Federal Court  Cour fédérale

Date: 20190206

Docket: IMM-3330-18

Citation: 2019 FC 152

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, February 6, 2019

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

HAMZA BOUALI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The applicant, Hamza Bouali, is a citizen of Algeria. He came to Canada in 1995 when he was three (3) years old. He became a permanent resident on May 24, 1995, and never applied for Canadian citizenship.

[2] On September 7, 2017, the applicant was convicted of robbery under paragraph 344(1)(b) of the *Criminal Code*, RSC, 1985, c C-46 [*Criminal Code*], for a theft committed at a restaurant. He was sentenced to one year of imprisonment. He was also found guilty of disguise with intent to commit an indictable offence, under subsection 351(2) of the *Criminal Code*. For this offence, he was sentenced to six (6) months' imprisonment concurrent with the first term of imprisonment.

[3] Because of the conviction, a report was prepared under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], and issued against the applicant on October 2, 2017. The officer was of the opinion that the applicant was inadmissible on grounds of serious criminality within the meaning of paragraph 36(1)(a) of the IRPA. The report was referred to the Immigration Division [ID] for an admissibility hearing under subsection 44(2) of the IRPA.

[4] On December 21, 2017, the applicant was granted a conditional release with various specific conditions to be met. The applicant was released from prison on January 5, 2018, after four (4) months of incarceration.

[5] On January 15, 2018, an ID officer found that the applicant was inadmissible to Canada under paragraph 36(1)(a) of the IRPA because he had been convicted in Canada of an offence punishable by a maximum term of imprisonment of at least ten (10) years and for which he had received a term of imprisonment of more than six (6) months. He issued a deportation order against the applicant that same day.

[6] On March 7, 2018, the applicant filed an application for an extension of time to file a notice of appeal with the Immigration Appeal Division [IAD]. He alleged in his application that he made it clear at his ID hearing that he intended to appeal the decision, but that his counsel at the time did not do so despite his instructions to that effect. He also alleged that upon his release from prison on January 5, 2018, he had been detained for less than six (6) months, thus allowing him to appeal the decision on the basis of humanitarian and compassionate considerations, despite the declaration of inadmissibility. Finally, he invoked the short delay incurred as well as the absence of prejudice to the respondent.

[7] On June 20, 2018, the IAD denied the applicant's request for an extension of time since it was of the view that the applicant did not meet the criteria set out in case law for obtaining such an order. In its analysis, the IAD pointed out that (1) the transcript of the ID hearing does not demonstrate a desire on the part of the applicant to appeal the decision, contrary to the applicant's claim; (2) the applicant does not state any reasonable grounds for the delay in filing the appeal; and (3) the applicant cannot appeal pursuant to subsection 64(2) of the IRPA since he was sentenced to more than six (6) months of imprisonment.

[8] The applicant seeks judicial review of that decision. First, he submits that the decision of the IAD does not give sufficient reasons, as the IAD failed to analyze each of the criteria set out by the Federal Court of Appeal in *Canada (Attorney General) v Hennelly*, [1999] FCA No. 846 [*Hennelly*]. Second, the applicant submits that the IAD erred in its interpretation of subsection 64(2) of the IRPA.

II. Analysis

A. *Standard of review*

[9] It is well established that the sufficiency of the reasons must be assessed on a standard of reasonableness since it does not constitute independent grounds for setting aside a decision. The reasons must be examined together with the result and serve the purpose of showing whether that result falls within a range of possible outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14, 18, 22 [*Newfoundland Nurses*]; *Khangura v Canada (Citizenship and Immigration)*, 2012 FC 702 at para 12 [*Khangura*]).

[10] When the reasonableness standard applies, the role of the Court is to determine whether the decision falls within the range of *"*possible, acceptable outcomes which are defensible in respect of the facts and law*"*. If *"*the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility*"*, it is not open to the Court to substitute its own view of a preferable outcome (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

[11] It is also generally recognized in case law that it is not necessary for the reasons to be exhaustive or perfect or to refer to all of the evidence or arguments presented by a party or appearing in the record. Even where the reasons for the decision are brief or poorly written, the Court should defer to the decision-maker's weighing of the evidence as long as it is able to understand why the decision was made (*Newfoundland Nurses* at para 16, 18; *Nguyen v Canada (Citizenship and Immigration)*, 2016 FC 1207 at paras 37-38).

