Federal Court  Cour fédérale

Date: 20160122

Docket: IMM-3692-15

Citation: 2016 FC 80

Vancouver, British Columbia, January 22, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

RAAFAY SHEHZAD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In recognition of the three separate branches of government, the executive, legislative, and judicial, the underlying matter before this Court as it was before the Federal Court of Appeal (FCA) in the *Tran* decision (*Canada (Public Safety and Emergency Preparedness*) *v Tran*, 2015 CA 237) demonstrates that the work of the first two branches of government would be

undermined and undone, if the courts were to acquiesce to the suggested interpretation equating the relevant Immigration Act provisions with the Criminal Code provisions.

[2] The legislative history, as specified below, in the *Tran* FCA decision, opines otherwise. The opposing view to the Federal Court of Appeal in *Tran* would go against that which has been duly set out in the policy which was legislated, as well as reflected, and juridically acquiesced to, in the Supreme Court of Canada interpretation of such in the *Medovarski* judgment (*Medovarski v Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 539, 2005 SCC 51 at para 13), wherein, it was most recently and clearly summarized by the Federal Court of Appeal in its paragraphs 47 and 63 of the same *Tran* decision. The Federal Court of Appeal stated point blank in paragraphs 47 and 63 of its *Tran* decision, the objectives of that 2002 legislation.

> [47] I will thus first consider the purpose of the IRPA and of section 36. The Supreme Court of Canada in Medovarski, at paragraph 10, described them as follows:
>
> > The objectives as expressed in the IRPA indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. […] Viewed collectively, the objectives of the IRPA and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.
>
> . . .
>
> [63] When the IRPA was adopted in 2002, the expression term of "imprisonment" (emprisonnement) was used in three specific provisions – sections 36, 50 and subsection 64(2).

[3] It is clearly acknowledged by the Supreme of Court of Canada in its 2007 *Medovarski* judgment that it was then in 2002 that the government legislated the provisions therein, clearly distinguishing the *Immigration Act* provisions from the *Criminal Code* provisions relevant therein.

II. Background

[4] This is an application for judicial review by the Applicant pursuant to paragraph 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision by the Immigration Appeal Division [IAD], dated July 21, 2015. In its decision, the IAD held that it lacked jurisdiction to hear the appeal of a removal order issued against the Applicant as the Applicant is inadmissible on grounds of serious criminality.

[5] The Applicant, Raafay Shehzad (age 20), was born in Pakistan and became a permanent resident of Canada on July 1, 2012. He is a citizen of the Republic of Ireland.

[6] On April 3, 2014, the Applicant was convicted of two counts of extortion (section 346(1.1)(*b*) of the *Criminal Code*, RSC 1985, c C-46 [Criminal Code]; and, one count of impersonating a peace officer (paragraph 130(1)(*a*) of the Criminal Code). He was sentenced to a one-year conditional sentence order on each count (to be served concurrently).

[7] On September 18, 2014, a deportation order [Removal Order] was issued against the Applicant on grounds of serious criminality pursuant to paragraph 36(1)(*a*) of the IRPA, as he had been sentenced to a term of imprisonment more than six months.

Serious criminality	**Grande criminalité**
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 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;

[8] The Applicant appealed the Removal Order before the IAD; and, argued before the IAD that the IAD could hear his appeal as, in law, a conditional sentence is not a term of imprisonment in the meaning of paragraph 64(2) of the IRPA. Paragraph 64(2) of the IRPA provides that no appeal may be made to the IAD by a permanent resident, if the permanent resident has been found to be inadmissible on grounds of serious criminality.

No appeal for inadmissibility	**Restriction du droit d'appel**
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 resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.	**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 internationaux, grande criminalité ou criminalité organisée, ni par dans le cas de l'étranger, son répondant.
Serious criminality	**Grande criminalité**
(2) For the purpose of subsection (1), serious criminality must be with	(2) L'interdiction de territoire pour grande criminalité vise, d'une part, l'infraction punie

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*).	au Canada par un emprisonnement d'au moins six mois et, d'autre part, les faits visés aux alinéas 36(1)*b*) et *c*).

[9] The IAD, after reviewing what appeared to be conflicting lines of jurisdiction, held that it did not have the jurisdiction to hear the appeal pursuant to paragraph 64 of the IRPA:

> Based on the teachings of the Supreme Court of Canada in *Proulx*, the plain reading of section 742.1 of the *Criminal Code* and the plain reading of the appellant's Conditional Sentence Order, I find that a conditional sentence is a "term of imprisonment" for the purposes of section 64(2) of the *Act*.
>
> (Tribunal's Record, Reasons for Decision, p 6)

III. Issues

[10] The only issue is whether the IAD erred in finding that a conditional sentence is a term of imprisonment for the purposes of paragraph 64(2) of the IRPA.

IV. Standard of Review

[11] The interpretation by the IAD of the IRPA attracts the standard of review of reasonableness as deference is owed to administrative tribunals interpreting their own statutes or statutes closely related to their functions (*Tran* above at paras 22 and 30 [*Tran*]; *Canada (Public Safety and Emergency Preparedness) v J.P.*, 2013 FCA 262 at para 74). The IAD's decision is reasonable if it falls within a range of possible, acceptable outcomes which are defensible in respect of fact and law; if, its decision-making process is justifiable, transparent and intelligible (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 at para 47).

