that Parliament’s clear legislative intent was to bar appeals to the IAD for all referrals made from June 19, 2013 onwards, regardless of the date of the conviction.

[26] The Respondent says that the Applicant mischaracterizes the presumption against retroactivity as there is no requirement that the presumption be expressly rebutted by legislative wording. Instead, the question is whether the law is unambiguous and Parliament’s intention is clear. See *Tabingo v Canada (Citizenship and Immigration)*, 2013 FC 377 at paras 22-23 [*Tabingo*], aff’d *Austria v Canada (Citizenship and Immigration)*, 2014 FCA 191at paras 75-78. And the Respondent notes that the Supreme Court of Canada has specifically held that there is no requirement that laws be prospective in application. See *Imperial Tobacco*, above, at para 69.

[27] The Respondent also notes that Parliament "is presumed to have a mastery of existing law, both common law and statute law… [and] is also presumed to have known all of the circumstances surrounding the adoption of new legislation": *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 59. The internal coherence of the statutory scheme is also presumed. See *2747-3174 Québec Inc v Quebec (Régie des permis d'alcool)*, [1996] 3 SCR 919 at para 207. Intended compliance with the Constitution is also presumed, and "where two readings of a provision are equally plausible, the interpretation which accords with *Charter* values should be adopted": *Application under s 83.28 of the* Criminal Code *(Re)*, 2004 SCC 42 at para 35. See also *R v Summers*, 2014 SCC 26 at paras 55-56.

[28] The Respondent submits that, in light of the above noted presumptions, Parliament must be taken to have been aware that it was removing the appeal rights of any number of permanent residents when it enacted the *FRFCA*. Parliament was aware that there is no limitation period in the *IRPA* governing when a report can be prepared under s 44(1) and referred under s 44(2) for persons who may be inadmissible for serious criminality. It follows that s 64(2) must apply to all cases of inadmissibility for serious criminality that had not been referred to the ID before June 19, 2013. As the IAD found, Parliament chose not to apply a limitation period to the writing up and referral of serious criminality reports. And since Parliament did address the question of transitional cases, and provided that those referred to the ID before enactment of the amended version of s 64(2) maintained their right of appeal, its intention to deny appeal by individuals not referred before June 19, 2013 clearly flows from the transitional provision. See Operational Bulletin 525, above.

[29] The Respondent submits that in *Medovarski*, the Supreme Court of Canada rejected the Applicant's argument that a statutory amendment that eliminates an appeal right violates the *Charter*. In *Medovarski,* the Court considered whether elimination of an existing right of appeal to the IAD in cases of serious criminality where a sentence more than two years was imposed violated s 7 of the *Charter*. The Court held that the appellants' loss of appeal rights did not engage the *Charter* because "the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7": *Medovarski*, above, at para 46. Even if the appellants' *Charter* rights had been engaged, the Court went on to hold that the unfairness of losing appeal rights did not violate the principles of fundamental justice because s 7 "do[es] not mandate the provision of a compassionate appeal from a decision to deport a permanent resident for serious criminality" and because "[t]here can be no expectation that the law will not change from time to time": *Medovarski*, above, at para 47. The Respondent also says that, as in *Medovarski*, there is no ambiguity in the transitional provisions that would justify an interpretation based on *Charter* values.

[30] The Respondent also points out that there is no statutory limitation period that applies to the Minister's discretion to refer cases of serious criminality to the ID. The Respondent accepts that the Applicant was not referred following his 1998 conviction, but submits that there is nothing in the legislation suggesting that the existence of an earlier conviction should fetter the Minister's discretion to refer after a second conviction. The Respondent notes that Operational Manual ENF 6 – Review of Reports under Subsection A44(1), (1 December 2016) at s 19.4, shows that CBSA policy is to send a permanent resident who has been convicted of a serious criminal offence a warning letter when the Minister's Delegate believes the report to be well-

founded but decides not to refer the report to the ID. The warning letter advises "that a decision could be made to refer the report at a later date" and is intended to have a deterring effect.

