Federal Court  Cour fédérale

Date: 20100420

Docket: IMM-4511-09

Citation: 2010 FC 428

Ottawa, Ontario, April 20, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

NGHIA TRONG NGUYEN-TRAN
(also known as: Tran Trong Nghi Nguyen)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introductory Background

[1] In order to arrive at a decision, the specific jurisprudential background to this case must be read to understand in what context the one issue before the Court exists.

> [11] The IAD, in a lengthy and detailed decision, examined the evidence before it and exercised its discretion in accordance with the analysis of the *Ribic* factors. As I understand it, the Applicant does not assert that the IAD ignored evidence or made erroneous findings of fact. Of particular interest in this application were the following factual findings that, in the view of the IAD, weighed against granting the discretionary relief:
>
> - The Applicant had two convictions as a youth offender and eight further offences as an adult;

- His most serious offence was for drug trafficking, a crime considered to be very serious by both Parliament and the United Nations;

- The Applicant has had problems complying with the terms and conditions of his sentencing and bail;

- The Applicant remains a member, or at the very least is associated with members, of a criminal organization operating in Calgary and involved in a deadly feud with another criminal organization;

- The presence of the Applicant around his step-sister has endangered her life. The Applicant's step-sister was removed from his home by the Alberta Child and Family Services (under court order) to protect her from being collaterally hurt due to the Applicant's gang relations; and

- The on-going gang violence (including two attempts on the Applicant's life) creates a real danger to the Applicant's step-sister and to other innocent people.

[12] The IAD also considered and weighed the evidence that operated in the Applicant's favour. His relationship with his disabled mother and step-sister, his expressions of remorse, his guilty pleas, the potential difficulty in re-establishing himself in Vietnam after 13 years in Canada, and other facts were all taken into account.

[13] The IAD, in conducting its analysis, provided careful explanations of why it preferred the evidence of certain witnesses over others, of why it found the testimony of the Applicant and certain witnesses to be lacking in credibility, and of why certain factors were given more weight on the facts of this case.

[14] Of particular relevance to this judicial review, the IAD considered the Applicant's gang association to be an "aggravating factor" in the seriousness of his crimes. Stated in different words, the IAD concluded that a crime committed in the context of gang violence or membership should be weighed more heavily against the Applicant, compared to a crime that was not. The IAD explained this consideration as follows:

> As part of the evaluation of the effect of the appellant's ongoing association with the FK, I note that another section of the [*IRPA*], section 121, specifically states that when considering penalties under the [*IRPA*] the fact that an offence had been committed in association with a criminal organization is an aggravating factor. I acknowledge that section 121 refers to aggravating factors for offences of human

> smuggling and trafficking. Therefore this is not a required consideration for me. But the fact that the [*IRPA*] notes that association with a criminal organization is an aggravating factor when committing a crime is indicative of the intention of Parliament when considering such issues. I also take note of the comments of the Supreme Court of Canada in the case of *Medovarski* that "the words of this statute, like any other, must be interpreted as having regard to the object, text and context of the provisions, considered together". Therefore, having regard to the [*IRPA*] as a whole, I import the objective of section 121 to a consideration of the seriousness of the appellant's criminal conviction. The fact that he was convicted of a crime of trafficking, in the presence of an identified member of the FK, and is admittedly having an ongoing association with members of the FK is an aggravating factor; both when considering the seriousness of the appellant's criminal acts and his efforts at rehabilitation. [Emphasis added].

[15] In weighing the *Ribic* factors, the IAD referred to *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539 at paragraph 10, where the Supreme Court prioritized security interests. On this basis, the IAD concluded that "[T]he 'non-security' related *Ribic* factors must . . . be disproportionate to outweigh evidence which indicates an ongoing security risk". In this case, the IAD determined that the Applicant's ongoing association with members of a criminal gang was a serious and important factor:

> It aggravates the seriousness of the appellant's criminal convictions, it remains a significant barrier to the appellant's rehabilitation despite the steps and efforts he has made in that regard, and it presents an ongoing danger to innocent people through their association with the appellant and by his ongoing presence in Canada.