V. Analysis

[12] The purpose of paragraph 64(2) of the IRPA is to remove criminals sentenced to terms of imprisonment of at least six months from the country. While the term "prison" was used in *Medovarski*, it must be explained in its context: at the time of the *Medovarski* decision, paragraph 64(2) of the IRPA could only apply to jail time as "a term of imprisonment of two years or more which could not then be served, and still cannot be served, in the community" (*Tran*, above at para 78).

[13] The parties do not dispute the important facts of this case: the Applicant is a permanent resident; he was convicted of several offences under the Criminal Code; and, was sentenced to a one-year conditional sentence.

[14] The Applicant relied heavily in his submissions on the decision in *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2014 FC 1040, to argue that a conditional sentence order is not a "term of imprisonment" for the purposes of the IRPA, specifically paragraph 64(2) of the IRPA. In that decision, Justice James W. O'Reilly held that it was unreasonable for an officer to find that a twelve month conditional sentence amounted to a term of imprisonment greater than six months in the meaning of paragraph 36(1)(*a*) of the IRPA.

[15] On October 30, 2015, the Federal Court of Appeal allowed the appeal in *Tran*, above . The Federal Court of Appeal, cognizant that deference must be given to the Immigration Division and the IAD in their interpretation of the IRPA, held that "[a] conditional sentence of

imprisonment imposed pursuant to the regime set out in ss. 742 to 742.7 of the *Criminal Code* may reasonably be construed as a term of imprisonment under paragraph 36(1)(*a*) of the IRPA." (*Tran*, above at para 88).

[16] The Court notes that in *Tran*, the Federal Court of Appeal dealt with the interpretation of "term of imprisonment" at paragraph 36(1)(*a*) of the IRPA; and, in the present case, the IAD dealt with the interpretation of the very same words at paragraph 64(2) of the IRPA. Nonetheless, given that paragraph 36(1)(*a*) of the IRPA and paragraph 64(2) of the IRPA use similar language; and, that paragraph 64(2) of the IRPA was allegedly amended in 2013 to put it in line with paragraph 36(1)(*a*) of the IRPA (*Tran*, above at para 86), the Court finds that the consideration and analysis of the Federal Court of Appeal regarding the interpretation of the words "term of imprisonment" at paragraph 36(1)(*a*) of the IRPA does apply to paragraph 64(2) of the IRPA. The Federal Court of Appeal, in *Tran* above, clearly addresses the legislation in paragraph 64(2) of IRPA as per paragraphs 43, 47, 63-67, 73, 80, 85 and 86 of its decision. The Federal Court of Appeal clearly provides its analysis on the subject matter of paragraph 64(2) of the IRPA, which applies directly to the present case before the Court. Furthermore, the legislative history, as discussed in the Federal Court of Appeal decision in *Tran*, also, is most instructive of the very reasons for adoption of the IRPA provisions relevant to the case at bar before this Court, as they apply directly to conditional sentences.

> [43] The absence of reasons in respect of the interpretation of subsection 36(1) may explain why the judge simply gave his own view of the proper interpretation of the relevant provision before concluding that the decision was unreasonable. But, even if the judge's interpretation was correct, this is not what he was mandated to do. Indeed, he had to assess whether the interpretation adopted by the decision maker fell within the range of interpretations defensible on the law and the facts.

. . .

[47] I will thus first consider the purpose of the IRPA and of section 36. The Supreme Court of Canada in Medovarski, at paragraph 10, described them as follows:

> The objectives as expressed in the IRPA indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. […] Viewed collectively, the objectives of the IRPA and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.

. . .

[63] When the IRPA was adopted in 2002, the expression term of "imprisonment" (emprisonnement) was used in three specific provisions – sections 36, 50 and subsection 64(2).

[64] Although for a lay person a term of imprisonment is generally understood as time spent in prison or in incarceration, it has a wider meaning when used in the context of determining what sentence may be imposed for a criminal offence under an Act of Parliament.

[65] It is clear that pursuant to section 742.1 of the Criminal Code (see Appendix A), and subject to various exceptions added in 2007 and 2012, a term of imprisonment of less than two years can be served in the community rather than in jail. It is understood that should the conditions imposed by the sentencing judge be breached, the offender may end up serving the rest of his term in jail.

[66] In a series of decisions (Proulx, above; R. v. Wu, 2003 SCC 73, [2003] 3 S.C.R. 530; R. v. Fice, 2005 SCC 32, [2005] 1 S.C.R. 742; Middleton, above) the Supreme Court of Canada also made it clear that although generally a sentence of "imprisonment" will be understood to include conditional terms of imprisonment when referring to a sentence under the Criminal Code, there may be cases where the Driedger modern rule of interpretation will require that the expression be limited to a carceral term of imprisonment.