[31] The Respondent also submits that it is perverse for the Applicant to argue that he should have been referred to the ID immediately after his 1998 conviction because, notwithstanding an appeal right to the IAD, he could have potentially been deported nearly two decades ago. In the intervening period, the Applicant had no right of appeal that can be said to have crystalized, so the decision to refer him for an admissibility hearing in 2016 does not interfere with any vested rights. The Respondent also submits that this Court held in *Torre v Canada (Citizenship and Immigration)*, 2015 FC 591 at para 32, that the only period relevant to determining whether a delay in referral amounts to an abuse of process is the period between preparation of a report under s 44(1) and the ID's inadmissibility determination.

[32] The Respondent says that the Applicant's reliance on *Tran* is misplaced as the Supreme Court of Canada did not depart from the existing law that any retrospective effect given to a statutory provision is a matter of statutory interpretation. In *Tran*, the term at issue was ambiguous, unlike s 64(1) of the *IRPA*, which denies appeal to the IAD if a "permanent resident has been found to be inadmissible" under one of the enumerated classes (emphasis added). The Respondent says that that s 64(1) can only refer to an inadmissibility finding "which precedes the coming into force of s. 64(2)" and was itself preceded by the underlying conviction and sentence. Therefore, the temporal scope of s 64(1) is clear, subject to the transitional provisions: an individual found inadmissible for serious criminality, as defined in s 64(2), cannot appeal to the

IAD if they have been found inadmissible after s 64(2) came into force. Any other interpretation would add words to the statute and do violence to the wording of the provision.

[33] The Respondent says that nothing in *Tran* affects *Medovarski*'s earlier decision that loss of a humanitarian and compassionate grounds appeal before the IAD does not engage *Charter* rights. The statements from *Tran* relied upon by the Applicant must be read in the context of its different factual scenario. Here, the Applicant was warned that the CBSA was aware of his first conviction and was put on notice that reoffending could result in his deportation. So there is no settled expectation of the Applicant that has been interfered with and there is no evidence that the Applicant would have acted differently had he known that he could not appeal the issuance of a deportation order to the IAD. The Respondent says that there is no absurdity in relying on the Applicant's 1998 conviction along with his more recent conviction to find him inadmissible. Part of the reason he was referred to the ID was his continuing criminality and manipulating the reasons for referral to allow an appeal to the IAD would distort his criminal history.

[34] The Respondent submits that the Applicant is incorrect in that he is not someone who had a right of appeal under s 63(1) of the *IRPA* before June 19, 2013. Section 63 sets out the different classes of individuals who may appeal to the IAD and it was s 63(3), not s 63(1), that would have created the Applicant's right of appeal. As the Applicant had not had a removal order made against him at an admissibility hearing, his "right of appeal" was completely inchoate and thus fell outside the ambit of the transitional provision in s 32 of the *FRFCA*. Similarly, the second transitional provision in s 33 is limited to individuals referred to the ID, regardless of when their admissibility hearing occurred, before June 19, 2013. This provision is also inapplicable to the

Applicant. The Respondent says that these transitional provisions would have been unnecessary if Parliament had not intended s 64(2) to operate retrospectively. The provisions protect defined rights of appeal which accrued before s 64(2) came into force, but do not limit the CBSA from writing up an individual for convictions which predate June 19, 2013.

[35] The Respondent also says that the discretion that the Applicant complains about is written into the statutory scheme. In the Applicant's case, that discretion was initially exercised to issue a warning instead of referring the Applicant to the ID. The Respondent points out that a consequence of the Applicant's argument would be to fetter the CBSA's discretion by requiring it to always refer individuals with a conviction to the ID for an admissibility hearing.

[36] The Respondent also submits that the Applicant's argument that the decision of the Minister's Delegate to refer him to the ID for both convictions is an abuse of process is itself an improper collateral attack on the Minister's Delegate's decision. The Applicant did not seek review of the Minister's Delegate's decision, and the Decision under review is the IAD's finding that it lacks jurisdiction to hear an appeal. The decision to refer is a reviewable decision which should remain undisturbed in the present application. See *Huang v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 28 at para 80.

