Date: 20070503

Docket: IMM-5470-06

Citation: 2007 FC 483

Ottawa, Ontario, May 3, 2007

Present: The Honourable Mr. Justice Blais

BETWEEN:

MAGTOUF, Mustapha

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review filed pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act or IRPA), against a decision by the Immigration and Refugee Board (the IRB) – Immigration Appeal Division (the IAD), dated September 21, 2006, dismissing the applicant's appeal for lack of jurisdiction.

RELEVANT FACTS

[2] Mustapha Magtouf (the applicant) is an Algerian national who arrived in Canada on June 27, 1999, after obtaining landing in Canada as a result of his wife's sponsorship.

[3] On May 18, 2005, the applicant pleaded guilty to a charge of aggravated assault against his wife under section 268 of the *Criminal Code*, R.S.C. 1985, c. C-46, liable to a maximum sentence of 14 years. On November 10, 2005, the sentence was imposed by the Honourable Élizabeth Corte of the Superior Court, who stated the following:

> [TRANSLATION]
>
> I think that the appropriate sentence would be a four-year prison sentence, from which I will deduct the pre-sentencing custody that I will count as double, therefore I will deduct forty-two (42) months and therefore, as of today, you will have six (6) months to serve, because that is what I consider remains on what you should have had as a sentence if you had pleaded guilty in the very first place.

[4] On November 9, 2005, a report was issued against the applicant pursuant to subsection 44(1) of the Act to the effect that he was a permanent resident inadmissible to Canada on grounds of serious criminality under paragraph 36(1)(*a*) of the Act. On February 10, 2006, a deportation order was issued against the applicant.

[5] On March 10, 2006, the applicant filed a notice of appeal of the decision issuing the deportation order. On March 29, 2006, the Minister filed an application to have the appeal dismissed for want of jurisdiction.

IMPUGNED DECISION

[6] In a decision dated September 21, 2006, IAD member Mona Beauchemin (the panel) determined that the IAD did not have the jurisdiction to hear this appeal based on the application of section 64 of the Act, to the effect that no appeal can be made by a permanent resident or foreign national who is inadmissible on grounds of serious criminality, namely a crime punishable in Canada by a term of imprisonment of at least two years.

ISSUES

[7] The issues in this matter are the following:

(1) Did the panel err in finding that the IAD did not have jurisdiction to hear the applicant's appeal?

(2) Did the panel err in refusing to decide the issue of the applicant's rights under section 7 of the Charter, in the absence of a notice of constitutional question?

STANDARD OF REVIEW

[8] It is well established that the appropriate standard of judicial review for a decision by the Board varies according to the nature of the decision. For a question of law, the standard is that of correctness, for a question of fact, that of patent unreasonableness; and for a mixed question of fact and law, that of reasonableness. This approach has been confirmed by the Supreme Court of Canada in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100.

[9] As the issues raised by the applicant in this application for judicial review are all questions of law, the standard of correctness will be applied.

ANALYSIS

(1) Did the panel err in finding that the IAD did not have jurisdiction to hear the applicant's appeal?

[10] Inadmissibility on grounds of serious criminality is found under section 36 of the Act which provides:

36. (1) A permanent resident or a	**36.** (1) Emportent interdiction de

foreign national is inadmissible on grounds of serious criminality for	territoire pour grande criminalité les faits suivants :
(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	*a*) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
(*b*) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or	*b*) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
(*c*) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.	*c*) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

[11] Pursuant to section 63 of the Act, a removal order issued after an inadmissibility finding may be appealed. However, there is an exception to this right to appeal under section 64 of the Act which reads as follows:

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.
(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.	(2) L'interdiction de territoire pour grande criminalité vise l'infraction punie au Canada par un emprisonnement d'au moins deux ans.

[12] Essentially, the applicant submitted that the panel erred in interpreting subsection 64(2) of the Act by taking into account the period of pre-sentencing custody in calculating the applicant's sentence to find a lack of jurisdiction.

[13] The panel considered the wording of the Act, the relevant passage from Corte J.'s decision regarding the appropriate sentence, as well as the specific circumstances which led to the applicant's detention. The panel supported its decision to consider the period of pre-sentencing custody in calculating the period of imprisonment with the decision of the Supreme Court of Canada in *R. v. Wust*, [2000] 1 S.C.R. 455. *Inter alia*, the panel refers to the following passage in *Wust, supra*:

> ¶ 41 To maintain that pre-sentencing custody can never be deemed punishment following conviction because the legal system does not punish innocent people is an exercise in semantics that does not acknowledge the reality of pre-sentencing custody . . .
>
> Therefore, while pre-trial detention is not intended as punishment when it is imposed, it is, in effect, deemed part of the punishment following the offender's conviction, by the operation of s. 719(3). The effect of deeming such detention punishment is not unlike the determination, discussed earlier in these reasons, that time spent lawfully at large while on parole is considered nonetheless a continuation of the offender's sentence of incarceration.