[12] With respect to the standard of review applicable to the IAD's interpretation of subsection 64(2) of the IRPA, the parties submit that the standard of review is correctness. The Court recognizes that there is some difference of opinion in the jurisprudence of this Court as to the applicable standard of review. Some decisions consider this to be a true question of jurisdiction, reviewable on a standard of correctness (see *Sivagnanasundram v Canada (Citizenship and Immigration)*, 2015 FC 1233 at para 25; *Nagalingam v Canada (Citizenship and Immigration)*, 2012 FC 1410 at para 12; *Nabiloo v Canada (Citizenship and Immigration)*, 2008 FC 125 at para 9). Others consider it to be a matter of interpreting a home statute, which must be reviewed on a standard of reasonableness (see *Granados v Canada (Citizenship and Immigration)*, 2018 FC 302 at para 12; *Flore v Canada (Citizenship and Immigration)*, 2016 FC 1098 at paras 15, 17-20; *Shehzad v Canada (Citizenship and Immigration)*, 2016 FC 80 at para 11). In any event, it is not necessary for the Court to rule on the applicable standard of review since it is of the view that the IAD did not make any reviewable error in its interpretation of subsection 64(2) of the IRPA, regardless of the standard of review used.

B. *Adequacy of reasons*

[13] Under subsection 5(3) of the *Immigration Appeal Division Rules*, SOR/2002-230, the applicant was required to file a notice of appeal with the IAD no later than thirty (30) days after receipt of the removal order made against him. He therefore had until February 14, 2018, to do so. The notice of appeal, however, was received by the IAD on March 8, 2018, approximately three (3) weeks after the expiry of the prescribed time limit.

[14] The decision whether to grant an extension of time is a discretionary one. The following criteria have been developed by case law to guide the decision-maker in the exercise of his or her discretion. The applicant must demonstrate (1) a continuing intention to pursue the proceeding; (2) the merits of the proceeding; (3) the absence of prejudice to the adverse party; and (4) a reasonable explanation for the delay (*Hennelly* at para 3, *Alberta v Canada*, 2018 FCA 83 at paras 44-45).

[15] The applicant submits that the reasons given by the IAD are insufficient since the IAD analyzed only two (2) of the four (4) criteria identified above. He also alleges that the IAD's analysis of the two (2) criteria discussed was incomplete and that it should have made more reference to his request for an extension of time in the decision. He asserts that his request for an extension of time clearly demonstrated his intention to appeal the decision, having instructed his counsel at the hearing to appeal, and having taken steps to find new counsel to pursue his immigration proceedings. He also criticizes the IAD for having concluded that he gave no reasonable grounds for the delay. According to the applicant, the evidence showed that he was unable to file his notice of appeal before March 7, 2018. The applicant is of the view that had the IAD carefully considered each of the criteria in *Hennelly*, it would have concluded that he had a continuing intention to pursue his appeal, that the appeal was well founded, that the Minister was not prejudiced by the delay in filing the appeal and, finally, that there was a reasonable explanation for the delay.

[16] After reviewing the record and the decision at issue, the Court finds that the reasons given by the IAD, although succinct, are sufficient to understand the basis of its decision to deny the applicant an extension of time.

[17] First, it is incorrect to claim that the IAD only addresses two (2) of the four (4) criteria. Three (3) of the four (4) *Hennelly* criteria are in fact addressed in the decision. While it is that the IAD does not directly address the prejudice criterion, the fact remains that, in the exercise of its discretion, it was up to the IAD to determine the importance to be given to each of the criteria, given the circumstances of the case. It was not required to make a finding on each of the criteria (*Newfoundland Nurses* at para 16, *Khangura* at para 16).

[18] Next, with respect to the criterion of the applicant's continuing intention to appeal the ID's decision, the IAD correctly points out that the transcript of the ID hearing did not demonstrate the applicant's will to appeal the decision. The reasons given by the IAD respond directly to the applicant's argument in his letter of March 7, 2018, that [TRANSLATION] "[d]uring his [ID] hearing, [he] clearly indicated his intention to appeal the negative decision in his case" and that "despite those instructions in this regard, [his counsel] did not appeal the decision".

