Date: 20080201

Docket: IMM-3220-07

Citation: 2008 FC 125

Ottawa, Ontario, February 1, 2008

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

ASHRAF NABILOO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant, Ms. Ashraf Nabiloo, is a permanent resident of Canada who, on October 8, 2005, was convicted in the Supreme Court of British Columbia (SCBC) of two offences contrary to the provisions of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (CDSA). On January 16, 2006, she was sentenced to three years for one offence and 30 months for the other, to be served concurrently. Ms. Nabiloo immediately filed an appeal of her conviction and sentence (which appeal is still outstanding) and was released on bail.

[2] After a hearing before the Immigration and Refugee Board, Immigration Division (Immigration Division), on November 21, 2006, Ms. Nabiloo was declared to be inadmissible to Canada on grounds of serious criminality pursuant to s. 36(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) and ordered deported. Not to be deterred, on December 21, 2006, she commenced an appeal of her deportation order to the Immigration and Refugee Board, Immigration Appeal Division (IAD). A response to her appeal arrived in a letter from the IAD dated March 29, 2007. In that letter, the IAD requested submissions as to why s. 64 of IRPA did not apply to bar the IAD from considering her appeal. In her written submissions in response to this preliminary question, Ms. Nabiloo requested that the IAD postpone its decision until a final determination has been made on her appeal of her conviction and sentence. In a decision dated June 28, 2007, the IAD dismissed the application for an adjournment and dismissed the appeal "for lack of jurisdiction". Ms. Nabiloo now asks this Court to overturn the decision of the IAD.

II. Issues

[3] The determinative issue in this judicial review application is the following:

> Does the phrase “a crime that was punished in Canada by a term of imprisonment of at least two years” used in subsection 64(2) of IRPA apply where the underlying conviction and sentence are the subject of an outstanding criminal appeal?

[4] Ms. Nabiloo, in her written submissions, also raised the issue of whether the IAD erred by refusing the request for an adjournment. However, as acknowledged by the parties, a tribunal that does not have jurisdiction to decide a matter does not have jurisdiction to consider preliminary or interlocutory issues pertaining to that matter (*Kang v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 297 at para. 41). As I have determined, for the reasons that follow, that the

IAD had no jurisdiction to hear the appeal, it follows that the IAD could not have considered the request for an adjournment.

III. Statutory Scheme

[5] The statutory scheme in this case begins with the inadmissibility provisions of IRPA. Under s. 36(1)(a), a permanent resident or foreign national is inadmissible on grounds of serious criminality:

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

[6] In Ms. Nabiloo's case, the next steps culminated in the issuance of a removal order by the Immigration Division pursuant to s. 45(d) of IRPA, which provides that:

Decision	Décision
45. The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions:	**45.** Après avoir procédé à une enquête, la Section de l'immigration rend telle des décisions suivantes :

…	…
(*d*) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible	*d*) prendre la mesure de renvoi applicable contre l'étranger non autorisé à entrer au Canada et dont il n'est pas prouvé qu'il n'est pas interdit de territoire, ou contre l'étranger autorisé à y entrer ou le résident permanent sur preuve qu'il est interdit de territoire.

[7] Section 63(3) of IRPA provides a right of appeal to the IAD "against a decision at an … admissibility hearing to make a removal order against them".

[8] This statutory right of appeal to the IAD against removal orders is, however, subject to a restriction in certain cases. Specifically relevant to this application, s. 64(1) and (2) provide that:

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 respect	(2) L'interdiction de territoire pour grande criminalité vise l'infraction punie au Canada par

to a crime that was punished in Canada by a term of imprisonment of at least two years.	un emprisonnement d'au moins deux ans

IV. Analysis

[9] A question of the IAD's jurisdiction is a question of law. As such, the issue will be reviewed on the standard of correctness (*Atwal v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 7 at para. 10; *Cheddesingh v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 124 at para. 15).

[10] Ms. Nabiloo submits that s. 64(2) of IRPA is concerned with the "punishment" and "term of imprisonment" the Applicant has received. She looks to s. 719(4) of the *Criminal Code* for the proper interpretation of these terms and notes that the *Criminal Code* stipulates that a sentence begins to run once an individual is taken into custody. As Ms. Nabiloo has not been taken into custody in the case at bar, she submits she has not been punished by a term of imprisonment as defined by s. 64(2) of IRPA, and accordingly the section does not apply. Further, she contrasts s. 36(1)(a) to s. 64(2) of IRPA and notes that while the former is based on the sentence that has been imposed, the latter requires the IAD to determine whether an individual has been incarcerated. Finally, Ms. Nabiloo submits that s. 64(2) can only be applied after there is no doubt that she has been punished by a term of imprisonment. For the IAD to be certain of this, it is required to wait until Ms. Nabiloo's criminal appeal is finally disposed of.