[14] The panel properly noted the objection by the applicant's counsel to the effect that the Supreme Court of Canada's decision had not been made in the context of section 64 of the Act. The panel responded to this objection by the applicant by referring to the decisions of Mr. Justice Yvon Pinard in *Atwal v. Canada (MCI)*, 2004 FC 7, [2004] F.C.J. No. 63 (QL), and M. Justice Douglas Campbell in *Canada (MCI) v. Smith*, 2004 FC 63, [2004] F.C.J. No. 2159 (QL), which apply the Supreme Court's reasoning in *Wust, supra*, to section 64 of the Act.

[15] The applicant argued before this Court that the decisions of the Federal Court on which the panel's decision was based, i.e. *Atwal* and *Smith, supra,* are not definitive as they give rise to the following certified question:

> [TRANSLATION]
>
> Is pre-sentence custody, which is expressly credited towards a person's criminal sentence, included in the "term of imprisonment" under section 64(2) of the *Immigration and Refugee Protection Act?*

[16] This argument is founded since, absent a decision by the Federal Court of Appeal setting aside these decisions, these decisions remain valid. Indeed, these two appeals were not brought before the Federal Court of Appeal and the interpretation of section 64 of the Act by the Federal Court in these decisions, as well as in later decisions, therefore remains valid.

[17] The applicant's counsel also raised an argument to the effect that not all of the judges calculate pre-sentencing custody in the same manner by deducting this period from the sentence imposed, and that the period of pre-sentencing custody is not specifically mentioned under subsection 64(2) of the Act. Accordingly, he submitted that the Act is ambiguous and should therefore be interpreted in favour of the applicant.

[18] The panel examined this argument by the applicant by considering the objective of sections 36 and 64 of the Act, as discussed by the Supreme Court of Canada in *Medovarski v. Canada (MCI.)* and *Esteban v. Canada (MCI)* 2005 SCC 51, [2005] S.C.J. No. 31 (QL), at paragraphs 9 to 11:

> ¶9 The *IRPA* enacted a series of provisions intended to facilitate the removal of permanent residents who have engaged in serious criminality. This intent is reflected in the objectives of the *IRPA* , the provisions of the *IRPA* governing permanent residents and the legislative hearings preceding the enactment of the *IRPA* .

> 10 The objectives as expressed in the *IRPA* indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. This marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security: e.g., see s. 3(1)(*i*) of the *IRPA* versus s. 3(*j*) of the former Act; s. 3(1)(*e*) of the *IRPA* versus s. 3(*d*) of the former Act; s. 3(1)(*h*) of the *IRPA* versus s. 3(*i*) of the former Act. Viewed collectively, the objectives of the *IRPA* and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.
>
> 11 In keeping with these objectives, the *IRPA* creates a new scheme whereby persons sentenced to more than six months in prison are inadmissible: *IRPA* , s. 36(1)(*a*). If they have been sentenced to a prison term of more than two years then they are denied a right to appeal their removal order: *IRPA* , s. 64. Provisions allowing judicial review mitigate the finality of these provisions, as do appeals under humanitarian and compassionate grounds and pre-removal risk assessments. However, the Act is clear: a prison term of over six months will bar entry to Canada; a prison term of over two years bans an appeal.

[19] The panel stated that with this objective in mind, it would not be logical that the government would have wanted the existence of a right to appeal to be dependant on the manner in which the matter proceeded before the criminal courts. The panel finally determined:

> In this context, it is illogical to determine that, because the appellant received his sentence after 21 months in pre-sentencing custody, he retained his right of appeal before the IAD, even though he would have lost it had he been sentenced to the same punishment, namely four years in prison, prior to the pre-sentencing custody.

[20] Further, the panel noted that the case law on ambiguity cited by the applicant's counsel refers to the ambiguity created by the interpretation of the French and English versions of the text of a statute, which was not raised in this case.

[21] In the context of this judicial review, the applicant made exactly the same arguments as those dismissed by the panel. Unfortunately for the applicant, these arguments are not any more

persuasive before me than they were before the panel. Indeed, in *Sherzad v. Canada (M.C.I.)*, 2005 FC 757, [2005] F.C.J. No. 954 (QL), Madam Justice Anne L. Mactavish stated at paragraph 49:

> . . . the meaning of subsection 64(2) is not immediately apparent, when the section is interpreted in light of the existing criminal jurisprudence relating to sentencing, the meaning of the section becomes clear. As a result, it is not necessary to resort to secondary canons of interpretation.

[22] Mactavish J. determined that the term of pre-sentencing custody was included in the imprisonment for the purposes of subsection 64(2) of the Act, stating that interpreting otherwise could lead to absurd results. I set out paragraphs 57 to 61 of her analysis:

> ¶ 57 Thus, the credit given to an offender for the time served prior to conviction is deemed part of the offender's "punishment". It would, in my view, be inappropriate for an offender to be able to argue in the criminal context that his or her sentence should be reduced in light of the time that the individual spent in pre-trial detention, and then to be able to turn around in the immigration context and say that no consideration should be given to the period spent in pre-trial detention, and that only the period of the sentence should be considered for the purposes of subsection 64(2) of IRPA.
>
> ¶ 58 As Justice Mosley noted in Cheddesingh (Jones), such an interpretation would be inconsistent with the teachings in Wust, and with the Parliamentary intent in enacting section 64 of IRPA.
>
> ¶ 59 Further, to accept Mr. Sherzad's interpretation of subsection 64(2) would lead to an absurd result. By way of example, if an individual charged with an offence were to plead guilty on arrest, and receive a sentence of two years, that individual would have his or her right of appeal to the IAD extinguished by operation of subsection 64(2). Another individual, charged with the same offence in identical circumstances, might choose to go to trial. If convicted, that individual would receive credit for any time spent in pre-trial detention, and have his or her sentence reduced accordingly to something less than two years. In such circumstances, the second offender would still have a right of appeal to the IAD.
>
> ¶ 60 Similarly, an offender who spends two years in pre-trial detention, and is then sentenced to 'time served' would, on Mr. Sherzad's interpretation of the provision, have received no 'punishment' for the purposes of subsection 64(2).
>
> ¶ 61 Such an interpretation would provide a positive incentive for offenders to use pre-trial delay to circumvent subsection 64(2), which cannot have been Parliament's intent.

[23] Mactavish J. relied on the previous decisions of the Federal Court on this issue, referring to Pinard J.'s decision in *Atwal*, *supra*, who noted:

> ¶ 15 With section 64 of the *IRPA*, Parliament sought to set an objective standard of criminality beyond which a permanent resident loses his or her appeal right, and Parliament can be presumed to have known the reality that time spent in pre-sentence custody is used to compute sentences under section 719 of the *Criminal Code*. To omit consideration of pre-sentence custody under section 64 of the *IRPA* when it was expressly factored into the criminal sentence would defeat the intent of Parliament in enacting this provision.

[24] I wholeheartedly support this interpretation as well as the panel's finding regarding the application of subsection 64(2) of the Act and the lack of jurisdiction to hear the appeal at issue. I am of the opinion that the panel's interpretation was free of error justifying this Court's intervention.

(2) Did the panel err in refusing to decide the issue of the applicant's rights under section 7 of the Charter, in the absence of a notice of constitutional question?

[25] The applicant's counsel argued before the panel that to interpret the words "a crime that was punished in Canada by a term of imprisonment of at least two years" in such a way as to include the time spent in pre-sentence custody, breached section 7 of the *Canadian Charter of Human Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter).

[26] The panel refused to consider this argument based on the lack of a notice of constitutional question.

[27] The respondent argued that the panel was correct to refuse to decide the constitutional question stated by the applicant in the absence of a notice of constitutional question. In support of

this, the respondent referred to section 52 of the *Immigration Appeal Division Rules*, SORS/2002-230, which provides:

52. (1) A party who wants to challenge the constitutional validity, applicability or operability of a legislative provision must complete a notice of constitutional question.	**52.** (1) La partie qui veut contester la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, d'une disposition législative établit un avis de question constitutionnelle.
. . .	[…]
(3) The party must provide (*a*) a copy of the notice of constitutional question to the Attorney General of Canada and to the attorney general of every province and territory of Canada, according to section 57 of the *Federal Court Act*; (*b*) a copy of the notice to the other party; and (*c*) the original notice to the Division, together with a written statement of how and when a copy of the notice was provided under paragraphs (*a*) and (*b*).	(3) La partie transmet : *a*) au procureur général du Canada et au procureur général de chaque province et territoire du Canada, en conformité avec l'article 57 de la *Loi sur la Cour fédérale*, une copie de l'avis; *b*) à l'autre partie une copie de l'avis; *c*) à la Section l'original de l'avis, ainsi qu'une déclaration écrite indiquant à quel moment et de quelle façon une copie de l'avis a été transmise aux destinataires visés aux alinéas *a*) et *b*).
. . .	[…]

[28] The applicant, on the other hand, argued that the panel erred in refusing to consider this argument, since a notice of constitutional question was not necessary in the case at bar. In fact, the applicant never sought a finding to the effect that subsection 64(2) of the Act was invalid, inapplicable or inoperative based on section 7 of the Charter, and therefore the Attorney General's intervention was not necessary. All that the applicant alleged was that an interpretation of this provision taking into account pre-sentencing custody could breach section 7 of the Charter.

[29] The Federal Court of Appeal in *Bekker v. Canada*, 2004 FCA 186, [2004] F.C.J. No. 819 (QL), pointed out the importance of the constitutional notice, stating at paragraph 8 of its decision:

> ¶8 This Court will not entertain a constitutional challenge in the absence of a Notice being served on the Attorney General of Canada and on each Attorney General of the Provinces: see *Gitxsan Treaty Society v. Hospital Employees Union et al.* (1999), 238 N.R. 73 (F.C.A.); *Giagnocavo v. M.N.R.* (1995), 95 D.T.C. 5618, where this Court said that it was without jurisdiction to hear the issue. Such Notice is not a mere formality or technicality that can be ignored or that the Court can relieve a party of the obligation to comply with: see *The Queen v. Fisher* (1996), 96 D.T.C. 6291, where this Court ruled that the Notice must be given in every case in which the constitutional validity or applicability of a law is brought in question in the manner described in section 57, including proceedings before the Tax Court governed by the Informal Procedure. Indeed, a judge cannot, *proprio motu*, raise a constitutional issue without giving a notice to the Attorney General: see *Reference re Remuneration of Judges of Provincial Courts*, 1997 CanLII 317 (S.C.C.), [1997] 3 S.C.R. 3.

[30] Further, the specific argument raised by the applicant has already been rejected by the Federal Court of Appeal in *McIntosh v. Canada (Secretary of State)*, [1994] F.C.J. No. 67 (QL), where the Court determined at paragraph 5:

> ¶5 Nor in our view may the appellant put in question in this Court the "applicability or operability" of any provision of the *Immigration Act* which, in essence, is what he wishes to do by arguing that the Act should not be construed so as to authorize the deportation of the appellant either because to do so would violate rights enshrined in the *Canadian Bill of Rights* or in the *Canadian Charter of Rights and Freedoms*. Again, in order to be able to do so he would have to show that he has made due compliance with the notice requirements contained in subsection 57(1) of the *Federal Court Act*. That he has not done. . . .

[31] To this I would add the analysis of Mr. Justice Paul U.C. Rouleau in *Kroon v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 697, [2004] F.C.J. No. 857 (QL), to the effect that even if a notice of constitutional question had been served, the IAD would not have had jurisdiction to decide this question. Rouleau J. explains at paragraphs 32 and 33 of his decision:

> ¶32 Applying the reasoning of Martin to the present case, I am satisfied that the IAD lacks the power to determine the constitutionality of section 64 of IRPA. There is simply nothing in the legislation which either expressly or implicitly grants this jurisdiction. On the contrary, the challenged provisions expressly limit the jurisdiction of the IAD insofar as they remove any right of appeal to the tribunal by a permanent resident who has been found to be inadmissible on grounds of serious criminality. In my view, Parliament could not have been more clear in its intention to limit the IAD's jurisdiction with respect to individuals who fall within paragraph 36(1)(*a*) of the Act. I do not read Martin as overruling this Court's decision in Reynolds wherein it was held that although the IAD had exclusive jurisdiction to consider questions of law and determine its own jurisdiction, its general powers did not extend to finding

> that a statutory section which contained an express limitation on its jurisdiction was unconstitutional.
>
> ¶33 In the present case, once the factual determination was made that the applicant was inadmissible for serious criminality, a decision the applicant does not dispute, the IAD lost any mandate to hear an appeal. Since the IAD does not have the power to decide legal questions arising under section 64, it therefore has no power to hear constitutional challenges to that provision.

[32] It is my opinion that the panel's finding that it lacked jurisdiction to consider the constitutional question raised by the applicant respects the standard of correctness and does not justify the intervention of this Court.

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

[34] The applicant proposed the following question for certification:

> [TRANSLATION]
>
> Is the word "punished" used at subsection 64(2) of the IRPA refer only to the sentence imposed or can it also refer also to the period of time spent in custody in custody in pre-sentencing custody?

[35] The respondent alleged that this question has long been settled by the case law and that it is not a question of general importance which should be certified.

[36] I agree with the respondent's comments and I am not persuaded that this question is of general importance and must be certified.

JUDGMENT

1. The application for judicial review is dismissed;

2. No question will be certified.

"Pierre Blais"

Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5470-06
STYLE OF CAUSE:	MAGTOUF, MUSTAPHA **v.** MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	April 19, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	BLAIS J.
DATE OF REASONS:	May 3, 2007

APPEARANCES:

Jean Gobeil	FOR THE APPLICANT
Sylvianne Roy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Aide juridique de Montréal, Immigration Section	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT