Federal Court  Cour fédérale

Date: 20181212

Dockets: IMM-1259-18
IMM-1261-18
IMM-1267-18

Citation: 2018 FC 1251

Ottawa, Ontario, December 12, 2018

PRESENT: The Honourable Mr. Justice Harrington

Docket: IMM-1259-18

BETWEEN:

THI DUNG PHAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-1261-18

BETWEEN:

THI DUNG PHAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-1267-18

BETWEEN:

THI DUNG PHAM

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] In 2016, Ms. Pham, a permanent resident, was found to be inadmissible to Canada on the grounds of serious criminality. She was ordered removed. The result would have been different had the matter been heard today. It is not that the law, section 36(1)(a) of the *Immigration and Refugee Protection Act*, has changed; rather it is the Court's interpretation of that law that has changed.

[2] Section 36(1)(a) of the Act (*IRPA)* provides that a permanent resident or foreign national is inadmissible on grounds of serious criminality for 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 an offence for which "a term of imprisonment of more than 6 months has been imposed." Ms. Pham had received a conditional sentence of 20 months for an offence which

carried with it a maximum sentence of 7 years when committed, but 14 years at the time of the admissibility hearing.

[3] In 2016 it was thought reasonable to consider that the maximum term of imprisonment could be the term current at the time of the admissibility hearing, and that a conditional sentence could be a "term of imprisonment". However, in October 2017 the Supreme Court rendered its decision in Tran v Canada (Public Safety and Emergency Preparedness), [2017] SCC 50, [2017] 2 SCR 289. The Court held that the term of imprisonment was to be assessed at the time the offence was committed and that a conditional sentence was not a term of imprisonment, within the meaning of section 36 of IRPA.

[4] These reasons cover three judicial reviews. One is a review of the original decision of the Immigration Division (ID) of the Immigration and Refugee Board which ordered Ms. Pham removed. Thereafter, the Immigration Appeal Division (IAD) held that it had no jurisdiction to consider her appeal because she had been convicted of serious criminality. The second review is of the IAD's refusal to reopen that appeal. The third is the IAD's refusal to extend time to allow Ms. Pham to launch a fresh appeal of the original ID decision. Her ultimate goal is that one of these three judicial reviews will be granted and the matter referred back to the ID or IAD for reconsideration. Her hope is to return to Canada.

I. THE FACTS

[5] In 2009, Ms. Pham committed and was charged with possession of marijuana for the purposes of trafficking and with production of marijuana, the whole contrary to the *Controlled Drugs and Substances Act*. At that time the maximum term of imprisonment was 7 years.

[6] She was convicted on both counts in 2014. By that time the maximum term of imprisonment with respect to production had been increased to 14 years. For present purposes it is not necessary to consider the trafficking conviction. The penalty depended on the quantity involved, which was not established in the record.

[7] The Court of Quebec imposed a 20 month conditional sentence which allowed her to serve her punishment in the community, followed by 12 months of probation.

[8] Thereafter, in accordance with section 44 of *IRPA* an Officer, being of the opinion that Ms. Pham was inadmissible, prepared a report for the Minister. The Minister's delegate was of the opinion that the report was well-founded and referred the matter to the ID for an admissibility hearing.

[9] As aforesaid, the ID found Ms. Pham inadmissible. The Member focused on the maximum term of imprisonment of 14 years current at the time of her hearing, and relied upon the decision of the Federal Court of Appeal in *Canada (Public Safety and Emergency Preparedness) v Tran*, 2015 FCA 237.

[10] Ms. Pham appealed to the IAD. The Minister applied to have the appeal struck as section 64(1) of *IRPA* provides that no appeal lies if the permanent resident has been found to be inadmissible on grounds of serious criminality. Ms. Pham failed to make representations on the Minister's application.

[11] In June 2016 the IAD agreed with the Minister and held that it was without jurisdiction. Somewhat contrary to the ID, the Panel focused on the fact that she had been sentenced to what it considered to be a term of imprisonment of 20 months. Twenty being more than six, Ms. Pham's appeal was struck. Ms. Pham has never sought leave to have that decision judicially reviewed.

[12] It should be borne in mind that by that time, in fact in April 2016, the Supreme Court had granted leave to appeal in *Tran*.

[13] Thereafter, Ms. Pham was informed that she would be removed to Vietnam in April 2017. Her request to a Removals Officer for an administrative stay was refused. She sought leave to have that decision judicially reviewed (IMM-1598-17) and moved for a judicial stay of her removal.

[14] Mr. Justice Martineau dismissed her motion. Thereafter, she went into hiding and IMM-1598-17 was later dismissed due to her failure to file an Application Record.