[19] The Court recognizes that it is possible that the applicant expressed to his counsel an intention to appeal the decision of the ID. Indeed, the minutes of the hearing before the ID show that in making its decision, the ID informed the applicant of the following:

> [TRANSLATION]
>
> [9] So, in this regard, I must issue a deportation order against [the applicant]. As I stated at the beginning of the hearing, some people have a right of appeal, but given the sentence that Mr. [Bouali]

> received, his right of appeal could be withdrawn. I invite him to discuss this further with his counsel (Certified Tribunal Record at p 17).

[20] However, the IAD had no evidence before it of a discussion between the applicant and his former counsel regarding the intention to appeal. In addition, the applicant did not adduce any affidavit attesting to the intention he had expressed to his counsel or to the steps he had allegedly taken between January 15, and March 5, 2018.

[21] Moreover, the Court notes a conflict in the applicant's explanations as to when the decision to appeal to before the IAD had been made. In his application for an extension of time, the applicant submits that he gave his counsel clear instructions to the effect that he wished to appeal the decision and that it was not until March 7, 2018, that he learned that the notice of appeal had not been filed in his case. However, in the reply filed in support of his application for judicial review, he alleges that he sincerely believed that he could not appeal the ID's decision and that for this reason he did not need to find a new lawyer immediately in order to respect a strict deadline. Although this last statement was not before the IAD, it is sufficient to raise questions as to the "continuing" intention of the applicant to appeal the decision.

[22] With respect to the criterion of a reasonable explanation for the delay, the IAD notes in its decision that the applicant did not state any reasonable grounds for having delayed the filing of his appeal. It was entirely open to the IAD to draw such a conclusion in light of the record before it.

[23] Finally, the IAD points out that the application was devoid of any prospect of success since the applicant could not appeal, pursuant to subsection 64(2) of the IRPA, having been sentenced to a term of imprisonment of more than six (6) months. This explanation was sufficient to show that the appeal was doomed to fail for lack of jurisdiction.

C. *Interpretation of subsection 64(2) of the IRPA*

[24] Paragraph 36(1)(a) of the IRPA, reproduced below, provides for inadmissibility on grounds of serious criminality:

36(1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36(1)** Emportent interdiction de 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 pour laquelle un emprisonnement de plus de six mois est infligé;

[25] Also, whereas subsection 63(3) of the IRPA allows permanent residents to appeal removal orders made against them, there are restrictions associated with that right of appeal, as provided under subsections 64(1) and (2) of the IRPA:

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	**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

resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.	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 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).

[26] The applicant alleges that the IAD erred in law in finding that the applicant could not appeal to the IAD under subsection 64(2) of the IRPA, because he served less than six (6) months of his prison sentence. He submits that subsection 64(2) of the IRPA must be interpreted in light of the principles laid down by the Supreme Court of Canada [SCC] in *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 [*Tran*], and that the use of the term "imprisonment" in subsection 64(2) of the IRPA refers to time served in prison and does not include the period following the granting of parole. On this point, the applicant makes an analogy between parole and conditional sentences, as discussed in *Tran*.

[27] In *Tran*, the SCC concluded that a conditional sentence does not constitute "imprisonment" within the meaning of paragraph 36(1)(a) of the IRPA, since it would be absurd for a person sentenced to conditional sentences to suffer the same consequences as a person sentenced to serve a shorter prison term (*Tran* at para 32).

[28] The applicant submits that the same reasoning should apply to the interpretation of subsection 64(2) of the IRPA and that a person who is released after four (4) months of imprisonment should not suffer the same consequences as a person incarcerated for more than six (6) months. Finally, he argues that, similarly to conditional sentences, the purpose of parole is to encourage reintegration and reduce the rate of incarceration. Like a conditional sentence, time served in the community as a result of incarceration in prison does not constitute imprisonment within the meaning of paragraph 36(1)(a) and subsection 64(2) of the IRPA.

[29] For the reasons that follow, the Court cannot agree with the applicant's arguments.

