Federal Court  Cour fédérale

Date: 20160314

Docket: IMM-3231-15

Citation: 2016 FC 305

Ottawa, Ontario, March 14, 2016

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

DUY THUYEN NGUYEN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review application against a decision made by the Immigration Appeal Division [IAD] of the Immigration and Refugee Board [Board] on June 23, 2015, refusing to grant to the applicant an extension of delay to commence an appeal against a removal order.

[2] The applicant is a citizen of Vietnam. He became a permanent resident of Canada on November 14, 2007. While in Canada, he was convicted of "Production of Substance" under subsection 7(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19, and "Theft of Gas / Electricity" under paragraph 326(1)(a) of the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*]. He was sentenced to a twelve month conditional sentence (house arrest).

[3] On March 31, 2014, the Immigration Division [ID] of the Board found the applicant to be inadmissible to Canada on grounds of serious criminality pursuant to paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], which reads as follows:

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;
[…]	[…]
[Emphasis added]	[Soulignements ajoutés]

[4] Subsections 64(1) and (2) of the Act provide that no appeal may be made to the IAD on findings of serious criminality:

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.
(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).
[…]	[…]
[Emphasis added]	[Soulignements ajoutés]

[5] The applicant did not file a notice of appeal within the 30 day delay prescribed in subsection 5(3) of the *Immigration Appeal Division Rules*, SOR/2002-230.

[6] On November 4, 2014, in *Tran v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 1040, the Federal Court decided that an interpretation of paragraph 36(1)(a) of the Act which included a conditional sentence as a "term of imprisonment" was unreasonable. This decision was appealed to the Federal Court of Appeal by the Minister of Public Safety and Emergency Preparedness [Minister]. In the meantime, through new counsel, the applicant sought an extension of delay to file an appeal to the IAD and asked the latter to grant him an adjournment pending a final determination of the Minister's appeal in *Tran*.

[7] The IAD refused to adjourn the case and found that the conditions to grant an extension of delay to file an appeal against the ID decision were not met. The IAD further noted that the proposed appeal lacked merit since the words "term of imprisonment" in subsection 64(2) of the Act includes a conditional sentence, and thus, the applicant had no right of appeal in this case.

[8] On July 14, 2005, the applicant filed the present application for leave and judicial review, and on December 3, 2015, leave was granted by a judge of this Court. The matter was heard on its merits in Toronto on March 1, 2016.

[9] In the meantime, on October 30, 2015, the Federal Court of Appeal released its decision in *Canada (Public Safety and Emergency Preparedness) v Tran*, 2015 FCA 237. The Federal Court of Appeal allowed the appeal by the Minister. It found that a conditional sentence of imprisonment imposed pursuant to the regime set out in sections 742 to 742.7 of the *Criminal*

Code may reasonably be construed as a term of imprisonment under paragraph 36(1)(a) of the Act.

[10] The applicant, who now represents himself, explained at the hearing of this judicial review application that he loves his family, that he is the father of a baby, and that he feels remorse for the crime for which he was convicted. He wishes to remain in Canada because he needs to help his wife and child who are living with him, as well as his mother and grandmother in Vietnam, who are counting on his financial assistance.

[11] I have considered both the written and oral representations of the parties, and have decided that the present judicial review application must be dismissed. The standard of review of the impugned decision of the IAD on the application to extend the delay to file an appeal against the ID decision is reasonableness. The decision of the IAD not to adjourn the matter pending the result of the appeal to the Federal Court of Appeal in *Tran* was reasonable. So was its decision to refuse an extension because, notably, the case lacks sufficient merit. The IAD considered all relevant factors. The decision of the Federal Court of Appeal in *Tran* is determinative and now binding. The applicant seems to have exhausted all available means under the Act and this Court has no power to allow the applicant to remain in Canada.

[12] For the above reasons, the application is dismissed. There is no question of general importance raised in this case.

JUDGMENT

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

No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3231-15
STYLE OF CAUSE:	DUY THUYEN NGUYEN v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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