[11] I do not find merit in these arguments.

[12] The proper interpretation of the word “punished” in s. 64(2) of IRPA has been considered numerous times by this Court. Most similar to the case at bar is the case of *Psyrris v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1443, where the Court considered the proper interpretation of s. 64(2) of IRPA in respect of an applicant who had been sentenced to two years plus a day of imprisonment (see, also, *Cartwright v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 792 at para. 71; *Sherzad v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 757 at paras. 66-70; *Cheddesingh*, above at paras. 25-30; *Martin v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 347 at para. 5). The case law to-date is unanimous that the word “punished” in section 64(2) of IRPA refers to the sentence imposed, not the actual duration of incarceration. Indeed, replacing the word “Applicant” with “Ms. Nabiloo” and “Supreme Court of Nova Scotia” with “SCBC”, I refer to and adopt Justice Heneghan’s analysis in *Cartwright*, above at paras. 59-67 on this point:

> The wording of subsection 64(2) is not immediately clear. It states that a person will fall within the definition of "serious criminality" and have his or her appeal rights curtailed before the IAD, with respect to "a crime" that "was punished" in Canada "by a term of imprisonment" of at least two years. The words "was punished" are very different from the wording of the inadmissibility provisions of the former Act, where the maximum term of imprisonment that may be imposed for a particular crime was often the governing consideration (sections 19(1) and (2) of the former Act).
> ...
> The interpretation of the words of section 64(2) in their "grammatical and ordinary sense" means that it is the actual punishment which an individual received in Canada which is determinative. The introductory wording of subsection 64(2), "For the purpose of subsection 1 ...", suggests, in my view, that this provision is to be read separately from subsection 36(1)(a) of IRPA, which defines serious criminality for the purpose of inadmissibility and speaks in terms of possible sentences which may be imposed for an offence.
> ...
> Despite the fact that subsection 64(2) cannot be interpreted along the same lines as section 36(1)(a) of IRPA and the fact that the definition differs from the former Act's definition of criminality, in my view, the interpretation urged by the Applicant

> cannot be accepted. It is the term of imprisonment imposed which subsection 64(2) describes, rather than the actual length of time served in prison prior to being granted parole.
> ...
> To "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. In my opinion, this definition of "punish" supports the interpretation that the Applicant was "punished" at the time of his sentencing, when the Supreme Court of Nova Scotia convicted and sentenced him to four years imprisonment in a federal penitentiary. [Emphasis added.]

[13] In sum, the jurisprudence is clear: a person is punished according to s. 64(2) if they have received a sentence of two or more years of imprisonment. Applying this principle to the case at bar, it is evident that, at the moment the IAD considered whether it had jurisdiction to hear Ms. Nabiloo's appeal, she had been sentenced to such a term. By concluding that s. 64(2) of IRPA barred Ms. Nabiloo's appeal, the IAD was merely following the case law.

[14] In rejecting Ms. Nabiloo's interpretation of s. 64(2) of IRPA, I also note the Supreme Court of Canada's decision in *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539 at paras. 10-11:

> 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…
>
> In keeping with these objectives, the IRPA creates a new scheme whereby persons sentenced to more than six months in prison or inadmissible: IRPA, s. 36(1)(a). If they have been sentenced to a prison term of more than two years then they are denied a right to appeal their removal order: an IRPA, s. 64. . . . [T]he act is clear: a prison term of over six months will bar entry to Canada; a prison term of over two years bans an appeal. [Emphasis added.]

[15] An interpretation of s. 64(2) which allows a convicted person to be treated as a serious criminal as soon as the conditions identified in s. 64(2) exist – regardless of the possibility of changed circumstances in the future – is more consistent with the emphasis on security identified in *Medovarski,* above, than one which would allow a convicted person to circumvent the normal procedures in IRPA by the mere filing of an appeal.