[16] The IAD balanced the *Ribic* factors and determined that the factors in favour of the Applicant were "not sufficiently strong to outweigh the security interests which require the appellant's removal from Canada". The IAD also concluded that there were insufficient humanitarian and compassionate considerations, including the best interests of the child, to warrant relief. The IAD declined to exercise its discretion to grant the special relief under s. 67(1)(c) of *IRPA*.

(As told by Justice Judith Snider in *Nguyen-Tran v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 93, [2010] F.C.J. No. 106 (QL)).

[2] In the case of *Sittampalam v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326, [2007] 3 F.C.R. 198, decided by the Federal Court of Appeal and penned by Justice Allen M. Linden, key factors in regard to inadmissibility in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) are considered:

> [15] This requires the Court to assess the proper interpretation of the language in paragraph 37(1)(*a*) of the IRPA. The interpretation of statutes is generally considered to be a question of law; therefore, the standard of review to be applied on this appeal of the case is correctness: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 8.
>
> [16] The Federal Court Judge held that paragraph 37(1)(*a*) includes a person who was a member of a criminal organization before the inadmissibility report. For the following reasons, I agree.
>
> [17] First, this meaning is consistent with the wording of the former Act. Paragraph 19(1)(c.2) of the former Act specifically referred to those who "are or were members ". It read:

Inadmissible persons	**Personnes non admissibles**
19. (1) No person shall be granted admission who is a member of any of the following classes:	**19.** (1) Les personnes suivantes appartiennent à une catégorie non admissible:
[…]	[…]
(c.2) persons who there are reasonable grounds to believe are or were members of an organization that there are reasonable grounds to believe is or was engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of any offence under the *Criminal Code* or	(c.2) celles dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction au *Code criminel* ou à la *Loi réglementant certaines drogues et autres substances* qui peut

Controlled Drugs and Substances Act that may be punishable by way of indictment or in the commission outside Canada of an act or omission that, if committed in Canada, would constitute such an offence, except persons who have satisfied the Minister that their admission would not be detrimental to the national interest;	être punissable par mise en accusation ou a commis à l'étranger un fait – acte ou omission – qui, s'il avait été commis au Canada, constituerait une telle infraction, sauf si elles convainquent le ministre que leur admission ne serait nullement préjudiciable à l'intérêt national;

[18] One of Parliament's objectives when enacting the IRPA was to simplify the former Act. Section 33 does just that: it reduces the necessary repetition of the phrases denoting past, present and future membership in the former Act by establishing a "rule of interpretation" that permits a decision-maker to consider past, present and future facts when making a determination as to inadmissibility.

[19] If one were to interpret paragraph 37(1)(*a*) as including only present membership in an organization, it would, in effect, render section 33 redundant. The Board said (at page 49), and I concur, that consideration of evidence of a person's history and future plans would be relevant to the question of whether a person is currently a member of an organization described in section 37, even without codification to such effect in legislation.

[20] In my view, Parliament must have intended section 33 to have some meaning. The language of section 33 is clear that a present finding of inadmissibility, which is a legal determination, may be based on a conclusion of fact as to an individual's past membership in an organization. In other words, the appellant's past membership in the A.K. Kannan gang, a factual determination, can be the basis for a legal inadmissibility finding in the present.

[21] Second, this interpretation is consistent with the purpose of the inadmissibly provisions and the IRPA as a whole. The inadmissibility provisions have, as one of their objectives, the protection of the safety of Canadian society. They facilitate the removal of permanent residents who constitute a risk to Canadian society on the basis of their conduct, whether it be criminality, organized criminality, human or international rights violations, or terrorism. If one were to interpret "being a member" as including only present membership in an organization described in paragraph 37(1)(*a*), this would have a contrary effect, by narrowing the scope of persons who are declared inadmissible, thereby increasing the potential risk to Canadian safety.