## VIII. ANALYSIS

### A. *The Decision Under Review*

[37] The Applicant was convicted in 1998 for assault causing bodily harm for which he received a jail sentence of 9 months.

[38] The Applicant could have been referred for an admissibility hearing at this time. Instead, the Minister's representatives followed the usual practice of issuing a warning to the Applicant, rather than referring him immediately to an admissibility hearing before the ID.

[39] The Applicant committed another violation and was convicted of assault with a weapon in 2016, for which he received a sentence of 64 days in pre-trial custody plus one day in jail.

[40] The Applicant was written up pursuant to s 44(1) of the *IRPA* and the Minister's Delegate referred the matter to the ID on November 7, 2016.

[41] The ID issued a deportation order on January 11, 2017 based upon the Applicant's inadmissibility for serious criminality.

[42] The Applicant then attempted to appeal the deportation order to the IAD.

[43] The IAD declined the appeal on the basis that, pursuant to ss 64(1) and (2) of the *IRPA*, there was no right of appeal to the IAD in the Applicant's case, so that the IAD lacked the

jurisdiction to hear and decide the Applicant's appeal. This is the Decision that is now before the Court for review.

B. *The Issues*

[44] Essentially, the Applicant says that the statutory bar to appeals to the IAD under ss 64(1) and (2) of the *IRPA* does not, or should not, apply in this case, so that the IAD does have the jurisdiction to hear the appeal. His arguments are based upon retroactivity, abuse of process and various *Charter* rights.

C. *Retroactivity*

[45] The Applicant says that the conviction and sentence of June 20, 2016, which postdates the amendments to s 64 of the *IRPA*, does not engage s 64(2) because the sentence was less than 6 months in duration.

[46] He says further that his conviction of May 5, 1998 relied upon by the Respondent for the deportation order also does not engage s 64(2) of the *IRPA* because it predates the coming into force of that section by over 15 years and predates the writing of the s 44 report by over 18 years. This is an issue of statutory interpretation for which the Applicant relies heavily upon the presumption against the retrospective or retroactive operation of statutes:

> 19. There is no question that the Respondent's interpretation is either retrospective or retroactive.

[47] As the Supreme Court of Canada made clear in *Imperial Tobacco*, above, there is no requirement of legislative prospectivity embodied in the rule of law or in any provision of the Constitution:

> 69 Except for criminal law, the retrospectivity and retroactivity of which is limited by s. 11(g) of the *Charter*, there is no requirement of legislative prospectivity embodied in the rule of law or in any provision of our Constitution. Professor P. W. Hogg sets out the state of the law accurately (in *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 48-29):
>
> > Apart from s. 11 (g), Canadian constitutional law contains no prohibition of retroactive (or ex post facto) laws. There is a presumption of statutory interpretation that a statute should not be given retroactive effect, but, if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms. Retroactive statutes are in fact common.
>
> 70 Hence, in *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at p. 1192, La Forest J., writing for a majority of this Court, characterized a retroactive tax as "not constitutionally barred". And in *Cusson v. Robidoux*, [1977] 1 S.C.R. 650, at p. 655, Pigeon J., for a unanimous Court, said that it would be "untenable" to suggest that legislation reviving actions earlier held by this Court (in *Notre-Dame Hospital v. Patry*, [1975] 2 S.C.R. 388) to be time-barred was unconstitutional.
>
> 71 The absence of a general requirement of legislative prospectivity exists despite the fact that retrospective and retroactive legislation can overturn settled expectations and is sometimes perceived as unjust: see E. Edinger, "Retrospectivity in Law" (1995), *29 U.B.C. L. Rev. 5*, at p. 13. Those who perceive it as such can perhaps take comfort in the rules of statutory interpretation that require the legislature to indicate clearly any desired retroactive or retrospective effects. Such rules ensure that the legislature has turned its mind to such effects and "determined that the benefits of retroactivity [or retrospectivity] outweigh the potential for disruption or unfairness": *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), at p. 268.
>
> 72 It might also be observed that developments in the common law have always had retroactive and retrospective effect. Lord

> Nicholls recently explained this point in *In re Spectrum Plus Ltd.*, [2005] 3 W.L.R. 58, [2005] UKHL 41, at para. 7:
>
> > A court ruling which changes the law from what it was previously thought to be operates retrospectively as well as prospectively. The ruling will have a retrospective effect so far as the parties to the particular dispute are concerned, as occurred with the manufacturer of the ginger beer in *Donoghue v Stevenson* [1932] AC 562. When Mr Stevenson manufactured and bottled and sold his ginger beer the law on manufacturers' liability as generally understood may have been as stated by the majority of the Second Division of the Court of Session and the minority of their Lordships in that case. But in the claim Mrs Donoghue brought against Mr Stevenson his legal obligations fell to be decided in accordance with Lord Atkin's famous statements. Further, because of the doctrine of precedent the same would be true of everyone else whose case thereafter came before a court. Their rights and obligations would be decided according to the law as enunciated by the majority of the House of Lords in that case even though the relevant events occurred before that decision was given.
>
> This observation adds further weight, if needed, to the view that retrospectivity and retroactivity do not generally engage constitutional concerns.

[48] This Court has also confirmed in *Tabingo*, above, (affirmed by the Federal Court of Appeal) that the issue is one of statutory interpretation and whether the statutory provision at issue is sufficiently clear that, reasonable speaking, it can only be interpreted as having retrospective effect:

> [22] Courts will not interpret legislation in a manner that removes existing rights or entitlements unless Parliament's intention to do so is clear. However, when a statute is unambiguous, there is no role for presumptions or interpretive aids, and the courts may not apply any of the interpretive presumptions noted earlier: *Professional Institute of the Public Service of*

> *Canada v Canada (Attorney General)*, 2012 SCC 71, paras 95, 159-160; *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, [2005] 2 SCR 473, para 71; *Gustavson Drilling (1964) Ltd v Canada (Minister of National Revenue)*, [1977] 1 SCR 271.
>
> [23] Here, the ordinary meaning of the provision governs. The meaning and effect of the word "terminated" is clear. Section 87.4, by its terms, is explicitly designed to apply retrospectively to applications dated before February 27, 2008 and to eliminate the obligation to further process pending applications. The plain and obvious meaning of section 87.4 requires that the provision be retrospective and interfere with vested rights, regardless of any perceived unfairness. The three presumptions relied on by the applicants are displaced by the clarity of Parliament's intention. Further, to interpret the section otherwise would leave it without any effect beyond refunding the application fee.

[49] In my view, in the present case, Parliament clearly indicated that s 64 would apply to all cases of inadmissibility on grounds of serious criminality that had not been written up and referred to the ID before June 19, 2013 so that the IAD was correct to find that

> [6] The Referral under subsection 44(2) of the *IRPA* pertaining to the appellant's 1998 and 2016 offences was signed on November 7, 2016. As the Referral was signed after June 19, 2013, the IAD lacks jurisdiction over the appeal, in accordance with the transitional provisions.

[50] As the IAD pointed out in its Decision, the Applicant's interpretation of s 64 is not supported by the transitional provisions which make it clear that Parliament intended that if the referral was not made prior to June 19, 2013, the individual in question loses the rights of appeal that were available before the amendment. The transitional provisions are clear that Parliament only intended that 2 classes of persons would continue to have appeal rights to the IAD:

- Individuals who "<u>had a right of appeal under subsection 63(1) of the Act</u> before the day on which section 24 (of Bill C-43) comes into force"; [emphasis added]; and,

- Individuals who were the subject of a report that is referred to the Immigration Division under subsection 44(2) of the Act before the day on which section 24 comes into force.

[Emphasis in original.]

[51] It is clear that the Applicant does not qualify as either of these classes of persons.

[52] Operation Bulletin 525 provides as follows:

- Sponsors of foreign nationals whose family class applications were refused before June 19, 2013 on the basis of serious criminality and were punished in Canada by a term of imprisonment of at least six months or were found described in paragraph 36(1)(*b*) or (c) have the right to appeal to the IAD until the time period for submitting the appeal expires.

