SUPREME COURT OF CANADA

CITATION: Tran *v.* Canada (Public Safety and Emergency Preparedness), 2017 SCC 50

APPEAL HEARD: January 13, 2017
JUDGMENT RENDERED: October 19, 2017
DOCKET: 36784

BETWEEN:

Thanh Tam Tran
Appellant

and

Minister of Public Safety and Emergency Preparedness
Respondent

- and -

Attorney General of British Columbia, Canadian Association of Refugee Lawyers, British Columbia Civil Liberties Association and African Canadian Legal Clinic
Interveners

CORAM: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

REASONS FOR JUDGMENT: (paras. 1 to 56)

Côté J. (McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Brown and Rowe JJ. concurring)

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Thanh Tam Tran *Appellant*

v.

Minister of Public Safety and Emergency Preparedness *Respondent*

and

Attorney General of British Columbia,
Canadian Association of Refugee Lawyers,
British Columbia Civil Liberties Association and
African Canadian Legal Clinic *Interveners*

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Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Immigration — Inadmissibility and removal — Permanent residents — Serious criminality — Permanent resident convicted of federal offence receiving 12-month conditional sentence — Maximum sentence for offence increased after offence committed but before conviction and sentencing — Whether conditional sentence is "term of imprisonment" for purposes of assessing permanent resident's inadmissibility to Canada on grounds of serious criminality under s. 36(1)(a) of Immigration and Refugee Protection Act — Whether "maximum term of imprisonment" referred to in s. 36(1)(a) is maximum sentence that could have been imposed at time of commission of offence or of admissibility determination — Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 36(1)(a).

T, a permanent resident in Canada, was charged with a federal offence for which, at the time of the commission of the offence, the maximum penalty was seven years of imprisonment. After he was charged, but prior to his conviction, the maximum penalty for that offence was increased to 14 years of imprisonment. T was convicted of the charge against him, and received a 12-month conditional sentence of imprisonment to be served in the community.

Following T's conviction and sentencing, immigration officers prepared a report stating that T was inadmissible to Canada on grounds of serious criminality, under s. 36(1)(a) of the *Immigration and Refugee Protection Act* ("*IRPA*"). This provision provides that a permanent resident is inadmissible to Canada for having been convicted in Canada of a federal offence punishable by a maximum term of

imprisonment of at least 10 years, or of a federal offence for which a term of imprisonment of more than six months has been imposed. The report was then submitted to a delegate of the Minister of Public Safety and Emergency Preparedness, who decided to adopt it and refer the matter to the Immigration Division of the Immigration and Refugee Board for an admissibility hearing. T applied for judicial review of the delegate's decision. The reviewing judge allowed the application, finding that the offence of which T was convicted did not come within s. 36(1)(a) of the *IRPA* and that the delegate's decision to the contrary was unreasonable. The Court of Appeal allowed the Minister's appeal.

Held: The appeal should be allowed, the decision of the Minister's delegate quashed and the matter remitted to a different delegate.

The modern principle of statutory interpretation is that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Applying this approach, the interpretation of s. 36(1)(a) of the *IRPA* by the Minister's delegate cannot stand under either standard of review.

Conditional sentences are not captured in the meaning of the phrase "term of imprisonment" in s. 36(1)(a) of the *IRPA*. The purpose of s. 36(1)(a) is to define "serious criminality" for permanent residents convicted of an offence in Canada. It is clear from the wording of the provision that whether or not an imposed sentence can establish serious criminality depends on its length — it must be "more than six

months". However, the seriousness of criminality punished by a certain length of jail sentence is not the same as the seriousness of criminality punished by an equally long conditional sentence. Conditional sentences, even with stringent conditions, will usually be more lenient than jail terms of equivalent duration, and generally indicate less serious criminality than jail terms. Since a conditional sentence is a meaningful alternative to incarceration for less serious and non-dangerous offenders, interpreting "a term of imprisonment of more than six months" as including both prison sentences and conditional sentences undermines the efficacy of using length to evaluate the seriousness of criminality.

Furthermore, the meaning of "term of imprisonment" varies according to the statutory context. Its meaning in ss. 36(1)(a) and 64 of the *IRPA* has been interpreted by this Court to mean "prison". This interpretation avoids absurd results. Since more serious crimes may be punished by jail sentences that are shorter than conditional sentences imposed for less serious crimes, it would be an absurd outcome if less serious and non-dangerous offenders who received conditional sentences were deported, while more serious offenders receiving jail terms shorter than those conditional sentences were permitted to remain in Canada. Public safety, as an objective of the *IRPA*, is not enhanced by deporting less culpable offenders while allowing more culpable persons to remain in Canada.