> [22] Third, if the Court were to interpret "being a member" as including only current members, it would lead to absurd results that could not have be intended by Parliament. This would mean that sections 34 (terrorism/security), 35 (crimes against humanity), and 37 (organized criminality) of the IRPA, all of which use the wording "being a member" or "being a prescribed senior official", would only refer to *current* circumstances.

II. Judicial Procedure

[3] This is an application for judicial review of a September 1, 2009 decision of the Immigration Division of the Immigration and Refugee Board (ID) finding the Applicant, Mr. Nghia Trong Nguyen-Tran, inadmissible due to organized criminality pursuant to paragraph 37(1)(*a*) of the IRPA.

III. Facts

[4] The Applicant has a long history with Canadian law enforcement and immigration officials as a result of his alleged links to the Fresh Killers gang (FK) in Calgary, Alberta. On April 20, 2004, a deportation order was issued to the Applicant on the basis of his criminal record. On January 28, 2010, the Federal Court dismissed a judicial review of the deportation order in decision 2010 FC 93, above.

[5] On March 2, 2010 the Applicant appeared for removal from Canada; he was confirmed as arriving in Vietnam on March 4, 2010.

IV. Decision under Review

[6] The ID took as evidence of the FK being a criminal organization the fact that they are engaged in a violent rivalry with the Fresh off the Boat (FOB) gang. Sgt. Eric G. Walker of the Calgary Police Service, who was recognized as an expert witness by the ID, estimated that there had been 21 homicides in the City of Calgary related to this rivalry since 2001. The ID also noted that the Applicant was the intended target of a shooting in February 2005 and that this shooting was linked, by the testimony of the Applicant's girlfriend, to a longstanding grudge (Applicant's Record (AR) at p. 10). It was also relevant that the Calgary police have recently given the Applicant a "duty to warn". These warnings are issued when the Calgary police receive credible information to the effect that a person's life is at risk. The ID cited evidence showing that many of the Applicant's friends have been murdered as a result of the rivalry with the FOB (AR at p. 11).

[7] The ID laid out several criteria of criminal organizations and applied them to the Applicant's case. The ID noted: the Applicant associates with members of the FK; the police have linked the Applicant to the FK since August 2002; the Applicant was convicted and has subsequently been charged with selling narcotics in the manner preferred by the FK, dial-a-dope schemes; and, he has been the target of gang violence (AR at pp. 17-18). The ID concluded that the cumulative effect of the evidence is such that there are reasonable grounds to believe that the Applicant is or was a member of the FK (AR at p. 19).

V. Issue

[8] Is this judicial review application moot?

VI. Analysis

[9] The Applicant's deportation makes the current application moot. Even if this Court were to quash the current decision it would make no difference to the Applicant, as he has already been deported due to serious criminality. Section 229 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, provides that a deportation order is issued for inadmissibility under both sections 36 and 37. Regardless of the current finding regarding the section 37 inadmissibility, the Applicant cannot return to Canada without ministerial authorization.

[10] The Court determines that the current application is moot as per the test in the case of *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, wherein the Supreme Court of Canada outlined the doctrine of mootness:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may

> nonetheless elect to address a moot issue if the circumstances warrant. (Emphasis added).

VII. Conclusion

[11] It is clear from the circumstances of the Applicant's deportation that a decision of this Court will not have any practical effect on the rights of Mr. Nguyen-Tran. The Applicant has been deported and may not return without special ministerial authorization. To send this decision back for redetermination would be without consequence due to the specific background outlined above.

[12] For all of the above reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4511-09
STYLE OF CAUSE:	NGHIA TRONG NGUYEN-TRAN (also known as: Tran Trong Nghi Nguyen) v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	April 13, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	April 20, 2010

APPEARANCES:

Mr. Raj Sharma	FOR THE APPLICANT
Mr. Rick Garvin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

SHARMA HARSANYI Barristers and Solicitors Calgary, Alberta	FOR THE APPLICANT
MYLES J. KIRVAN Deputy Attorney General of Canada	FOR THE RESPONDENT