[16] I also find additional support for my analysis from criminal law principles. In the criminal sphere the status of a convicted person remains the same until his or her conviction is overturned by a higher court. The mere filing of an appeal does not change that status (*Hewson v. The Queen*, [1979] 2 S.C.R. 82 at 102 quoting from *Suggs v. State of Maryland* (1969), 250 A. 2d 670 at 672). Similarly, I find that the status of Ms. Nabiloo does not change even though she has filed a criminal appeal. The fact remains that, until her conviction or sentence is changed, Ms. Nabiloo remains an individual who has been sentenced to two or more years of imprisonment and hence is criminally inadmissible and barred from bringing an appeal to the IAD pursuant to s. 64(2) of IRPA.

[17] Ms. Nabiloo has raised the possibility that, should her appeal be successful, she would in the untenable position of being the subject of an unappealable removal order without being a serious criminal. This, she submits, is because the reopening of an IAD decision may only occur where the IAD is satisfied that there has been a failure to observe a principle of natural justice (IRPA, s. 71). In support of this position, Ms. Nabiloo relies on the Federal Court of Appeal's decision in the case of *Nazifpour v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 35, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 196.

[18] My first observation is that the existence of such an eventuality does not preclude an interpretation of s. 64(2) which is consistent with criminal law principles, consistent with the case law to-date on s. 64(2), and consistent with the intent of s. 64(2) as described in *Medovarski*, above.

[19] However, I also do not believe that Ms. Nabiloo would be without recourse to the IAD. The decision in *Nazifpour* is not directly applicable to the circumstances faced by Ms. Nabiloo. In *Nazifpour*, the Court of Appeal was considering whether s. 71 of IRPA extinguished the jurisdiction of the IAD to reopen an appeal against a deportation order. The Court of Appeal found that it did, except where the IAD had failed to observe a principle of natural justice. In contrast, in the case before me, the question is not whether the IAD has jurisdiction to reopen an appeal from the IAD but whether the IAD has jurisdiction to hear the appeal of a deportation order made by the Immigration Division. But for s. 64(2) of IRPA, the IAD would have jurisdiction to consider all of the circumstances surrounding the conviction of Ms. Nabiloo, including humanitarian and compassionate considerations. The IAD would not be limited to considering whether the Immigration Division had breached its duty of fairness - as was the situation in *Nazifpour*.

[20] What avenues are open to Ms. Nabiloo if she is successful on her criminal appeal? Let me assume that Ms. Nabiloo's sentence is reduced such that she is no longer inadmissible to Canada due to serious criminality as defined in IRPA. In such an event she would no longer be barred by s. 64 of IRPA from bringing an appeal to the IAD of the deportation order. Her application to the IAD could be brought under s. 63(3) of IRPA and not as an appeal of the earlier IAD decision under s. 71. Should these events come to pass, I acknowledge that Ms. Nabiloo would be out of time for bringing an appeal to the IAD (*Immigration Appeal Division Rules*, S.O.R./2002-230, r. 7(2)).

However, Ms. Nabiloo would still be able to apply for an extension of time to bring her appeal (*Immigration Appeal Division Rules*, S.O.R./2002-230, r. 58(d)). Since s. 64(2) would no longer apply to bar the hearing of her appeal, the IAD would have jurisdiction to consider the request for an extension of time and the appeal of the removal order (see *Rumpler v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1485 at paras. 34-36).

V. Conclusion

[21] For these reasons, I will dismiss the application for judicial review.

[22] On the issue of whether a question should be certified in this case, the Respondent submits that the law is settled. However, the parties agree that, if the Court chooses to certify a question, such question should be as follows:

> Does the phrase “a crime that was punished in Canada by a term of imprisonment of at least two years" used in subsection 64 (2) of the IRPA apply where the underlying conviction(s) and/or sentence is/are the subject of an outstanding criminal appeal(s)?

[23] To be certified, a question of general importance must transcend the interests of the parties to the litigation, contemplate issues of broad importance and be determinative of the appeal *(Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, [1994] F.C.J. No. 1637 at para. 4 (C.A.) (QL)). In my view the proposed question satisfies these criteria. Accordingly, I will certify this question.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. the application for judicial review is dismissed; and

2. the following question is certified:

   Does the phrase “a crime that was punished in Canada by a term of imprisonment of at least two years" used in subsection 64 (2) of IRPA apply where the underlying conviction(s) and/or sentence is/are the subject of an outstanding criminal appeal(s)?

“Judith A. Snider”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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