The phrase "punishable by a maximum term of imprisonment of at least 10 years" in s. 36(1)(a) of the *IRPA* refers to the maximum term of imprisonment

available at the time of the commission of the offence, and is to be understood as referring to the circumstances of the actual offender or of others in similar circumstances. This interpretation aligns with the purpose of the *IRPA*, as outlined in s. 3. The *IRPA* aims to permit Canada to obtain the benefits of immigration, while recognizing the need for security and outlining the obligations of permanent residents. The obligation of permanent residents to behave lawfully includes not engaging in "serious criminality" as defined in s. 36(1); however, that obligation must be communicated to them in advance. While Parliament is entitled to change its views on the seriousness of a crime, it is not entitled to alter the mutual obligations between permanent residents and Canadian society without clearly and unambiguously doing so. Section 36(1)(a) must be interpreted in a way that respects these mutual obligations. In the absence of an indication that Parliament has considered the retrospectivity of this provision and the potential for it to have unfair effects, the presumption against retrospectivity applies. Accordingly, the relevant date for assessing serious criminality under s. 36(1)(a) is the date of the commission of the offence, not the date of the admissibility decision.

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Considered: *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; **referred to:** *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364; *R. v.*

Proulx, 2000 SCC 5, [2000] 1 S.C.R. 61; *R. v. Shah*, 2003 BCCA 294, 182 B.C.A.C. 142; *R. v. Saundercook-Menard*, 2008 ONCA 493; *R. v. Chapman*, 2007 YKSC 55; *R. v. Jacobson* (2006), 207 C.C.C. (3d) 270; *R. v. Keller*, 2009 ABCA 418, 469 A.R. 151; *R. v. Sandhu*, 2014 ONCJ 95; *R. v. Kasakan*, 2006 SKCA 14, [2006] 8 W.W.R. 23; *R. v. Lebar*, 2010 ONCA 220, 101 O.R. (3d) 263; *R. v. Knoblauch*, 2000 SCC 58, [2000] 2 S.C.R. 780; *R. v. Wu*, 2003 SCC 73, [2003] 3 S.C.R. 530; *R. v. Middleton*, 2009 SCC 21, [2009] 1 S.C.R. 674; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906; *R. v. Pham*, 2013 SCC 15, [2013] 1 S.C.R. 739; *R. v. Vine* (1875), L.R. 10 Q.B. 195; *In re A Solicitor's Clerk*, [1957] 1 W.L.R. 1219; *R. v. Hooyer*, 2016 ONCA 44, 129 O.R. (3d) 81.

Statutes and Regulations Cited

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Immigration Act, 1976, S.C. 1976-77, c. 52, s. 27(1)(*d*).

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 3, 36(1), 44(1), (2), 45(a), (c), (d), 46(1)(c), 50(b), 63(3), 64(2) [am. 2013, c. 16, s. 24], 74(d).

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APPEAL from a judgment of the Federal Court of Appeal (Gauthier, Ryer and Near JJ.A.), 2015 FCA 237, [2016] 2 F.C.R. 459, 478 N.R. 165, 392 D.L.R. (4th) 351, 38 Imm. L.R. (4th) 175, [2015] F.C.J. No. 1324 (QL), 2015 CarswellNat 5677 (WL Can.), setting aside a decision of O'Reilly J., 2014 FC 1040, 31 Imm. L.R. (4th) 160, [2014] F.C.J. No. 1106 (QL), 2014 CarswellNat 4405 (WL Can.). Appeal allowed.

Peter H. Edelmann, *Aris Daghighian* and *Erin C. Roth*, for the appellant.

François Joyal and *Kathryn Hucal*, for the respondent.

Written submissions only by *Christina Drake*, for the intervener the Attorney General of British Columbia.

John Norris, for the intervener the Canadian Association of Refugee Lawyers.

Lorne Waldman and *Warda Shazadi Meighen*, for the intervener the British Columbia Civil Liberties Association.

Faisal Mirza, *Dena Smith* and *Danardo Jones*, for the intervener the African Canadian Legal Clinic.

The judgment of the Court was delivered by

CÔTÉ J. —

[1] Canada's *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*") recognizes that there are important social, cultural and economic benefits to immigration. It also recognizes that successful integration of permanent residents involves mutual obligations for those new immigrants and for Canadian society.

[2] This appeal concerns the obligation of permanent residents to avoid "serious criminality", as set out in s. 36(1)(a) of the *IRPA*. This obligation is breached when a permanent resident is convicted of a federal offence punishable by a maximum term of imprisonment of at least 10 years, or of a federal offence for which a term of imprisonment of more than 6 months has been imposed.

[3] The appellant, Thanh Tam Tran, was convicted of a federal offence and received a 12-month conditional sentence. At issue in this appeal is whether a conditional sentence consists of a "term of imprisonment" for the purposes of s. 36(1)(a) and whether, when the maximum sentence for an offence has changed over time, the "maximum term of imprisonment" referred to at s. 36(1) should be taken to be the maximum sentence that could have been imposed at the time of the commission of the offence, of the conviction, of sentencing or of the determination as to the permanent resident's admissibility to Canada.

[4] For the reasons that follow, I would allow the appeal.

I. Background

[5] Section 36(1)(a) of the *IRPA* provides the basis for finding a permanent resident inadmissible to Canada on grounds of "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;

Inadmissibility can lead to loss of status and removal from Canada.

[6] If a Canada Border Services Agency ("CBSA") officer is of the opinion that a permanent resident is inadmissible, that officer may prepare a report setting out the relevant facts and transmit that report to the Minister of Public Safety and Emergency Preparedness ("Minister") (*IRPA*, s. 44(1)). If the Minister is of the opinion that the report is well founded, the Minister may refer the report to the Immigration Division of the Immigration and Refugee Board ("Immigration Division") for an admissibility hearing (s. 44(2)). However, even if he is of the opinion that the report is well founded, the Minister retains some discretion not to refer it to the Immigration Division.

[7] If the Minister does refer the report to the Immigration Division, an admissibility hearing is held for the permanent resident, and the Immigration Division must either recognize that person's right to enter Canada (*IRPA*, s. 45(a)), authorize him or her to enter Canada for further examination (s. 45(c)), or make a removal order against that person (s. 45(d)). If a removal order is made, that person's permanent resident status is lost (*IRPA*, s. 46(1)(c)). Although a right to appeal to the Immigration Appeal Division exists against a decision to make a removal order against a permanent resident (*IRPA*, s. 63(3)), there is no right to appeal by a permanent resident who has been found inadmissible on grounds of serious criminality if the finding of inadmissibility was "with respect to a crime that was punished in Canada by a term of imprisonment of at least six months" (*IRPA*, s. 64(2)).

[8] This appeal concerns the judicial review of a decision by the Minister to refer a report concerning Mr. Tran's admissibility to the Immigration Division.

[9] Mr. Tran is a citizen of Vietnam. In 1989, he acquired permanent resident status in Canada. In March 2011, he was involved in a marihuana grow operation containing approximately 915 plants and was charged with production of a controlled substance, contrary to s. 7(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA*"). At the time of the commission of the offence, the maximum penalty if convicted was seven years of imprisonment (s. 7(2)(b)).

[10] On November 6, 2012, legislation came into effect (*Safe Streets and Communities Act*, S.C. 2012, c. 1, s. 41) increasing the maximum sentence for this offence to 14 years of imprisonment and providing for a new minimum sentence of 2 years of imprisonment if the number of plants produced was more than 500 (*CDSA*, s. 7(2)(b)(v)).

[11] On November 29, 2012, Mr. Tran was convicted of the charge against him. On January 18, 2013, he received a 12-month conditional sentence of imprisonment, to be served in the community.

II. Decisional History

A. *Administrative Decisions*

[12] On July 26, 2013, a CBSA officer prepared a report stating that Mr. Tran was inadmissible to Canada under s. 36(1)(a) of the *IRPA*. A delegate of the Minister referred Mr. Tran's case to the Immigration Division for an admissibility hearing. This referral was withdrawn on September 10, 2013, in view of legislative changes to appeal rights under s. 64(2) of the *IRPA*. Mr. Tran was given an opportunity to make additional submissions as to why a removal order should not be sought against him.

[13] On October 4, 2013, Mr. Tran provided written submissions in which he argued that he did not fall within the purview of s. 36 because: (1) the conditional sentence order made against him was not a "term of imprisonment", and therefore a "term of imprisonment of more than six months" had not been imposed; and (2) the *CDSA* amendments raising the maximum sentence for the offence for which he was convicted were not retroactively applicable to him, and therefore the offence, at the time he committed it, was not "punishable by a maximum term of imprisonment of at least 10 years". Mr. Tran also made submissions on various discretionary factors in support of his position that his case did not warrant referral to the Immigration Division.

[14] On October 7, 2013, a second CBSA officer submitted another report ("Report") regarding Mr. Tran to a delegate of the Minister. The Report states, in part:

> I recommend that this report be referred to an admissibility hearing and a deportation order be issued.

. . .

> I have reviewed counsel's submissions carefully and thoroughly, and given thought to each relevant point. Many are legal arguments that do not fall into the scope of my duties in this matter. In looking at my responsibility under the Act, I am guided by CIC Enforcement Manual ENF 6, which states I should consider the following non-exhaustive list of factors. I address each of them below, with consideration to additional and relevant points raised by counsel. [Emphasis added.]
>
> (A.R., vol. I, at p. 1)

The Report then canvasses conditions in Mr. Tran's home country of Vietnam, his degree of establishment in Canada, and the best interests of his children. Notably, the Report lists a series of arrests and charges without conviction, and a conviction for impaired driving, which are cited in support of a conclusion that Mr. Tran

> tends to get arrested every couple of years. By failing to acknowledge any of his past problems, particularly his very recent conviction, it is my opinion that [Mr. Tran] is not accepting responsibility for his actions. Based on the little information before me, I can only assume he will reoffend because he has done so in the past and because he has not demonstrated any inclination to take responsibility for anything beyond what he thinks immigration officials are aware of. . . .
>
> . . .
>
> Based on all of the above information, and in consideration of the submissions made by counsel, it is my opinion that this report should be referred to a hearing. [Mr. Tran] has been involved in a serious criminal offence. The evidence provided is that he has been involved in criminal activity in the past and that he is not taking full responsibility for his actions. The mitigating factors (establishment, family, hardship in Vietnam, etc) are overshadowed by the seriousness of the offence, [Mr. Tran]'s conduct in society, and the lack of any indication his behaviour will improve.
>
> (A.R., vol. I, at p. 3)

[15] On October 10, 2013, the Minister's delegate endorsed the Report and referred the matter for an admissibility hearing before the Immigration Division. Mr. Tran then applied for judicial review of the delegate's decision.

B. *Judicial Review in the Federal Court, 2014 FC 1040, 31 Imm. L.R. (4th) 160*

[16] Justice O'Reilly found the decision to be unreasonable. He allowed Mr. Tran's application for judicial review and ordered that another officer consider the question of Mr. Tran's inadmissibility. The judge found that whether a conditional sentence is a "term of imprisonment" varies according to the statutory context; that conditional sentences are meant as an alternative to incarceration for less serious offences; and that Mr. Tran's conditional sentence was not a "term of imprisonment" under the *IRPA*. Ergo, Mr. Tran had not been sentenced to a "term of imprisonment of more than six months". On the maximum term of imprisonment question, O'Reilly J. found that s. 36(1)(a) referred to the maximum punishment available at the time of conviction (para. 20):

> 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.

The judge also found the officer's reliance on unproven allegations of criminal activity to be unreasonable.

[17] Justice O'Reilly certified two questions of general importance, thus permitting an appeal to the Federal Court of Appeal under s. 74(d) of the *IRPA*:

> 1. Is a conditional sentence of imprisonment imposed pursuant to the regime set out in ss. 742 to 742.7 of the *Criminal Code* [R.S.C. 1985, c. C-46] "a term of imprisonment" under s. 36(1)(a) of the *IRPA*?
>
> 2. Does the phrase "punishable by a maximum term of imprisonment of at least 10 years" in s. 36(1)(a) of the *IRPA* refer to the maximum term of imprisonment available at the time the person was sentenced or to the maximum term of imprisonment under the law in force at the time admissibility is determined?
>
> (2015 FC 899)

C. *Federal Court of Appeal, 2015 FCA 237, [2016] 2 F.C.R. 459*

[18] Justice Gauthier, for a unanimous Federal Court of Appeal, allowed the Minister's appeal. She found that even if the reviewing judge's interpretation of s. 36(1)(a) was correct, he had nevertheless failed to do what he was required to do under a reasonableness standard on judicial review: to assess whether the interpretation adopted by the administrative decision maker fell within the range of interpretations defensible on the law and facts.

[19] Gauthier J.A. found that the interpretation of s. 36(1)(a) adopted by the Minister's delegate was not unreasonable. Regarding the actual term of imprisonment imposed (the first certified question), she held that it was not unreasonable to construe a conditional sentence as a "term of imprisonment" under s. 36(1)(a). She added that

to say that a conditional sentence is more lenient than similar terms of incarceration does not mean that Parliament does not nevertheless consider the offence in question serious enough to warrant inadmissibility. She noted that the parliamentary committee debates about lowering the threshold of the term of imprisonment beyond which there is no right to appeal inadmissibility findings to the Immigration Appeal Division (*IRPA*, s. 64(2)) included three proposals to exclude conditional sentences, each of which was defeated. She explained that if Parliament considers a conditional sentence of at least six months to be sufficiently serious to warrant the loss of appeal rights, it was not unreasonable for the Minister's delegate to interpret a conditional sentence as a "term of imprisonment" under s. 36(1)(a).

[20] With respect to "punishable by a maximum term of imprisonment of at least 10 years", Gauthier J.A. found that "punishable" refers to the offence under the Act of Parliament and not to what could be imposed on any particular offender. She was of the view that the context of s. 36(1)(a) supports a conclusion that the test is objective rather than subjective. She found that it was not unreasonable to conclude that the relevant point in time is when admissibility is being assessed, since admissibility should be assessed against Canada's prevailing views of the seriousness of the offence in question. She was also of the view that s. 11(*i*) of the *Canadian Charter of Rights and Freedoms* did not apply because proceedings before the Minister's delegate are neither criminal nor penal.

III. Preliminary Matters

[21] Prior to tackling the statutory interpretation questions at the heart of this appeal, I will address two preliminary matters. First, to be clear, the decision under review is that of the Minister's delegate, taken pursuant to s. 44(2) of the *IRPA*, to refer the matter to the Immigration Division for an admissibility hearing. While the Minister's delegate merely adopted the Report — and that Report is all that is available in support of the decisions taken at the s. 44(1) and s. 44(2) stages — it is nevertheless the Minister's delegate's decision that was under review and not that of the officer.

[22] Second, while courts have the discretion to hear an application for judicial review prior to the completion of the administrative process and the exhaustion of appeal mechanisms, they should exercise restraint before doing so (*Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364, at paras. 35-36; D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 1, at topic 3:4100). In this case, the parties have not asked this Court to revisit the decisions of the courts below to hear the application, and I am of the view that this Court should respect those decisions.

IV. Analysis

[23] The modern principle of statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of

Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). Applying this approach, I am of the view that, under either standard of review, the assumed interpretation of s. 36(1)(a) by the Minister's delegate cannot stand.

A. *Conditional Sentences Are Not Included in "Term of Imprisonment"*

[24] I cannot, on either standard of review, accept the interpretation that conditional sentences are captured in the meaning of "term of imprisonment". Such an interpretation must be rejected for at least three reasons.

[25] First, the purpose of s. 36(1)(a) is to define "serious criminality" for permanent residents convicted of an offence in Canada. It is clear from the wording of the provision that whether or not an imposed sentence can establish "serious criminality" depends on its length. Length is the gauge. It must be "more than six months". However, the seriousness of criminality punished by a certain length of jail sentence is not the same as the seriousness of criminality punished by an equally long conditional sentence. In other words, length of the sentence alone is not an accurate yardstick with which to measure the seriousness of the criminality of the permanent resident.

[26] Chief Justice Lamer explained in *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 44, that "a conditional sentence, even with stringent conditions, will usually be a more lenient sentence than a jail term of equivalent duration". He elaborated as follows (at para. 52):

> A judge does not impose a fixed sentence of "x months" in the abstract, without having in mind where that sentence will be served. Furthermore, when a conditional sentence is chosen, its duration will depend on the type of conditions imposed. Therefore, the duration of the sentence should not be determined separately from the determination of its venue. [Citations omitted.]

[27] The dissymmetry between the length of jail terms and the length of conditional sentences was usefully illustrated by counsel for Mr. Tran. On the one hand, there are cases in which *mitigating* factors prompted courts to replace jail terms of less than six months with conditional sentences longer than six months (e.g. *R. v. Shah*, 2003 BCCA 294, 182 B.C.A.C. 142; *R. v. Saundercook-Menard*, 2008 ONCA 493; *R. v. Chapman*, 2007 YKSC 55; *R. v. Jacobson* (2006), 207 C.C.C. (3d) 270 (Ont. C.A.)). On the other hand, there are cases in which *aggravating* factors led courts to replace conditional sentences longer than six months with jail terms shorter than six months (e.g. *R. v. Keller*, 2009 ABCA 418, 469 A.R. 151; *R. v. Sandhu*, 2014 ONCJ 95; *R. v. Kasakan*, 2006 SKCA 14, [2006] 8 W.W.R. 23; *R. v. Lebar*, 2010 ONCA 220, 101 O.R. (3d) 263). Notably, in the case at bar, Mr. Tran asked the Court of Appeal for British Columbia to replace his 12-month conditional sentence with a custodial sentence of less than 6 months (A.F., at para. 18).

[28] Not only is length an unreliable indicator of "serious criminality" when comparing jail sentences to conditional sentences, but it may not even be a reliable measure across conditional sentences because of the disparate conditions attached to them. More fundamentally, conditional sentences generally indicate less "serious criminality" than jail terms. As Lamer C.J. said, a "conditional sentence is a

meaningful alternative to incarceration for less serious and non-dangerous offenders" (*Proulx*, at para. 21; see also *R. v. Knoblauch*, 2000 SCC 58, [2000] 2 S.C.R. 780, at para. 102). Thus, interpreting "a term of imprisonment of more than six months" as including both prison sentences and conditional sentences undermines the efficacy of using length to evaluate the seriousness of criminality.

[29] Second, the meaning of "term of imprisonment" varies according to the statutory context. In some instances, the word "imprisonment" is used in the *Criminal Code* to capture conditional sentences (*R. v. Wu*, 2003 SCC 73, [2003] 3 S.C.R. 530, at para. 25; *Proulx*, at para. 29). But that is not always the case. In *R. v. Middleton*, 2009 SCC 21, [2009] 1 S.C.R. 674, at para. 14, Justice Fish concluded that there is no consistent meaning for the word "imprisonment" in the *Criminal Code*:

> . . . "imprisonment" in the phrases "sentence of imprisonment" and "term of imprisonment" does not bear a uniform meaning for all purposes of the *Criminal Code*. In several instances, these terms necessarily contemplate incarceration.

Nor is there a consistent meaning across other statutes. Critically, its meaning in ss. 36(1)(a) and 64 of the *IRPA* was interpreted by this Court in *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539, at paras. 11 and 13, to mean "prison":

> . . . the *IRPA* creates a new scheme whereby persons sentenced to more than six months in prison are 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: *IRPA*, s. 64.

> Provisions allowing judicial review mitigate the finality of these provisions, as do appeals under humanitarian and compassionate grounds and pre-removal risk assessments. However, the 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.
>
> . . .
>
> In summary, the provisions of the *IRPA* and the Minister's comments indicate that the purpose of enacting the *IRPA*, and in particular s. 64, was to efficiently remove criminals sentenced to prison terms over six months from the country. [Emphasis added.]

While not necessarily determinative, this existing interpretation of "term of imprisonment" in the context of the *IRPA* fortifies my conclusion in this case.

[30] The Minister says that, in recent amendments to ss. 50(b) and 64(2) of the *IRPA*, the exclusion of conditional sentences from the meaning of "term of imprisonment" was explicitly rejected. I do not agree with this interpretation of legislative history. It is useful to note as a starting point that the six-month threshold originated in the *Immigration Act, 1976*, S.C. 1976-77, c. 52, s. 27(1)(*d*) — before the introduction of conditional sentences as a sentencing option in Canada — and was later kept in the *IRPA* in 2002. In 2013, the threshold for denial of appeal rights set out in s. 64(2) was reduced from a "term of imprisonment" of at least two years to a "term of imprisonment" of at least six months (S.C. 2013, c. 16, s. 24). The Minister points to committee debates surrounding those amendments — debates in which proposals to exclude conditional sentences from counting toward the s. 64(2) threshold were rejected. Specifically, the Minister's argument rests on the rejection of three proposals by the House of Commons and Senate committees tasked with

examining amendments. However, since the proposed amendments addressed more than just conditional sentences[1] and had to do with changes to s. 64(2) rather than to s. 36(1)(a), I cannot draw any meaningful inferences from the rejection of those proposals.

[31] Finally, my interpretation avoids absurd results. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 27, Justice Iacobucci explained the presumption that the legislature does not intend absurd consequences:

> It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté [P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)], an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile [R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994)], at p. 88).

[32] If s. 36(1)(a) is interpreted such that a conditional sentence is a "term of imprisonment", absurd consequences will follow. As previously mentioned, conditional sentences are "for less serious and non-dangerous offenders" (*Proulx*, at para. 21). Thus, more serious crimes may be punished by jail sentences that are

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[1] It was also proposed that there be thresholds related to the length of time a foreign national had resided in Canada (House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, No. 064, 1st Sess., 41st Parl., November 28, 2012, at pp. 4-5 (K. Lamoureux, Lib.)); that access to appeals be restored for those convicted of crimes outside Canada (pp. 2-3 (J. J. Sims, NDP)); and that amendments be made concerning the Canadian Security Intelligence Service interview, compassionate and humane grounds, misrepresentations, reports to the House, and retroactivity (*Debates of the Senate*, vol. 148, No. 168, 1st Sess., 41st Parl., May 30, 2013, at p. 4081 (Hon. A. Eggleton)).

shorter than conditional sentences imposed for less serious crimes — shorter because they are served in jail rather than in the community. It would be an absurd outcome if, for example, "less serious and non-dangerous offenders" sentenced to seven-month conditional sentences were deported, while more serious offenders receiving six-month jail terms were permitted to remain in Canada. Public safety, as an objective of the *IRPA* (s. 3(1)(h)), is not enhanced by deporting less culpable offenders while allowing more culpable persons to remain in Canada.

[33] It would also be absurd for offenders to seek prison sentences instead of conditional sentences so that they can remain in Canada, as Mr. Tran has done in this case. Conditional sentences are designed as an alternative to incarceration in order to encourage rehabilitation, reduce the rate of incarceration, and improve the effectiveness of sentencing (*Proulx*, at para. 20). These objectives would be sabotaged if individuals who are subject to conditional sentences sought to replace them with prison terms, thinking the latter to be their only path for a future in the Canadian communities from which incarceration would remove them.

[34] For these reasons, the phrase "term of imprisonment" in s. 36(1)(a) of the *IRPA* cannot, by either standard of review, be understood to include conditional sentences.

B. *The Maximum Term Is Determined as of the Time of the Commission of the Offence*

[35] Turning to the interpretation of "punishable by a maximum term", in my view, a contextual reading of s. 36(1)(a) supports only one conclusion: the phrase "punishable by a maximum term of imprisonment of at least 10 years" refers to the maximum sentence that the accused person could have received at the time of the commission of the offence.

[36] Section 36(1)(a) begins with "having been convicted", which sets the temporal marker at the time of conviction. As counsel for Mr. Tran underscored during oral argument, the fact of a conviction precedes the two disjunctive clauses: the maximum term and the actual term imposed. Both are rooted in the fact of having been convicted. It is at the moment of conviction that the two disjunctive clauses become operable, and it is with reference to that time that the clauses are to be understood.

[37] By the time of Mr. Tran's conviction (November 29, 2012) and sentencing (January 18, 2013), the maximum sentence for an offence under s. 7(1) of the *CDSA* had increased from imprisonment for 7 years to imprisonment for 14 years. However, in view of s. 11(*i*) of the *Charter*, Mr. Tran, or anyone else in his position, could not receive a sentence greater than seven years. This is so because production of a controlled substance, contrary to s. 7(1) of the *CDSA*, is a criminal offence. Hence, sentences for convictions under that provision must not offend s. 11(*i*) of the *Charter* which provides:

> **11.** Any person charged with an offence has the right

. . .

> (*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Accordingly, the maximum sentence Mr. Tran could have been sentenced to upon his conviction is limited by the maximum sentence available at the time of the commission of the offence. Mr. Tran was not punishable by a term of imprisonment of at least 10 years.

[38] The Court of Appeal held that "punishable by a maximum term of imprisonment of at least 10 years" could be interpreted without reference to Mr. Tran or to a person in his position. I disagree. The criterion cannot simply be the abstract maximum penalty divorced from the actual "permanent resident . . . convicted" in a particular case. In my view, "punishable by a maximum term of imprisonment of at least 10 years" is to be understood as referring to the circumstances of the actual offender or of others in similar circumstances.

[39] This interpretation aligns with the purpose of the *IRPA*, as outlined in s. 3:

> **3 (1)** The objectives of this Act with respect to immigration are
>
> > **(a)** to permit Canada to pursue the maximum social, cultural and economic benefits of immigration;

> **(b)** to enrich and strengthen the social and cultural fabric of Canadian society, while respecting the federal, bilingual and multicultural character of Canada;
>
> . . .
>
> **(c)** to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada;
>
> **(d)** to see that families are reunited in Canada;
>
> **(e)** to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society;
>
> . . .
>
> **(h)** to protect public health and safety and to maintain the security of Canadian society;
>
> **(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
>
> **(j)** to work in cooperation with the provinces to secure better recognition of the foreign credentials of permanent residents and their more rapid integration into society.

[40] As stated above, the *IRPA* aims to permit Canada to obtain the benefits of immigration, while recognizing the need for security and outlining the obligations of permanent residents. The Minister emphasizes the *IRPA*'s security objective. Yet, as the Chief Justice explained in *Medovarski*, the security objective in the *IRPA* "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" (para. 10). The obligation under the *IRPA* to behave lawfully includes not engaging in "serious criminality" as

defined in s. 36(1). So long as this obligation is met, the *IRPA*'s objectives related to "successful integration" will remain relevant to permanent residents, and the *IRPA*'s objectives related to the "benefits of immigration" and "security" will be furthered.

[41] A similar interaction between the mutual obligations of the state and of individuals, in the criminal law context, has been described as follows:

> The state's duty to provide a framework for security may be presented as part of a bargain between the state and its citizens, a bargain in which a measure of security is provided in return for a measure of obedience.
>
> . . .
>
> The fundamental duty of justice requires the state to recognise certain rights of individuals in its dealings with them; notably, in the sphere of criminal law, the state should respect the rule of law and the principle of legality, so that citizens as rational agents may plan their lives so as to avoid criminal conviction.
>
> (A. Ashworth, *Positive Obligations in Criminal Law* (2013), at pp. 100-101)

This description is apposite in the immigration law context. Permanent residents too must be able to "plan their lives". Their obligations must be communicated to them in advance. As Lon Fuller warned, a legal system must "publicize, or at least . . . make available to the affected party, the rules he is expected to observe" (*The Morality of Law* (rev. ed. 1969), at p. 39). When Mr. Tran committed his offence, he could not have been aware that doing so was an act of "serious criminality" that might breach his obligations and lead to deportation.

[42] The Minister relies on *Medovarski*, at para. 47, for the proposition that permanent residents cannot expect that "the law will not change from time to time". The Minister argues that admissibility under s. 36(1)(a) must be tested against Parliament's views of the seriousness of the offence at the time of the admissibility decision. I do not agree. While Parliament is entitled to change its views on the seriousness of a crime, it is not entitled to alter the mutual obligations between permanent residents and Canadian society without doing so clearly and unambiguously. In this case, it has failed to do so. As such, s. 36(1)(a) must be interpreted in a way that respects these mutual obligations. The right to remain in Canada is conditional, but it is conditional on complying with *knowable* obligations. Accordingly, the relevant date for assessing serious criminality under s. 36(1)(a) is the date of the commission of the *offence*, not the date of the admissibility decision.

[43] The presumption against retrospectivity lends further support to this conclusion. While I agree with the Court of Appeal that s. 11(*i*) of the *Charter* does not apply to the decision of the Minister's delegate because the proceedings were neither criminal nor penal, the presumption against retrospectivity is a rule of statutory interpretation that is available in the instant case. The purpose of this presumption is to protect acquired rights and to prevent a change in the law from "look[ing] to the past and attach[ing] new prejudicial consequences to a completed transaction" (Driedger (1983), at p. 186). The presumption works such that "statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act"

(*Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, at p. 279; see also *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 71).

[44] The presumption against retrospectivity engages the rule of law. Lord Diplock explained that the rule of law "requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it" (*Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, [1975] A.C. 591 (H.L.), at p. 638). As this Court explained in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 70, the rule of law "vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs".

[45] The presumption against retrospectivity also bespeaks fairness (*R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 25). For example, sentencing judges are required to consider immigration consequences (*R. v. Pham*, 2013 SCC 15, [2013] 1 S.C.R. 739). It would raise issues of fairness to introduce a new collateral consequence *after* sentencing that would have been relevant *before* sentencing. As Mr. Tran points out, a permanent resident convicted of marijuana production 25 years ago would suddenly find themselves inadmissible years after having served the associated sentence. Such an outcome would not only offend fairness and the rule of law, but would also undermine the decision of the sentencing judge who decades ago

crafted an appropriate sentence without knowledge of additional deportation consequences.

[46] The Minister argues that the presumption against retrospectivity cannot assist Mr. Tran because this Court's decision in *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301, precludes its application. I disagree.

[47] In *Brosseau*, this Court held that the presumption will not apply if the new prejudicial consequence at issue is designed to protect the public rather than as a punishment for a prior event. The fact that s. 36(1)(a) of the *IRPA* reflects "an intent to prioritize security" (*Medovarski*, at para. 10) is not, in itself, sufficient to bring it within the "public protection" exception contemplated in *Brosseau*. To interpret the public protection exception as inclusive of *all* legislation that can be said to be *broadly* aimed at public protection would ignore the purpose underlying the presumption against retrospectivity.