[67] However, as noted by the Minister, in Middleton, both Justice Fish, writing for the majority (paragraphs 10-11), and Justice Binnie, in his concurring reasons (paragraph 57), acknowledged that the general rule applies unless Parliament clearly indicates to the contrary. In that case, Justice Fish in fact stated that the textual consideration of the provision itself, which expressly referred to "confinement" and "prison", was sufficient and made it plain that conditional sentences of imprisonment could not come within the meaning of "sentence of imprisonment" in section 732(1) of the Criminal Code.

. . .

[73] The parties were agreed that the legislative evolution of paragraph 36(1)(a) is not particularly helpful to determining the issue before us. However, the legislative evolution of section 50 of the IRPA does shed some light, and generally one is presumed to intend to use the same words with the same meaning in the sections in which it appears. Prior to the adoption of IRPA, section 50 read as follows:

50 […]	50 […]
(2) A removal order that has been made against a person who was, at the time it was made, an inmate of a penitentiary, jail, reformatory or prison or becomes an inmate of such an institution before the order is executed shall not be executed until the person has completed the sentence or term of imprisonment imposed, in whole or as reduced by a statute or other law or by an act of clemency.	L'incarcération de l'intéressé dans un pénitencier, une prison ou une maison de correction, antérieurement à la prise de la mesure de renvoi ou à son exécution, suspend l'exécution de celle-ci jusqu'à l'expiration de la peine, compte tenu des réductions légales de peine et des mesures de clémence.

. . .

[80] That said, and coming back to the interpretation of the section in context, as mentioned earlier, section 64 was amended to reduce the term of imprisonment provided for therein to six months

or more in 2013. The fact that it would apply to offenders sentenced to serve their term of imprisonment in the community was expressly raised by the National Immigration Law Section of the Canadian Bar Association who recommended that any amendment to subsection 64(2) should include some language to clarify that a term of imprisonment did not include conditional terms of imprisonment of the duration set out in this provision.

. . .

[85] Various participants noted that conditional terms of imprisonment fell within the provision as drafted, as well as the potential unfairness of precluding appeals for those on whom a conditional sentence of imprisonment of more than six months had been imposed, whereas those on whom jail terms of lesser lengths were imposed were not so precluded, even though these punitive measures are considered equivalent or harsher: see, for example, House of Commons. Standing Committee on Citizenship and Immigration, Evidence, 1st Sess., 41st Parl., Meeting No. 62, 21 November 2012 at p. 2 (Ahmed Hussen (National President, Canadian Somali Congress)) (Joint Book of Authorities, Vol. 4, Tab 121); Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology, Meeting No. 38 (1-2 May 2013) 38:44 (Gordon Maynard (Past Chair, National Immigration Law Section, Canadian Bar Association)) (Joint Book of Authorities, Vol. 4, Tab 126); Meeting No. 39 (8-9 May 2013) at 39:20 (Senator Art Eggleton) (Joint Book of Authorities, Vol. 4, Tab 127). Several discussions prompted the proposal of three distinct motions to expressly exclude conditional sentences from the provision, each of which was defeated: House of Commons. Standing Committee on Citizenship and Immigration, Evidence, 1st Sess., 41st Parl., Meeting No. 64, 28 November 2012 at 2, 4 (Jinny Jogindera Sims (Newton-North Delta, NDP)), 4, 7 (Kevin Lamoureux (Winnipeg North, Lib.)) (Joint Book of Authorities, Vol. 4, Tab 122); Debates of the Senate, 41st Parl., 1st Sess., No.168 (30 May 2013) at 4081-4082 (Senator Art Eggleton) (Joint Book of Authorities, Vol. 4, Tab 128).

[86] The opinion that Parliament still views terms of imprisonment of more than six months served in the community as serious enough to warrant losing one's right of appeal of a finding of inadmissibility is certainly supported by the legislative history when subsection 64(2) was amended in 2013 allegedly to put it in line with paragraph 36(1)(a). Although such interpretative tools are typically given less weight than others, I simply cannot conclude that the interpretation of the Minister's delegate, which the legislative history appears to support, should be found

> unreasonable on the basis that it produces inconsistent consequences which might be regarded as absurd. These inconsistencies were clearly spelled out and considered before the adoption of subsection 64(2) and no change was made to exclude those inconsistent consequences.

[17] In its decision, the IAD examined, which were then, conflicting lines of jurisprudence; and, followed the line of jurisprudence which it thought commended itself most to this case. The IAD held that a one-year conditional sentence is a term of imprisonment of at least six months; and, pursuant to paragraph 64(2) of the IRPA, it did not have the jurisdiction to hear the appeal of the Removal Order.

[18] Given the recent decision of the Federal Court of Appeal in *Tran*, above, the IAD's decision is reasonable.

VI. Conclusion

[19] Consequently, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be dismissed.

There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3692-15
STYLE OF CAUSE:	RAAFAY SHEHZAD v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JANUARY 20, 2016
JUDGMENT AND REASONS:	SHORE J.
DATED:	JANUARY 22, 2016

APPEARANCES:

Fritz Gaerdes Christopher Elgin	FOR THE APPLICANT
Alison Brown	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Elgin, Cannon &Associates Vancouver, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT