Federal Court  Cour fédérale

Date: 20230314

Docket: IMM-6435-21

Citation: 2023 FC 341

Ottawa, Ontario, March 14, 2023

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

FRANCISMAR DOS SANTOS E SILVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Francismar Dos Santos E Silva, is a citizen of Brazil. He seeks judicial review a decision by the Refugee Appeal Division [RAD] dated August 19, 2021, upholding a decision by the Refugee Protection Division [RPD] that he is excluded pursuant to Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, 189 UNTS 137 [Convention] and section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27

[IRPA] [Decision]. The RAD concluded that the Applicant had committed two serious non-political crimes, either of which would have been sufficient on its own to exclude him.

[2] Prior to coming to Canada in 2018, he resided in the United States for approximately 16 years without status. While in the United States, the Applicant was charged with several offences. On April 12, 2002, while in Connecticut, he was charged with three offences: possession of narcotics, the sale of certain illegal drugs, and the sale of illegal drugs within 1,500 feet of a school, public housing or childcare facility. On January 31, 2016, while in Florida, the Applicant was charged with driving under the influence. The Applicant did not appear in court for either of the proceedings and left behind outstanding warrants.

[3] In coming to its conclusion, the RAD rejected the Applicant's argument that, because his offence took place in 2016, the RPD was bound to consider it against the *Criminal Code* provisions in effect at that time. The Applicant's argument was based on *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 [*Tran*], where the Supreme Court of Canada states a maximum term of imprisonment of at least 10 years had to be in effect at the time of the commission of the offence, and not the date of the admissibility assessment, when determining whether a person is inadmissible to Canada on grounds of serious criminality under paragraph 36(1)(a) of the IRPA. The RAD did not agree Tran should apply in this circumstance because *Tran* clarified a point about the IRPA's paragraph 36(1)(a), not Article 1F(b), and because the Federal Court of Appeal's decision in *Sanchez v Canada (Citizenship and Immigration)*, 2014 FCA 157 [*Sanchez*]) explicitly states that the RPD should consider the exclusion issue based on the penalty at the time of the assessment.

[4] The central issue in the present case is whether the Supreme Court's decision in *Tran* has any effect on the Federal Court of Appeal's decision in *Sanchez*, and in particular whether *Tran* alters the benchmark of time for determining the seriousness of the offence in both exclusion and admissibility cases. In other words, and as stated by the Applicant: Is *Sanchez* still good law?

[5] The Applicant submits that the RAD (i) erred by finding that *Tran* only applies to permanent residents and foreign nationals under section 36 of the IRPA and not to refugees under section 98; (ii) misapplied the factors set out in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 [*Jayasekara*] when assessing the Applicant's impaired driving charge; and (iii) ignored relevant evidence pertaining to the narcotics charges.

[6] In contrast, the Respondent submits that (i) *Tran* does not apply to refugee claimants; (ii) had the RAD ignored *Sanchez*, it would have committed an error; and (iii) the RAD reasonably concluded that the Applicant's crimes were serious.

[7] For the reasons that follow, and despite the able submissions of counsel for the Applicant, this application for judicial review is dismissed.

II. Issues and Standard of Review

[8] The parties raise numerous issues, which I reformulate as follows:

A. Did the RAD err by concluding that the Supreme Court's judgment *Tran* does not apply to exclusion cases when making a decision under section 98 of the IRPA?

B. Did the RAD ignore relevant evidence with respect to the narcotics charges?

C. Should a question be certified?

[9] The Applicant submits that the first issue should be evaluated on a standard of correctness on the basis that it is an issue of law. The Respondent submits that reasonableness is the presumptive standard of review and that the applicability of *Tran* does not fall into the category of questions of law that are of central importance to the legal system as a whole.

[10] I agree with the Respondent. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] emphasized that the presumption of reasonableness is the starting point in all cases (paras 10, 31, 58). General questions of law that are of central importance to the legal system as a whole are, however, reviewable on a standard of correctness (*Vavilov* at paras 58-59). The Supreme Court instructs that "the mere fact that a dispute is 'of wider public concern' is not sufficient for a question to fall into" the category of correctness (*Vavilov* at para 61). In the matter at hand, while there is in my view a wider concern beyond this case and a debate as to the applicable line of jurisprudence, the issue does not rise to the level set by the Supreme Court, namely a general question of law of central importance to the legal system as a whole (*Vavilov* at paras 60-61). I therefore find that the first question shall be subject to a reasonableness review. In addition, I note that even if I had found that the standard of correctness applies, my conclusion as to the first issue would remain the same.

[11] Barring a situation that calls for a correctness review, which I have found is not present in this case, the standard of review applicable to a question of exclusion under Article 1F(b) of the

Convention is that of reasonableness (*Vavilov* at paras 10, 16-17; *Sanchez* at para 8; *Abbas v Canada (Citizenship and Immigration),* 2019 FC 12 at para 12 [*Abbas*]; *Diaz Castillo v Canada (Citizenship and Immigration),* 2021 FC 1118 at para 10).

[12] A reasonable decision is one that is justified in relation to the facts and the law that constrain the decision maker (*Vavilov* at para 85). It is the Applicant, the party challenging the decision, who bears the onus of demonstrating that the RAD's decision is unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the challenging party must satisfy the court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100).

[13] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). As such, the approach is one of deference, especially with respect to findings of fact and the weighing of evidence. A reviewing court should not interfere with factual findings, absent exceptional circumstances, and it is not the function of this Court on an application for judicial review to reweigh or reassess the evidence considered by the decision maker (*Vavilov* at para 125). A reasonableness review also is not a "line-by-line treasure hunt for error," the reviewing court simply must be satisfied that the decision maker's reasons "add up" (*Vavilov* at paras 102, 104).

III. Analysis

A. *The RAD did not err by declining to apply the Supreme Court's decision in* Tran.

[14] Prior to December 2018, operating a vehicle while impaired with alcohol carried a maximum sentence of five years of imprisonment. This, however, changed on December 18, 2018, when an amendment to the Criminal Code increased the maximum penalty to ten years. This is relevant because the increase in the maximum penalty means that the RAD concluded that the Applicant's crime is presumed to be serious, based on the Supreme Court of Canada's statement that "where a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada, the crime will generally be considered serious" (*Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at para 62). The RAD noted that the assumption may be rebutted by considering the factors set out by the Federal Court of Appeal in *Jayasekara*. The RAD, however, concluded that the *Jayasekara* factors did not rebut the presumption of seriousness in the present case.

[15] In reaching its conclusion that Tran did not apply, the RAD noted that the Supreme Court in Tran found that the phrase "punishable by a maximum term of imprisonment of at least 10 years" in paragraph 36(1)(a) of the IRPA refers to the maximum term of imprisonment available at the time of the commission of the offence when determining a person's admissibility to Canada. The RAD concluded that the analysis under Article 1F(b) of the Convention differs from that of section 36 of the IRPA, and that *Sanchez* remains applicable because it addresses Article 1F(b) directly.

[16] The Applicant submits that because his offence took place in 2016, the RAD was bound, on the basis of *Tran*, to consider it against the provisions of the *Criminal Code* in effect at the time. The Applicant pleads that, while the tests for admissibility and exclusion are not identical, the post-*Tran* benchmark should be the date of the commission of the offence in all cases – be they a visitor, worker, permanent resident or refugee claimant. Otherwise, in the Applicant's view, the law is being applied in a discriminatory manner. The Applicant states that by limiting the scope of *Tran*, one holds refugee claimants to a higher standard than permanent residents and foreign nationals.

[17] The Respondent submits that it was reasonable for the RAD to follow *Sanchez* in its exclusion analysis. The Respondent pleads that there is a clear distinction between paragraph 36(1)(a) of the IRPA and Article 1(F) in the jurisprudence and the law. The Respondent highlights that it is possible for a person to be found to be a Convention refugee in Canada and still be found inadmissible to Canada, which speaks to the separate nature of the tests, analysis, and intent between paragraph 36(1)(a) of the IRPA and Article 1F(b) of the Convention. The Respondent submits that it was not for the RAD to move the law forward and had it sought to do so, the decision would have been unreasonable.

[18] I have not been persuaded that the RAD erred in its conclusion that *Sanchez* was accepted case law and that it was not bound to apply *Tran* to an analysis under Article 1F(b). I agree with the Respondent that it was not for the RAD to expand the application of *Tran*, when there is no indication in the *Tran* decision that the analysis was extended beyond paragraph 36(1)(a) of the IRPA.