[30] Subsection 64(2) of the IRPA has been interpreted many times in the past. The courts have been consistent on this point. It is not the length of time actually served in prison prior to granting parole which is decisive, but rather the term of imprisonment imposed (*Cartwright v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 792 at para 65 [*Cartwright*]; see also *Martin v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 347 at para 5; *Nguyen v Canada (Citizenship and Immigration)*, 2010 FC 30 at para 18; *Nabiloo v Canada (Citizenship and Immigration)*, 2008 FC 125 at para 12).

[31] Although *Tran* is subsequent to this jurisprudence, the Court does not consider that this allows it to challenge the established interpretation of subsection 64(2) of the IRPA.

[32] First, *Tran* was referring to the term "imprisonment" in paragraph 36(1)(a) of the IRPA.

[33] Moreover, in pointing out that the meaning of the word “imprisonment” could vary according to the legislative context, the SCC relied on its interpretation of this term in *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 [*Medovarski*]. In that case, there was a question of interpreting the transitional provisions that removed the right of permanent residents to appeal against a removal order for serious criminality. In interpreting the ban on appeals in subsection 64(2), the SCC referred to the person “sentenced to a prison term of more than two years” (emphasis added, *Medovarski* at paras 11, 13).

[34] Similarly, in *Tran*, the SCC looked at the sentence imposed *at the time* of conviction. Mr. Tran was sentenced to a twelve (12)-month suspended sentence in the community. In this case, the applicant was sentenced to one (1) year in prison.

[35] The interpretation according to which the right of appeal is restricted in relation to the conviction—that is, the moment sentence is passed—is consistent with this Court’s interpretation of subsection 64(2) of the IRPA in *Cartwright.* In that case, the applicant was granted parole prior to the two (2)-year period prescribed by subsection 64(2) of the IRPA as it then read. In interpreting the word “punish” in subsection 64(2) of the IRPA, Justice Elizabeth Heneghan clarified that “[t]o ‘punish’ a person for a crime is to impose judicial sanction; it is to pronounce a sentence relative to the crime for which a conviction has been entered” (*Cartwright* at para 67). This definition of the term supports the interpretation that the applicant was “punished” at the time of sentencing.

[36] The Court finds that the interpretation proposed by the applicant would ensure that a claimant's rights of appeal to the IAD would be determined by the Parole Board of Canada. As noted by Justice Heneghan in *Cartwright*, the term of the "imprisonment" within the meaning of the IRPA should be determined by the criminal courts on sentencing and not by the Parole Board of Canada or provincial parole boards.

III. Conclusion

[37] After reviewing the record and the decision, the Court is of the view that the reasons of the IAD allow it to determine whether the finding denying the extension of time is reasonable. The Court also finds that the IAD made no reviewable error in its interpretation of subsection 64(2) of the IRPA, regardless of the standard of review applicable to it. For all these reasons, the application for judicial review is dismissed.

IV. Certified question

[38] The applicant proposes that the following question be certified for consideration by the Federal Court of Appeal under paragraph 74(d) of the IRPA:

> [TRANSLATION]
>
> Given that the term "imprisonment", in the case of paragraph 36(1)(a) and section 64 of the *IRPA*, makes reference to the notion of "prison" according to the Supreme Court in *Tran*, and that the applicant served less than six months in prison, could he be eligible to appeal to the IAD under s. 64 of the *IRPA*?

[39] To be certified, a question must be dispositive of the appeal, transcend the interests of the immediate parties to the litigation, and contemplate issues of broad significance or general

importance (*Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9; *Varela v Canada (Citizenship and Immigration)*, 2009 FCA 145 at paras 28-29; *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at para 11).

[40] The Minister objects to the applicant's application for certification of a question and argues that the question is not dispositive or general in nature.

[41] The Court agrees that the question is not dispositive since the IAD denied the request for an extension of time to file an appeal, not only on the basis of the appeal's lack of merit because of its interpretation of subsection 64(2) of the IRPA, but also in terms of two (2) other *Hennelly* criteria, namely, the lack of a continuing intention to pursue the appeal and the absence of a reasonable explanation justifying the delay.

[42] For these reasons, the Court declines to certify the proposed question.

JUDGMENT in IMM-3330-18

THIS COURT' JUDGMENT is that:

1. The application for judicial review is dismissed; and

2. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

Certified true translation
This 7th day of May, 2019.
Michael Palles, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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