Federal Court Cour fédérale

**Date: 20141104**

**Docket: IMM-7208-13**

**Citation: 2014 FC 1040**

**Ottawa, Ontario, November 4, 2014**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**THANH TAM TRAN**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

## JUDGMENT AND REASONS

### I. Overview

[1] In 1989, Mr Than Tam Tran arrived in Canada from Vietnam and became a permanent resident. In 2013, a judge of the British Columbia Provincial Court convicted Mr Tran on a charge of producing marijuana and imposed a sentence of 12 months to be served in the community (*ie* a conditional sentence). In turn, an officer of the Canadian Border Services Agency (CBSA) referred Mr Tran's file to the Immigration Division to decide whether Mr Tran

should be found to be inadmissible to Canada for having been convicted of an offence for which a term of imprisonment greater than six months has been imposed, or an offence punishable by a maximum term of imprisonment of at least 10 years (*Immigration and Refugee Protection Act*, SC 2001, c 27, [IRPA] s 36(1)(*a*)). In the exercise of his discretion whether to refer Mr Tran's file, the officer considered the following factors:

- Mr Tran's age when he arrived in Canada (19), the length of time he has been here (24 years), and his substantial family support in Canada;
- The poor living conditions in Vietnam;
- Mr Tran's employment history and establishment in Canada;
- Mr Tran's criminal record, including a conviction for impaired driving and arrests on various other charges;
- The circumstances surrounding the triggering offence (production of marijuana), the maximum sentence available (7 years' imprisonment at the time, but subsequently increased to 14 years), and the sentence actually imposed (a 12-month conditional sentence);
- Mr Tran's potential for rehabilitation (fairly low); and
- The best interests of Mr Tran's five children.

[2] Based on these considerations, the officer decided to refer Mr Tran's case to the Immigration Division to decide if Mr Tran is inadmissible to Canada for serious criminality. That is the decision Mr Tran seeks to challenge in this application for judicial review. He maintains that the officer erred in three respects: (1) by finding that he had been convicted of an offence for which a term of imprisonment greater than 6 months had been imposed; (2) by

concluding that he had been convicted of an offence punishable by a maximum sentence of at least 10 years; and (3) by rendering an unreasonable decision based on extraneous evidence, namely, arrests and charges that did not result in convictions. He asks me to overturn the officer's decision and order another officer to reconsider the question of his inadmissibility to Canada.

[3] I agree with Mr Tran that the officer erred. In my view, Mr Tran's conditional sentence of 12 months did not represent a term of imprisonment greater than 6 months; his offence was punishable by a maximum of 7 years' incarceration (not 10 or more); and the officer should not have considered allegations that did not result in convictions. Therefore, I must allow this application for judicial review and order another officer to reconsider the question of Mr Tran's inadmissibility.

[4] There are three issues:

1. Does a conditional sentence of 12 months constitute a term of imprisonment greater than 6 months?
2. Was Mr Tran convicted of an offence punishable by maximum of at least 10 years' imprisonment?
3. Was the officer's conclusion unreasonable?

## II. The Officer's Decision

[5] The officer found there were reasonable grounds to believe that Mr Tran was inadmissible to Canada for having been convicted of an offence punishable by a maximum of at

least 10 years' imprisonment or for having received a sentence of more than 6 months' imprisonment. In the exercise of his discretion whether to refer Mr Tran's case to the Immigration Division for an admissibility hearing, the officer considered the various factors outlined above.

[6] In the end, the officer concluded that Mr Tran had been involved in a serious offence and had been involved in other criminal activity. Further, there were insufficient mitigating factors to cause the officer not to refer the case for an inadmissibility hearing.

### A. *Issue One – Does a conditional sentence of 12 months constitute a term of imprisonment greater than 6 months?*

[7] The Minister argues that a conditional sentence has been definitively characterized as a sentence of imprisonment and, therefore, a conditional sentence of 12 months is obviously a term of imprisonment greater than 6 months.

[8] I disagree. In my view, the officer's decision was unreasonable.

[9] The Minister correctly points out that the Supreme Court of Canada characterized a conditional sentence as a term of imprisonment in *R v Proulx*, 2000 SCC 5. However, in subsequent cases, the Court has clarified that the question whether a particular statutory reference to imprisonment includes a conditional sentence must be answered in context. In some cases, a reference to a term of imprisonment will include conditional sentences and, in others, it will refer solely to carceral sentences. For example, the Supreme Court has held that the word

"imprisonment" "does not bear a uniform meaning for all purposes of the Criminal Code" (*R v Middleton*, 2009 SCC 21, at para 14). Obviously, then, if it does not bear a uniform meaning throughout the *Criminal Code*, it cannot bear a uniform meaning across the whole of the federal statute book. The fact that a conditional sentence is described as a sentence of imprisonment in general terms in the Code does not necessarily mean it should be considered to be a sentence of imprisonment in other statutes, such as IRPA. Context matters.

[10] In effect, s 36(1)(*a*) describes the grounds on which a person can be found inadmissible for "serious criminality". Serious criminality encompasses both responsibility for a serious crime (one punishable by a maximum of 10 years or more) and serious criminals (those sentenced to more than 6 months of imprisonment). By contrast, courts impose conditional sentences on persons who are not regarded as serious criminals. As the Supreme Court stated in *Proulx*, a conditional sentence "is a meaningful alternative to incarceration for less serious and non-dangerous offenders" (at para 21). To include conditional sentences within s 36(1)(*a*) would appear to be at odds with the purpose of that provision: to identify those coming within the concept of "serious criminality".

[11] Further, in relation to s 36(1)(*a*) in particular, the Supreme Court has stated that the reference to a term of imprisonment in that provision relates to the period of time the person has been sentenced to spend <u>in prison</u>, which would exclude conditional sentences (*Medovarkski v Canada (MCI)*, 2005 SCC 51, at para 11). The Court said:

> In keeping with these objectives, the IRPA creates a new scheme whereby persons sentenced to more than six months <u>in prison</u> are inadmissible: IRPA, s 36(1)(*a*). . . [T]he Act is clear: <u>a prison term</u> of over six months will bar entry to Canada. (Emphasis added).

[12] The Minister also relies on cases where there was a question whether the reference to a sentence of imprisonment meant the full term of the sentence imposed by the Court or just the amount of time the offender actually spent in prison before being paroled. For example, where a person was sentenced to 4 years' imprisonment, but only spent 10 months in prison before being paroled, was the person sentenced to a term of imprisonment greater than 2 years (for purposes of s 64(2) of IRPA)? The answer is yes – it is the sentence actually imposed that matters, not the amount of time actually spent in custody. See *Martin v Canada (MCI)*, 2005 FC 60, aff'd 2005 FCA 347; *Cartwright v Canada (MCI)*, 2003 FCT 792.

[13] By analogy, the Minister contends that, even if a sentence includes no time in prison, so long as the sentence exceeds 6 months, it comes within s 36(1)(*a*). It is the duration that matters, according to the Minister, not the amount of time actually spent in prison.

[14] I disagree. In the cases cited by the Minister, the persons were sentenced to terms of incarceration of 4 years and 3 years respectively. Even though paroled early, their prison sentences remained in place and the offenders were liable to re-incarceration in the event of any parole violations. Here, no prison sentence was ever imposed on Mr Tran. In my view, on that basis, the parole cases are entirely distinguishable.

[15] Accordingly, I find that the officer's conclusion that Mr Tran's 12-month conditional sentence amounted to a term of imprisonment greater than 6 months was unreasonable.

B. *Issue Two – Was Mr Tran convicted of an offence punishable by maximum of at least 10 years' imprisonment?*

[16] The Minister argues that Mr Tran should be considered to have been convicted of an offence punishable by a maximum of at least 10 years' imprisonment since Parliament recently, prior to the officer's decision, elevated the maximum from 7 to 14 years.

[17] I cannot agree.

[18] Section 36(1)(*a*) states that a person is inadmissible to Canada on grounds of serious criminality for "having been convicted of an offence . . . punishable by a maximum term of imprisonment of at least 10 years".

[19] I note that the Federal Court of Appeal recently held that, for purposes of the exclusion clause in Article 1F(*b*) of the Refugee Convention, the seriousness of a crime should be assessed according to punishment available at the time it is reviewed for immigration purposes, not when the accused was convicted (*Sanchez v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 157, at para 6). However, the Court's ruling does not mean the same is true under s 36(1)(*a*). The sole issue under Article 1F(*b*) is whether the crime was "serious" without any specific reference to the sentence that could have been imposed on the offender (but see *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 where the Court suggested that punishment by a maximum sentence of ten years or more will usually indicate that the crime is serious (at para 62)). By contrast, s 36(1)(*a*) sets out a specific test: whether the person was convicted of a crime for which he or she could be punished by a maximum of at least 10 years'

imprisonment. As I read it, s 36(1)(*a*) refers to the maximum punishment available at the time of conviction. There is no similar wording in Article 1F(*b*).

[20] Here, Mr Tran was not convicted of a crime punishable by at least 10 years' imprisonment. The maximum sentence at the time of his conviction was 7 years. While the maximum sentence was subsequently raised to 14 years, Mr Tran was not punishable by a sentence of that duration. Therefore, the offence of which he was convicted did not come within s 36(1)(*a*), and the officer's decision to the contrary was unreasonable.

C. *Issue Three –Was the officer's conclusion unreasonable?*

[21] The Minister argues that the officer, in the exercise of his discretion, was entitled to consider arrests and dropped charges relating to Mr Tran.

[22] The case law makes clear that arrests and charges, in themselves, are not evidence of criminal conduct (*Veerasingam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1661, at para 5). However, the evidence underlying arrests and charges, if reliable, can be considered (at para 6).

[23] Here, the officer treated arrests and charges as being evidence of criminal behaviour. In particular, based on Mr Tran's past brushes with the law, he found that Mr Tran would likely "reoffend because he has done so in the past". However, those arrests and charges simply did not amount to evidence that Mr Tran had re-offended, since they amounted merely to allegations, not proof, of criminal conduct.

[24] Similarly, the officer also relied on police reports relating to conduct that did not give rise to arrests or charges. Again, this evidence does not constitute proof of criminal conduct; it merely records the allegations received by the police (*Rajagopal v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 523, at para 43; *Younis v Canada*, 2008 FC 944, at para 55).

[25] Accordingly, I find that the officer's reliance on unproved allegations – arrests, charges, and police reports – rendered the officer's conclusion that there were reasonable grounds to believe Mr Tran was inadmissible for serious criminality unreasonable.

## III. Conclusion and Disposition

[26] A CBSA officer found that Mr Tran – convicted of an offence carrying a maximum of 7 years' imprisonment and sentenced to a 12-month conditional sentence – came within s 36(1)(*a*) of IRPA, which renders persons inadmissible to Canada if they have committed a crime punishable by a maximum of at least 10 years or sentenced to more than 6 months' imprisonment. In my view, in the circumstances, the officer's decision was unreasonable. Further, the officer unreasonably relied on unproved allegations in exercising his discretion to refer Mr Tran for an inadmissibility hearing. Therefore, I must allow this application for judicial review and order another officer to reconsider Mr Tran's file.

[27] As the parties requested an opportunity to make submissions regarding a question of general importance to be certified, I will entertain any submissions received within 10 days of this judgment.

## JUDGMENT

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is allowed. The matter is referred back to another officer for reconsideration.

2. The parties may make submissions regarding a question of general importance to be certified within 10 days.

"James W. O'Reilly"
Judge

Annex "A"

*Immigration and Refugee Protection Act*, SC 2001, c 27

Serious Criminality

**36.** (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(*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;

*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch. 27

Grande criminalité

**36.** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

*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;

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-7208-13 |
| **STYLE OF CAUSE:** | THANH TAM TRAN v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | VANCOUVER, BRITISH COLUMBIA |
| **DATE OF HEARING:** | JUNE 25, 2014 |
| **JUDGMENT AND REASONS:** | O'REILLY J. |
| **DATED:** | NOVEMBER 4, 2014 |

**APPEARANCES:**

| | |
|---|---|
| Peter Edelmann<br>Aris Daghighian | FOR THE APPLICANT |
| Banafsheh Sokhansanj | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Edelmann & Company<br>Law Offices<br>Vancouver, British Columbia | FOR THE APPLICANT |
| William F. Pentney<br>Deputy Attorney General of Canada<br>Vancouver, British Columbia | FOR THE RESPONDENT |