- Persons who are subject to a report under subsection 44(2) of the IRPA on the basis of serious criminality and were punished in Canada by a term of imprisonment of at least six months or were found described in paragraph 36(1)(*b*) or (c) have the right to appeal their removal order to the IAD if the referral to the IAD was signed by the Minister's Delegate (MD) before June 19, 2013, regardless of the date the referral was sent to the ID. (For greater clarity, if a request for an admissibility hearing is sent after June 19, 2013 to the ID, including a referral signed before June 19, 2013, and the person had a right of appeal under subsection 63(3) before June 19, 2013, that person would maintain their right of appeal.)

- For persons whose referral to the ID for serious criminality was signed by the MD after June 19, 2013, the new definition of serious criminality as defined in subsection 64(2) will apply and they do not have the right to appeal.

[Emphasis in original.]

[53] In my view, these provisions make Parliament's intent clear and the IAD correctly found that the Applicant had no right of appeal to the IAD. This was not only a reasonable interpretation of the provision, in my view, it was a correct interpretation of the provision.

[54] Relying heavily upon the Supreme Court of Canada decision in *Tran*, above, the Applicant says that the IAD's refusal of jurisdiction is based upon an interpretation of the relevant statutory provisions that leads to absurd consequences.

[55] In this regard, the Applicant reminds the Court of the guidance provided by the Supreme Court on this issue in para 31 of *Tran*:

> Finally, my interpretation avoids absurd results. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 27, Justice Iacobucci explained the presumption that the legislature does not intend absurd consequences:
>
> > It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté [P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)], an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile [R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994)], at p. 88).

[56] In this case, the Applicant says that the refusal of jurisdiction is ridiculous, extremely unreasonable, inequitable, illogical and prejudicial.

[57] While conceding that the principal issue before the Court is a matter of statutory interpretation, the Applicant says that Parliament could not have intended (or, at least, the intent is unclear) that s 64 of the *IRPA* – which, *inter alia*, removed the right of appeal to the IAD of a permanent resident who has been found to be inadmissible on grounds of serious criminality – would reach back to crimes committed in 1998, which is when the Applicant was convicted of assault causing bodily harm for which he received a sentence of 9 months. He says this is unfair and that Parliament should have set a time limit on the "reach back" implications of s 64(1) because the absence of any time limitation offends the rule of law and goes against the teachings of the Supreme Court in *Tran*.

[58] One of the problems with these allegations is that the unfairness and "reaching back" issues and the fairness and equitable arguments could all have been raised in judicial review proceedings dealing with the referral decision of November 7, 2016 or the deportation order of January 11, 2017. Yet the Applicant, for no reason that he now places before the Court (he has filed no affidavit), decided not to challenge them. He has chosen, instead, to challenge the IAD's jurisdiction decision on grounds that Parliament could not have intended an extensive or open-ended reach back effect when it enacted s 64 of the *IRPA*.

[59] While the Applicant has filed no affidavit with this application, it is clear from the Criminal Narrative Report Pursuant to A44(1) that the Applicant was obviously aware that subsequent convictions would lead to serious consequences:

> While it is true that Mr. Cano-Granados has been in Canada a significant amount of time, it would not be a hardship on anyone else if he was to be removed from Canada as no one is dependent upon him for either financial or emotional support. He speaks

> Spanish fluently, the language of the country of his birth and he speaks fluent English. The country of Mexico would accept him back and do so without having to secure a passport. Mr. Cano-Granados should have no issues assimilating back into the Mexican culture.
>
> Mr. Cano-Granados admitted that in 1998 when he was incarcerated he was visited by two Immigration officers and interviewed. He said that they gave him a verbal warning about his in Canada conviction and to quote him "they scared the crap out of me, they were right in my face". So Mr. Cano-Granados obviously was aware that subsequent actions on his part that would lead to any convictions would result in more serious consequences. While he clearly recalls the encounter it did not stop his ongoing behaviour. Under these circumstances a written warning would not be appropriate.