[15] The Supreme Court rendered its decision in *Tran* in October 2017. As mentioned above the Court held that a term of imprisonment is to be assessed at the time the offence was committed and that a conditional sentence is not a term of imprisonment, within the meaning of section 36 of *IRPA*. This is true whether the standard of review was reasonableness or correctness.

[16] Shortly thereafter, Ms. Pham represented by new counsel, applied for an extension of time to file a notice of appeal of the ID's removal order. Counsel then asked that her application be changed to an application to reopen the IAD's appeal as she had not realized that the IAD had already dismissed Ms. Pham's appeal for lack of jurisdiction.

[17] In early March 2018, the IAD dealt with both the application for an extension of time and the application to reopen the appeal. Both were dismissed. Thereafter, on March 16, 2018, Ms. Pham, now represented by still another counsel, filed these three applications for leave and judicial review.

[18] The application under IMM-1259-18 is with respect to the IAD's refusal to extend time to appeal the decision of the ID.

[19] The application under IMM-1261-18 is with respect to the IAD's refusal to reopen the appeal under section 71 of *IRPA*.

[20] Finally, the application under IMM-1267-18 is for an extension of time to judicially review the ID's decision of January 2016 and thereafter for the grant of judicial review and a referral of the matter back to the ID for reconsideration.

[21] Later in March, under all three docket numbers, Ms. Pham sought a second stay of removal. Her motion was dismissed by Mr. Justice Russell who was of the view that she would not suffer irreparable harm if removed to Vietnam and that she did not come to court with clean hands. She was removed.

[22] In August leave was granted in all three files. However, the extension of time request under IMM-1267-18 was not dealt with. Thus it falls upon me to decide whether an extension of time should be granted (*Chen v Canada (Citizenship and Immigration)*, 2010 FC 899; *Canada (Citizenship and Immigration) v Heidari Gezik*, 2015 FC 1268).

II. ISSUES

[23] The first issue is whether I should grant an extension of time to Ms. Pham to judicially review the ID's decision of January 2016. If she did not have recourse to the IAD due to serious criminality, she had the right to seek leave to have the ID's decision judicially reviewed. (*IRPA*, section 72(2)(a)). Sections 72(2)(b) and (c) of *IRPA* go on to provide that the application is to be filed within 15 days if the matter arose in Canada but that a judge of the Court may "for special reasons" allow an extended time for filing and serving.

[24] If I grant an extension of time and allow the judicial review, the other two judicial reviews become moot. If I either refuse to extend time or extend time but dismiss the application for judicial review, then I must consider the IAD's refusal to reopen the appeal, or to extend time.

[25] Contingent upon my decision in the first issue, I have to determine whether it was unreasonable for the IAD to refuse to reopen the appeal. Under section 71 of *IRPA* an appeal may only be reopened if the foreign national has not left Canada and the IAD is satisfied that the first time around "it failed to observe a principle of natural justice."

[26] The third issue, subject to the above, is to determine whether it was unreasonable for the IAD to refuse to extend time for Ms. Pham to file a new appeal from the ID's decision of January 2016. The basis of Ms. Pham's argument is that if she was not inadmissible on the grounds of serious criminality then she had a right to appeal her removal order under section 63(3) of *IRPA*.

Extension of Time

[27] There is a wealth of jurisprudence dealing with extensions of time under *IRPA*, or under the *Federal Courts Act* and *Rules*. The underlying premise is that justice should be done. The Federal Court of Appeal has held, time and time again, that an extension of time is discretionary and should take into account the following four criteria:

a. Did the moving party have a continuing intention to pursue the judicial review application?

b. Is there some potential merit to the application?

c. Does the moving party have a reasonable explanation for the delay?

d. Is there prejudice to the other party arising from the delay?

It is not necessary that all four criteria be satisfied (*Canada (Attorney General) v Hennelly*, 1999 FCJ 846; *Canada (Attorney General) v Larkman*, 2012 FCA 204 and just recently *Thompson v Attorney General of Canada et al*, 2018 FCA 212).

[28] Counsel for Ms. Pham relies upon *Almrei v Canada (Citizenship and Immigration)*, 2011 FC 554, which dealt with a motion filed in 2010 to extend time in order to review a decision made in 2002 which refused an application for permanent residence. Mr. Almrei swore that he had not received copy of the decision and believed his application was on hold because he was the subject of a "Security Certificate" considered by the Supreme Court in *Charkaoui v Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9. Madam Justice Snider was of the view that this was a reasonable explanation, and granted the extension.

[29] Counsel for the Minister relies upon the recent decision of Chief Justice Crampton in *Lesly v Canada (Citizenship and Immigration)*, 2018 FC 272. At the heart of that case was a fresh interpretation the Supreme Court of Canada gave in *B0110 v Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 SCR 704 to another section of *IRPA* - section 27(1), which deals with, amongst other things, people-smuggling and trafficking in persons. As Mr. Lesly was in a similar situation to *B0110* it followed that he had a strong arguable case if he was within time, just as Ms. Pham has. However, the Chief Justice refused to extend time. At paragraph 24

he considered fairness to third parties who act diligently in filing their applications and appeals therefrom "and as a result are no longer able to benefit from the same substantive change in the law that may form the basis for an application." There is a public aspect to this based on *res judicata*. He pointed out at paragraph 26 that "unless an extension is granted, intervening developments in the common law do not have retrospective effect to decisions that have acquired the status of being 'final'".

[30] In this case there is no evidence that Ms. Pham had a continuing intention to pursue the matter. She only became active again after the Supreme Court's decision in *Tran*. There is no explanation given for the delay. She has sworn no affidavit. There is no reason to speculate, much less infer, that she was lying in hiding waiting for the *Tran* decision. Her request for an extension of time is dismissed.

III. THE IAD'S REFUSAL TO REOPEN

[31] There are two conditions precedent under section 71 of *IRPA*. The appeal division must not only be satisfied that it failed to observe a principle of natural justice, but also that the foreign national in question had not left Canada under a removal order. The short answer is that Ms. Pham is a scofflaw. At the time of her application to the IAD she should not have been in Canada. She should have been in Vietnam. As Madam Justice Strickland put it in *Debnath v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 332, at paragraph 18 "…the clean hands doctrine has been applied in cases where the applicant evaded immigration authorities or an arrest warrant to delay or avoid removal. Here, the applicants' misconduct was serious and

demonstrated a complete disregard for Canadian immigration laws …" In that case the applicants had not been entitled to a pre-removal risk assessment as less than 12 months had elapsed since their refugee claim was last rejected. However, by failing to report for removal and going into hiding they were still in Canada after more than a year had passed. "The need to deter others from similar conduct cannot be understated" (para 25).

[32] The longer answer is that it was not unreasonable for the IAD to satisfy itself that it had not failed to observe a principle of natural justice the first time around. At the heart of natural justice is the right of a party to be given a fair opportunity to make its case, or defence, before an impartial decision-maker. Ms. Pham submits that because of the unreasonable decision of the IAD to decline jurisdiction on the grounds of her serious criminality (as so held by the Supreme Court) she was deprived of the opportunity to make her case on the merits.

[33] The Federal Court of Appeal in *Tran* was attempting to follow the teachings of the Supreme Court. The reasonableness standard of review generally applies and deference is to be shown to a decision-maker in the interpretation of his or her home or related statutes. There may be more than one reasonable conclusion (*Dunsmuir v New Brunswick*, 2008 SCC 9, 2008 1 SCR 190). The Court acknowledged this conundrum when it said at paragraph 87:

> In the circumstances, considering the current teachings of the Supreme Court of Canada and although there may clearly be other defensible interpretations, I cannot conclude that the interpretation adopted by the Minister's delegate in this case is unreasonable. Obviously the deference granted to administrative decision makers is in part meant to give them flexibility to adjust to new arguments and circumstances. It is thus obviously open to the ID and the IAD to adopt another interpretation should they believe that it is warranted by the inconsistent consequences described above. But

> this would likely have to be applied to the three provisions in the IRPA where the expression "term of imprisonment" is used.

[34] The submission is that the IAD fettered its discretion. Based on the decision in *Nguyen v Canada (Citizenship and Immigration)*, 2016 FC 305 the IAD considered the Federal Court of Appeal's decision in *Tran* as "determinative and now binding".

[35] It is true that the IAD could have differed from the ID on the interpretation of section 36(1) of *IRPA*. The Federal Court of Appeal had recognized that section 36 of *IRPA* could be interpreted another way. However, Ms. Pham's recourse was to apply to this Court, rather than to say nothing to the IAD and to then go into hiding.

[36] Tribunals, Courts of First Instance, and Courts of Appeal make errors. This is why we have a hierarchical system, although even the Supreme Court changes its mind from time to time, particularly when it comes to judicial review. As Mr. Justice Martineau noted in *Ikuzwe v Canada (Citizenship and Immigration)*, 2014 FC 875, the principles of natural justice do not cover errors of law that may have been committed by an original decision-maker. Decisions of higher courts which in effect change the common law or an interpretation of a statute, do not have retroactive effect. (See also *Lesly* referred to above).

[37] In *Fiore v Canada (Citizenship and Immigration)*, 2016 FC 1098, Madam Justice Tremblay-Lamer reaffirmed that the IAD in the interpretation of its home statute reasonably concluded that a conditional sentence was a term of imprisonment. Following the Supreme Court's decision in *Tran*, the IAD allowed an application to reopen the appeal (IAD File No.

VB5-00529). All the Member said was "after reviewing appellant's counsel's letter of December 20, 2017, and noting that the Minister's counsel does not oppose, the application to re-open the appeal is allowed." This unreasoned decision has no precedential value. It is also distinguishable in that in that case the Minister did not oppose, while in this case, she does.

[38] Counsel has also brought to my attention another decision of the IAD: *Gabriel v Canada (Public Safety and Emergency Preparedness)*, 2018 CanLII 26590, a decision of the IAD. That decision dealt with both natural justice, which will be dealt with under this heading, and with an extension of time, which will be dealt with separately. The Member said that the original IAD decision "failed to engage in any meaningful way with the issues raised in paragraph 87 of the Federal Court of Appeal decision in Tran or otherwise with the underlying facts and circumstances of the appeal." The Member was of the view that the IAD had fettered its discretion and not only erred in law "but also denied the appellant his participatory right to a hearing on the merits of his appeal."

[39] Based on the state of the law as it was at the time the decision of the IAD was justifiable. Ms. Pham had not bothered to make any representations on the Minister's application to dismiss for want of jurisdiction. If the IAD erred, Ms. Pham should have exercised her other recourses. An error in law is not a breach of natural justice.

[40] In sum, it is incorrect to say that Ms. Pham was denied the opportunity of making her case. Her case before the IAD was whether or not it had jurisdiction. She made no submissions, and should not be heard to complain now. She was not denied natural justice.

IV. THE IAD'S REFUSAL TO EXTEND TIME TO APPEAL

[41] As I understand it this would be a fresh appeal of the ID's 2016 decision in virtue of section 63(2) of *IRPA* which gives a permanent resident the right to appeal against a decision made at an admissibility hearing to remove him or her. The section 64 bar on the ground of serious criminality would no longer apply.

[42] The IAD noted that when her first appeal was dismissed for lack of jurisdiction it was done in accordance with the case law as it then stood. That decision of the IAD is final and still stands because she did not apply for judicial review before the Federal Court although as it said "she could have done so particularly since at that time, the Supreme Court of Canada had already accepted to hear the appeal in Tran, but did not do so." To grant an extension of time would allow Ms. Pham to benefit from a retroactive application of *Tran*.

[43] The argument before the IAD was based on *obiter* remarks by Madam Justice Snider in *Nabiloo v Canada (Citizenship and Immigration)*, 2008 FC 125. Ms. Nabiloo had also been ordered removed on the grounds of serious criminality. Although her application for judicial review was dismissed, Madam Justice Snider added that she did not believe Ms. Nabiloo would be without recourse to the IAD, as at the time Ms. Nabiloo's criminal conviction was under appeal. Assuming that her sentence was reduced such that she was no longer inadmissible to Canada due to serious criminality she would not be barred by section 64 of *IRPA* from bringing an appeal to the IAD. While she would be out of time in accordance with the *Immigration*

Appeal Division Rules she could seek an extension of time from the IAD in accordance with its Rule 58.

[44] The circumstances in this case are quite different. Ms. Pham had not appealed her sentence. As the Chief Justice noted in *Lesly* above, at paragraph 26, an extension "…parallels the approach taken to convictions in criminal law in cases that are no longer 'in the system', even where the provision under which the accused was convicted is subsequently declared constitutionally invalid." (citations omitted).

[45] There is no reviewable error on the IAD's part in refusing to extend time.

V. CERTIFIED QUESTION

[46] Ms. Pham proposes the following serious question of general importance which would support an appeal to the Federal Court of Appeal:

> Does the Board fail to observe a principle of natural justice as that term is understood in s.71 of the *Immigration Refugee Protection Act* when it refuses to hear an appeal on the basis of an unreasonable interpretation of its jurisdiction?

[47] The Minister opposes primarily on the grounds that the proposed question does not arise on the facts of the case and is not dispositive; and/or the applicable law is settled.

[48] In my opinion the Board did not fail to observe a principle of natural justice. Jurisdiction is a question of law, and an error does not constitute a breach of natural justice. The law is settled. *Tran* does not have retroactive effect.

JUDGMENT IN IMM-1259-18, IMM-1261-18 AND IMM-1267-18

THIS COURT'S JUDGMENT is that the applications for judicial review in IMM-1259-18 and IMM-1261-18 are dismissed, as is the application for an extension of time in IMM-1267-18. There is no question of general importance to certify.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-1259-18; IMM-1261-18; IMM-1267-18
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