Federal Court  Cour fédérale

Date: 20100118

Docket: IMM-2659-09

Citation: 2010 FC 30

Ottawa, Ontario, this 18th day of January 2010

Before: The Honourable Mr. Justice Pinard

BETWEEN:

Ngoc Quang NGUYEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the "*IRPA*") of a decision of the Immigration Appeal Division (the "IAD") of the Immigration and Refugee Board of Canada (the "Board") dated May 5, 2009, dismissing the applicant's appeal of his removal order.

[2] Ngoc Quang Nguyen, the applicant, was born in a Hong Kong refugee camp on February 24, 1985. He came to Canada as a permanent resident on November 10, 1986 with his parents and his four siblings. At the age of nine, the applicant's parents gave him up to the care of a foster home because they could not financially provide for all of their children. The applicant lived in foster care until the age of 18.

[3] On February 12, 2004 the applicant was convicted of one (1) count of breaking and entering and one (1) count of mischief. On February 13, 2004, the applicant was convicted of six (6) counts of breaking and entering and five (5) counts of mischief. The applicant spent five months and three weeks in pre-sentence custody. The sentencing judge found this equivalent to 11 months of a sentence and imposed an 18-month term of imprisonment for each of the thirteen charges to be served concurrently following his pre-sentencing detention.

[4] The applicant completed his sentence, ultimately serving 12 months of his sentence in prison and three months at a therapy centre before being released. Thus, of the 18 months ordered, he completed 15 months prior to being released.

[5] On December 10, 2007, an immigration officer of Citizenship and Immigration Canada prepared a report advising that the applicant was now inadmissible to Canada due to his criminal convictions. On March 27, 2008 the Immigration Division of the Board issued a deportation order against the applicant pursuant to paragraph 36(1)(*a*) of the *IRPA*. The applicant filed an appeal with the IAD. On May 5, 2009, the IAD dismissed the appeal on grounds of lack of jurisdiction.

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[6] The following sections of the *IRPA* are relevant to this judicial review:

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;

(*b*) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(*c*) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

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;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

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.

(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 two years.

(3) No appeal may be made under subsection 63(1) in respect of a decision

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) L'interdiction de territoire pour grande criminalité vise l'infraction punie au Canada par un emprisonnement d'au moins deux ans.

(3) N'est pas susceptible d'appel au titre du paragraphe 63(1) le refus fondé sur l'interdiction de territoire pour fausses

that was based on a finding of inadmissibility on the ground of misrepresentation, unless the foreign national in question is the sponsor's spouse, common-law partner or child.

déclarations, sauf si l'étranger en cause est l'époux ou le conjoint de fait du répondant ou son enfant.

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[7] The determinative issue for the IAD was whether the applicant's appeal of his deportation order was barred pursuant to subsection 64(2) of the *IRPA*. The IAD concluded that a sentence of less than two years, in this case 18 months, does, for the purposes of subsection 64(2), become a sentence of more than two years simply because the trial judge, in imposing the sentence of less than two years, took into account the time already spent in custody as a result of the offence. Thus the sentence was 29 months (11 months of pre-sentence custody and an 18-month term of imprisonment after conviction) for the purposes of subsection 64(2). Because it determined the applicant met the definition of "serious criminality", section 64 was engaged and the IAD had no jurisdiction upon which it could consider an appeal of inadmissibility.

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[8] The applicable standard of review of the IAD's interpretation of whether "term of imprisonment" includes pre-trial custody is correctness since it is a question of jurisdiction and statutory interpretation (*Brown v. Minister of Public Safety and Emergency Preparedness*, 2009 FC 660, para. 16; *Dunsmuir v. New Brunswick*, 2008 SCC 9).

[9] The applicant alleges that the IAD erred when it failed to properly interpret the promotion of international law and human rights as well as the purpose of family reunification as objectives of the *IRPA*. The IAD found security to be an objective of the *IRPA*. The applicant objects to the emphasis placed on this particular objective in the case at bar. Recent jurisprudence from the Supreme Court of Canada and the Federal Court supports the IAD's interpretation, however.

[10] In *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539, the Supreme Court explained the objectives of the *IRPA* illustrate the intent of Parliament to prioritize security by restricting access to Canada for those who engage in violence:

> [10] 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. This marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security: e.g., see s. 3(1)(*i*) of the *IRPA* versus s. 3(*j*) of the former Act; s. 3(1)(*e*) of the *IRPA* versus s. 3(*d*) of the former Act; s. 3(1)(*h*) of the *IRPA* versus s. 3(*i*) of the former Act. 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.
>
> (My emphasis.)

[11] Justice Michel Shore confirmed this interpretation in *Ramnanan v. Minister of Citizenship and Immigration et al.*, 2008 FC 404:

> [46] The objectives of the *IRPA*, enumerated in section 3, are twofold: paragraphs (*a*) to (*g*), contain objectives aiming at facilitating immigration and family reunification; paragraphs (*h*) and (*i*), on the other hand, aim to protect the health, safety and security of the Canadian society:

3. (1) The objectives of this Act with respect to immigration are	**3.** (1) En matière d'immigration, la présente loi a pour objet :
…	[…]
(*h*) to protect the health and safety of Canadians and to maintain the security of Canadian society;	*h*) de protéger la santé des Canadiens et de garantir leur sécurité;
(*i*) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and	*i*) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;

> [47] In drafting the new immigration legislation, Parliament decided that the tipping point had been reached and it intended for the sake of the security of Canadian society, to restrict access to Canada for persons inadmissible on grounds of criminality, serious criminality and to those who engage in violence, terrorism or violations of international and human rights. The intention of Parliament in that regard materializes in various provisions, for example, in s. 64, ss. 68(4), s. 196 and s. 197 of the *IRPA*. (*Medovarski*, above; *Martin v. Canada (Minister of Citizenship and Immigration)*, above.)

[12] Thus, the IAD correctly acknowledged that legislative intent of the *IRPA*, as set out in the Supreme Court's reasons in *Medovarski, supra*, and confirmed in *Ramnanan, supra*.

[13] The applicant submits that the pre-trial custody should not be included in the calculation of the term of imprisonment. Thus, the IAD has jurisdiction to hear the appeal as the applicant was

sentenced to only 18 months of imprisonment. Furthermore, the applicant argues that he only served 15 months before he was released. The IAD allegedly erred by not considering the term of imprisonment as that time actually spent in incarceration rather than the initial sentence. Both of the applicant's arguments should be dismissed.

[14] As noted by Justice Michael Phelan in *Brown*, *supra*, there is significant case law from the Federal Court which concludes that pre-trial custody can be considered part of the "term of imprisonment" pursuant to subsection 64(2). Specifically in *Minister of Citizenship and Immigration v. Atwal*, 2004 FC 7, I found that the pre-trial custody would be included in calculating the term of imprisonment under section 64:

> [15] With section 64 of the *IRPA*, Parliament sought to set an objective standard of criminality beyond which a permanent resident loses his or her appeal right, and Parliament can be presumed to have known the reality that time spent in pre-sentence custody is used to compute sentences under section 719 of the *Criminal Code*. To omit consideration of pre-sentence custody under section 64 of the *IRPA* when it was expressly factored into the criminal sentence would defeat the intent of Parliament in enacting this provision.

[15] In so doing, I relied on the Supreme Court's reasoning in *R. v. Wust*, [2000] 1 S.C.R. 455. At paragraph 41 of that decision Madam Justice Louise Arbour found that while pre-trial detention: "is not intended as punishment when it is imposed, it is, in effect, deemed part of the punishment following the offender's conviction by the operation of s. 719(3)" (see also *Magtouf v. The Minister of Citizenship and Immigration*, 2007 FC 483).