[60] The Applicant's failure to challenge earlier decisions, where he could have raised any humanitarian and compassionate factors and all of the equitable and fairness arguments he has raised before me, cannot be used as a basis for arguing that Parliament's failure to limit the "reach back" consequence of s 64 means that Parliament's intent was unclear. In the end, this application involves the application of time-honoured principles of statutory interpretation that, in my view, are not altered by the Supreme Court of Canada's decision in *Tran*, above.

D. *Charter Issues*

[61] The Applicant argues that the Respondent's interpretation of the law cannot be correct because it would breach the Applicant's rights under ss 7 and 11 of the *Charter*. There is little elaboration on these points and I think that any arguments along these lines have been dealt with by the Supreme Court of Canada in *Medovarski*, above, where the Supreme Court has the following to say on point:

> 46 The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada: *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 733. Thus the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms*.
>
> 47 Even if liberty and security of the person were engaged, the unfairness is inadequate to constitute a breach of the principles of fundamental justice. The humanitarian and compassionate grounds raised by Medovarski are considered under s. 25(1) of the *IRPA* in determining whether a non-citizen should be admitted to Canada. The *Charter* ensures that this decision is fair: e.g., *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Moreover, *Chiarelli* held that the s. 7 principles of fundamental justice do not mandate the provision of a compassionate appeal from a decision to deport a permanent resident for serious criminality. There can be no expectation that the law will not change from time to time, nor did the Minister mislead Medovarski into thinking that her right of appeal would survive any change in the law. Thus for these reasons, and those discussed earlier, any unfairness wrought by the transition to new legislation does not reach the level of a *Charter* violation.

[62] It is clear that *Charter* values should inform the interpretation of an impugned statutory provision but, in the present case, there is no real ambiguity in the provisions at issue. *Medovarski* also makes it clear that the loss of a right of appeal is inadequate to implicate liberty and security interests and that the Applicant can have no expectation that the law will not change from time to time.

[63] The Applicant seeks to avoid the implications of *Medovarski* by reference to the recent Supreme Court of Canada decision in *Tran*, above. In my view, *Tran* does not impact the results in the present case for a variety of reasons.

[64] First of all, *Tran* does not change the fundamental principle that the retrospective application of legislation remains a question of statutory interpretation in each case. See *Tran*, above, at paras 48-49, quoting *Imperial Tobacco*, above, at para 71. In the present case – which differs from *Tran* in this regard – Parliament's intent is clear that those found inadmissible for serious criminality under s 64 cannot benefit from an appeal to the IAD if written up before s 64 came into force.

[65] Secondly, *Tran* does not change *Medovarski*'s teaching that the loss of an appeal right (in that case a humanitarian and compassions appeal) does not engage *Charter* rights and, in fact, *Tran* dealt with a different fact situation from the present case.

[66] Thirdly, in the present case, the evidence suggests that the Applicant was aware that he could be deported based upon his 1998 conviction because he was notified to this effect. This can be seen from the Criminal Narrative Report Pursuant to A44(1), cited above, and the transcript of the ID admissibility hearing which shows that the Applicant was provided with the Minister's disclosure package that included the Criminal Narrative Report (Certified Tribunal Record at 12) and agreed that the information that had been provided was all correct (Certified Tribunal Record at 16).

[67] Fourthly, the Applicant has presented no evidence that his subsequent offending actions would have been any different if he had known there was no appeal to the IAD.