[19] The Federal Court of Appeal's judgment in *Sanchez* is precisely on point given the certified question and answer at para 9:

> …
>
> > Question: When assessing the Canadian equivalent of a foreign offence in the context of exclusion under Article 1F(b) of the Convention Relating to the Status of Refugees and the Jayasekara factors, should the Refugee Protection Division Member assess the seriousness of the crime at issue at the time of commission of the crime or, if a change to the Canadian equivalent has occurred in the interim, at the time when the exclusion is being determined by the Refugee Protection Division?
> >
> > Answer: If a change to the penalty for the Canadian equivalent offence has occurred, the assessment should be done at the time when the Refugee Protection Division is determining the issue of the section 1F(b) exclusion.

[20] The Federal Court of Appeal found that when "assessing the penalty for the equivalent crime under Canadian law, the Refugee Protection Division cannot close its eyes to the law that is on the books at the time of its determination" (*Sanchez* at para 6). The Federal Court of Appeal was clear.

[21] The Federal Court of Appeal also substantially agreed with the Federal Court's reasoning, which included the following:

> > [60] It is for Canada to decide who it regards as undeserving, and Canada's views on that may well change from time to time as Parliament alters its views on particular crimes. A crime previously regarded with more leniency may well be seen as much more threatening and repugnant as times and governments change. In my view, a claimant considered undeserving of protection at the time of the refugee hearing cannot be allowed to claim refugee status because he or she can say their criminal activity was regarded as

> less serious at the time of commission. If that were the case, refugee protection in Canada could be granted to people the country has come to regard as highly undesirable and undeserving. I don't think Canada's hands can be tied in its way (*Sanchez v. Canada (Citizenship and Immigration)*, 2013 FC 913).

[22] In contrast, the Supreme Court's reasoning in *Tran* was centred on Mr. Tran's status as a permanent resident and the presumption against retrospectivity. The Supreme Court found that the obligation of permanent residents to behave lawfully and not engage in "serious criminality" as defined in subsection 36(1) of the IRPA must be communicated to them in advance – otherwise , it would be potentially unfair (*Tran* at paras 40-49). While Parliament is entitled to change its views on the seriousness of a crime, it is not entitled to alter the mutual obligations between permanent residents and Canadian society without doing so clearly and unambiguously (*Tran* at para 42). The Supreme Court found that Parliament had not done so in that case and that Mr. Tran could not have been aware when he was committing his offence that he was engaging in an act of "serious criminality" that may breach his obligations and lead to deportation (at paras 41-42). Consequently, the Supreme Court concluded that "the right to remain in Canada is conditional, but it is conditional on complying with knowable obligations. Accordingly, the relevant date for assessing serious criminality under paragraph 36(1)(a) is the date of the commission of the offence, not the date of the admissibility decision." (at para 42).

[23] I find that the rationale for the decision in *Tran* differs from the considerations expressed by the Federal Court and the Federal Court of Appeal in *Sanchez*. In my view, it was reasonable of the RAD to conclude that the reasoning in *Sanchez* remains applicable to the matter at hand following *Tran*. Paragraph 36(1)(a) of the IRPA addresses convictions for crimes committed within Canada, and Article 1F(b) pertains to crimes outside the country of refuge prior to

admission into the country of refuge. Indeed, had the RAD opted to depart from established authority, *Sanchez*, and expanded *Tran* to apply in the exclusion context, there is an appreciable risk that the RAD's decision could have been found to be unreasonable.

[24] The Applicant raises the related issue of whether the RAD, "having applied the wrong test under Canadian law, came to an unreasonable decision on the driving offence". The Applicant submits that, had the RAD used the standard in *Tran*, it would have come to a different result given that at the time, section 255 of the *Criminal Code* provided for a maximum sentence of 5 years. Furthermore, the Applicant submits that the RAD ignored the fact that the Minister created a policy exemption for persons seeking to enter Canada on impaired driving offences that occurred before December 18, 2018. The Applicant submits that this combination of errors led to an unreasonable decision.

[25] I disagree. First, I have found that it was reasonable for the RAD to rely on *Sanchez* and consider the relevant time for the assessment to be the time of determination of the issue of exclusion, rather than the date the offence was committed. Second, the RAD considered the direction issued by the Minister and concluded that the direction applies to section 36 of the IRPA. I see no reason to intervene.

B. *The RAD did not ignore relevant evidence with respect to the narcotics charges.*

[26] The Applicant submits that the documentary evidence is that the Applicant entered a plea to the simple charge of possession and was provided with an absolute discharge, and thus this could not possibly be a serious offence. At the hearing, counsel explained that the documents

indicate that the plea vacation and the *nolle prosequi* entered on November 23, 2020, are equivalent to an unconditional discharge. The Applicant pleads that the RAD chose to ignore the resolution of the charge, thereby rendering the Decision unreasonable.

[27] The Respondent pleads that the RAD was alive to the fact that the Applicant was not prosecuted, but nevertheless assessed the crime as serious based on the charges for possession and sale of narcotics, and the information contained in the police incident report. The RAD, relying on *Abbas*, found that it was not a reviewable error to exclude a claimant based on dismissed charges. The Respondent highlights the RAD's concerns with the Applicant's credibility. The Respondent submits that taking the above into account, the RAD reasonably assessed the seriousness of the crime based on the evidence before it.

[28] The Applicant has failed to persuade me that the RAD committed a reviewable error in its treatment of the evidence on the narcotics charges. As noted above, it is not the function of this Court to reweigh or reassess the evidence considered by the RAD (*Vavilov* at para 125). The RAD considered the documents from the Connecticut Superior Court, the accompanying letter from the Public Defender, and the fact that a *nolle prosequi* was entered. The RAD considered applicable jurisprudence in relation to the dismissed charges, and then proceeded to assess the evidence in the record. Ultimately, I consider the issue to be one of weight, with the RAD giving more weight to the police incident report. Consequently, I decline to intervene.

C. *Should a question be certified?*

[29] As stated recently by the Federal Court of Appeal, to be properly certified, a question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance (*Canada (Immigration and Citizenship) v Laing*, 2021 FCA 194 at para 11). Moreover, a question that is in the nature of a reference, or whose answer depends on the facts of the case cannot raise a properly certified question (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at paras 46-47; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36).

[30] The Applicant submits the following question for certification:

> Whether the decision of the Supreme Court of Canada in *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289, has altered the benchmark of time for determining the seriousness of the offence in exclusion, as well as admissibility, cases, thereby bringing refugee claimants into parity with all other applicants seeking to enter Canada?

[31] The Applicant pleads that the proposed question meets the criteria as it transcends the interests of the parties by seeking to address the lack of parity between refugee claimants being considered for exclusion and all other applicants, including visitors, under the IRPA. The Applicant submits that the issue is dispositive of the appeal because it would not be presumptively negative as against the driving offence.

[32] The Respondent states that the jurisprudence is settled and that the Supreme Court in *Tran* did not suggest or imply that the presumption against retrospectivity pursuant to paragraph 36(1)(a) assessments has any application to an Article 1F(b) analysis.

[33] As to the issue transcending the interests of the parties, I find this to be a borderline case. While I have concluded that it was reasonable for the RAD to follow established precedent, I also find that the Federal Court of Appeal should be afforded the opportunity to revisit their precedent in *Sanchez* should they wish to do so in light of *Tran* and the arguments that the Applicant has raised concerning the differing standards between exclusion and admissibility cases.

[34] The difficulty in the present matter is that for a question to be properly certifiable, it must be dispositive of the appeal. While that may be the case with respect to the impaired driving offence, it is not the case with respect to the narcotics charges. During the hearing, the Applicant clarified that he was not arguing that *Sanchez* was not applicable to the narcotics charges. Rather, his position was that given the necessity of entering a *nolle prosequi* because the computer system would not accept a conditional discharge, the RAD should not have concluded that the offence was serious.

[35] The RAD concluded the following:

> [104] A single crime is sufficient to exclude the Appellant by operation of section 98 of the Act. However, in my independent analysis, I find serious reasons for considering that the Appellant committed two serious non-political crimes, either of which would have been sufficient on its own to exclude him. As such I find that he is excluded as per Article 1F(b).

[36] Given the instructions of the Federal Court of Appeal as to the requirements for properly certified questions and the finding by the RAD that the narcotics charges alone would have been sufficient to exclude the Applicant, I am precluded from certifying a question.

IV. Conclusion

[37] For the foregoing reasons, I am of the view that the Applicant has failed to meet his burden of demonstrating that the RAD's decision is unreasonable. This application for judicial review is therefore dismissed.

[38] No serious question of general importance for certification will be certified.

JUDGMENT in IMM-6435-21

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is dismissed; and

2. No question is certified.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6435-21
STYLE OF CAUSE:	FRANCISMAR DOS SANTOS E SILVA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 3, 2022
JUDGMENT AND REASONS:	ROCHESTER J.
DATED:	MARCH 14, 2023

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