[16] The applicant, however, relies heavily on the Supreme Court's more recent decision in *R. v. Mathieu*, [2008] 1 S.C.R. 723. The comments of the Court clearly indicate, according to the applicant, a departure from *Wust*, above, and the previous dicta from the Federal Court:

> [6] In short, I find that the term of imprisonment in each case is the term imposed by the judge at the time of sentence. The offender's prior detention is merely one factor taken into account by the judge in determining that sentence. This conclusion is dictated by the relevant provisions of the *Criminal Code*, including ss. (1) and (3) of s. 719. It is also consistent with the presumption of innocence to which every accused, even if detained pending trial, is entitled until he or she is convicted. As we will see below, it is consistent as well with the sentencing objectives that are relevant here.
>
> [7] Although it is possible, on an exceptional basis, to treat the time spent in pre-sentence custody as part of the term of imprisonment imposed at the time of sentence — in the context of a minimum sentence, for example, or of a conditional sentence — these are exceptions that prove the rule. As to minimum sentences, see *R. v. Wust*, [2000] 1 S.C.R. 455, 2000 SCC 18; regarding conditional sentences, see *R. v. Fice*, [2005] 1 S.C.R. 742, 2005 SCC 32.

[17] However, Deputy Justice Louis Tannenbaum recently considered the impact of *Mathieu*, *supra*, in *Ariri v. Minister of Public Safety and Emergency Preparedness*, 2009 FC 834, and found that considering the pre-trial custody as part of the term of imprisonment for the purposes of determining if the applicant has serious criminality is an acceptable exception to the ruling in *Mathieu* (see also *Brown*, *supra*).

[18] A separate argument put forward by the applicant is that the IAD should have considered how much time the applicant actually spent in prison rather than the term of imprisonment imposed. However, the respondent notes that this Court is bound by the Federal Court of Appeal's decision in

Martin v. Minister of Citizenship and Immigration, 2005 FCA 347, at paragraph 5 where Madam Justice Sharlow held that the word "punished" in subsection 64(2) "refers to the sentence imposed, not the actual duration of incarceration" (see also *Nabiloo v. The Minister of Citizenship and Immigration*, 2008 FC 125). Thus, the applicant's argument is untenable.

[19] I note that there is no dispute that the five months and three weeks the applicant spent in pre-trial custody is equivalent to 11 months credited to the applicant's sentence. In contrast, in *Brown, supra*, Justice Phelan was persuaded that the 2:1 credit was not clearly credited to the applicant. Thus, the IAD's decision that it did not have jurisdiction was an error as the term of punishment was less than two years. This is distinguishable from the case at bar. The term of imprisonment here equals 29 months.

[20] With regard to the case law, it is clear that the IAD did not commit a reviewable error interpreting the objectives of the *IRPA*. Similarly, the IAD did not commit a reviewable error interpreting "punished in Canada by a term of imprisonment", subsection 64(2), as inclusive of the time an offender spends in pre-trial custody. Thus, for the purposes of subsection 64(2), a "sentence" of imprisonment can include the time the applicant has spent in pre-trial custody. The IAD correctly applied the law.

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[21] For all the above reasons, the intervention of the Court is not warranted and the application for judicial review is dismissed.

[22] The applicant asks that the following question be certified:

> In light of [the text of the proposed question reads “In lieu of”] the recent decision in *R. v. Mathieu*, [2008] 1 S.C.R. 723, does pre-sentence custody, which is expressly credited towards a person’s criminal sentence, form part of the “term of imprisonment” under section 64(2) of the *Immigration and Refugee Protection Act*?

[23] Considering that in the cases of *Brown*, above, and *Ariri*, *supra*, this Court concluded that the *Mathieu* decision did not change the law regarding the question at issue; considering that the applicant did not refer to any decision to the contrary; considering that when the law is clear on the issue addressed by the proposed certified question, the Court should not certify it (see, for example, *Kumar v. Minister of Citizenship and Immigration*, 2004 FC 601, para. 27; *Hussenu v. Minister of Citizenship and Immigration*, 2004 FC 283, para. 42; and *Arumugam v. Canada (M.E.I.)*, [1994] F.C.J. No. 122 (T.D.) (QL), para. 5), I agree with the respondent that there is no question for certification arising in this case.

JUDGMENT

The application for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada dated May 5, 2009, dismissing the applicant's appeal of his removal order, is dismissed.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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