E. *Abuse of Process – Ministerial Discretion*

[68] The Applicant's argument on this issue is as follows:

> 36. In the matter at bar, the conviction and the sentence occurred well over a decade before the said section came into force, and the Respondent chose not to pursue it. Had the Respondent pursued it, under the provision then in force, there is no question that the Applicant had the right to pursue the Appeal at the Immigration Appeal Division. Instead the Respondent did not do so, but instead chose to attach these matters to matters which did occur after the Section came into force, a conviction on June 20th, 2016, which resulted in a sentence not caught by 64 (2) of the IRPA, to take away the Applicant's appeal rights. This is clearly an absurd curtailing of the Applicant's appeal rights. It cannot stand, as it clearly goes against the intent of Parliament, as per the Transitional Provision, and clearly violates the Rule of Law, the presumption against retroactivity, and the Charter.
>
> 37. What the Respondent at bar is trying to do is circumvent the intent of parliament, by a technicality, and using its own decision or failure to pursue a Report under the provision of the former Act, and years before there would have been a bar to commencing an Appeal.
>
> 38. The Respondent's interpretation of the Act is clearly incorrect as it is against the Rule of Law and the Charter.
>
> 39. The Applicant also proposes that while Parliament clearly did not intend for the provision to be retroactive, the manner in which the transitional provisions have been written, attaching the retroactivity of the law to the writing of a S. 44 (1) report by the Minister is also problematic and potentially *ultra vires*, because it attaches the giving or taking away to appeal rights to an arbitrary exercise of discretion by the Minister, which opens it up for abuses such as what the Minister is attempting at bar. Therefore, the Section needs to be read broadly so that it can be congruent with the Charter and the Rule of Law, as the Court has already indicated as appropriate (see above).
>
> [Emphasis in original.]

[69] Clearly, the Minister's decision not to pursue deportation in 1998 was an exercise in Ministerial discretion that provided the Applicant with significant advantages. The decision was, of course, dependent upon the Applicant's not offending at any time in the future. Thus, the Applicant was given a clear choice: do not reoffend and remain in Canada, or reoffend and face possible deportation. The Applicant made his choice and incurred a further conviction in 2016.

[70] Clearly, the Minister could not, or chose not to, seek deportation until the Applicant made his choice. The suggestion that the Minister somehow lay in the weeds and waited for the legislation to change so that the Applicant would lose his right of appeal before the IAD has no support on the facts of this case. It was the Applicant who triggered the referral and admissibility hearing.

[71] I can find no reviewable error in the Decision.

## IX. CERTIFICATION

[72] The Applicant had submitted three questions for certification:

> Does the writing of the report on s 33 of the transitional provisions lead to an absurd result which renders that section *ultra vires*?
>
> Does the operation of s 33 of the transitional provisions lead to absurd results that make the section *ultra vires*?
>
> Should the transitional provisions be read broadly so that the IAD has jurisdiction to hear appeals under s 63 of the *IRPA* before s 24 of the *FRFCA* came into force?

[73] In my view, the questions are just different ways of saying the same thing: Does the IAD have jurisdiction to hear an appeal of a removal order where the sentence imposed that would eliminate a right of appeal under ss 64(1) and (2) of the *IRPA* is for a conviction predating the amendment of s 64(2) by s 24 of the *FRFCA* and would not have eliminated a right of appeal before s 64(2)'s amendment?

[74] I think I have to agree with the Respondent that, in the present case, the transitional provisions which allow exceptions to the general rule in s 64(2) don't even arise and the Applicant can receive no benefit from them. In my view, the questions do not raise determinative issues, so that positive answers would not be dispositive. However, even if the question as re-phrased could be considered as determinative, in considering the level of procedural fairness owed during the writing of a s 44 report, the Federal Court of Appeal has already accepted that a conviction which predates the amendment of s 64(2) can eliminate appeal rights to the IAD. See *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 at paras 38 and 40-41. And the Supreme Court of Canada has already addressed the available *Charter* arguments in *Medovarski*, so there is no question of broad significance or general importance that would meet the test for certification. See *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at paras 15-16 and *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46.

**JUDGMENT IN IMM-3200-17**

**THIS COURT'S JUDGMENT is that**

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3200-17 |
| **STYLE OF CAUSE:** | PAULO CESAR CANO GRANADOS, (AKA PAULO CESAR CANO) v THE MINISTER OF CITIZENSHIP & IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | FEBRUARY 1, 2018 |
| **JUDGMENT AND REASONS:** | RUSSELL J. |
| **DATED:** | MARCH 15, 2018 |

**APPEARANCES:**

| | |
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