[48] The presumption is a tool for discerning the intended temporal scope of legislation. In the absence of an indication that Parliament has considered retrospectivity and the potential for it to have unfair effects, the presumption must be that Parliament did not intend them:

> The absence of a general requirement of legislative prospectivity exists despite the fact that retrospective and retroactive legislation can overturn settled expectations and is sometimes perceived as unjust: see E. Edinger, "Retrospectivity in Law" (1995), 29 *U.B.C. L. Rev.* 5, at p. 13. Those who perceive it as such can perhaps take comfort in the rules of statutory

> interpretation that require the legislature to indicate clearly any desired retroactive or retrospective effects. Such rules ensure that the legislature has turned its mind to such effects and "determined that the benefits of retroactivity (or retrospectivity) outweigh the potential for disruption or unfairness": *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), at p. 268. [Emphasis added.]
>
> (*Imperial Tobacco,* at para. 71, per Major J.)

[49] The presumption exists to ensure that laws will only apply retrospectively where Parliament has clearly signaled that it has weighed the benefits of retrospectivity with its potential unfairness. Otherwise, we presume that Parliament did not intend such effects.

[50] Ordinarily, express language or necessary implication (*Gustavson Drilling*, at p. 279) provides this necessary indication that Parliament has turned its mind to the issue of retrospectivity. The "public protection" exception permits protective legislation to operate retrospectively absent express language or necessary implication, provided that legislative intent otherwise supports doing so. But, in accordance with the underlying purpose of the presumption, the exception is only triggered where the design of the penalty itself signals that Parliament has weighed the benefits of retrospectivity against its potential for unfairness. This will be the case where there is a clear nexus between the protective measure and the risks to the public associated with the prior conduct to which it attaches. In such cases, as in *Brosseau*, the scope of protection is aligned with the specific risks posed by persons who have engaged in specific harmful conduct and is tailored to preventing those

risks prospectively (see *Brosseau*, at pp. 319-20, citing *R. v. Vine* (1875), L.R. 10 Q.B. 195, at p. 199; see also *In re A Solicitor's Clerk*, [1957] 1 W.L.R. 1219 (Q.B.)).

[51] Section 36(1)(a) of the *IRPA* fails to provide such a clear nexus for two reasons, both of which are tied to the fact that Parliament relied on criminal sentences as a gauge for "serious criminality". First, by not associating "serious criminality" with specific offences and instead relying on the sentences they attract, Parliament contemplated that the range of offences constituting "serious criminality" can expand and contract over time. This suggests that Parliament intended to tailor the penalty to prevailing views about a particular conduct, not to the prevention of risks associated with that conduct (F.C.A. reasons, at para. 58). Second, as "serious criminality" is defined by reference to criminal sentences, the scope of public protection it affords necessarily captures criminal sentencing considerations that extend beyond "public protection", including punishment (see *R. v. Hooyer*, 2016 ONCA 44, 129 O.R. (3d) 81, at para. 42; *K.R.J.*, at paras. 31-32).

[52] As such, s. 36(1)(a) does not engage the "public protection" exception because — in the absence of a clear nexus between the risk and the protective measures available in response — it does not signal that Parliament weighed the potential for unfairness and the protective benefits of requiring that the class of non-citizens inadmissible for serious criminality remain perfectly aligned with the class of offences that s. 36(1)(a) deems "serious" at any point in time.

[53] For these reasons, I am of the view that "punishable by a maximum term of imprisonment of at least 10 years" refers to the maximum sentence that the accused person could have received at the time of the commission of the offence. The maximum sentence that Mr. Tran could have received at that time was only seven years. Thus he was not convicted of an offence "punishable by a maximum term of imprisonment of at least 10 years".

C. *Decision by the Minister's Delegate to Refer*

[54] The Minister's delegate formed the opinion that the Report on Mr. Tran's inadmissibility for serious criminality was well founded, and he referred the Report to the Immigration Division on that basis. Because that opinion was premised on an untenable interpretation of the grounds for inadmissibility under s. 36(1)(a), his decision to refer the Report cannot be sustained. It is therefore unnecessary for me to consider whether he properly exercised his discretion under s. 44(2).

V. Conclusion

[55] I would allow the appeal, quash the decision of the Minister's delegate, and remit the matter to a different delegate.

[56] Additionally, while this Court's analysis is not limited to the certified questions, in the interest of providing guidance on the legal questions addressed by

the Federal Court and Federal Court of Appeal, I would answer those questions as follows:

1. Is a conditional sentence of imprisonment imposed pursuant to the regime set out in ss. 742 to 742.7 of the *Criminal Code* "a term of imprisonment" under s. 36(1)(a) of the *IRPA*?

   — No.

2. Does the phrase "punishable by a maximum term of imprisonment of at least 10 years" in s. 36(1)(a) of the *IRPA* refer to the maximum term of imprisonment available at the time the person was sentenced or to the maximum term of imprisonment under the law in force at the time admissibility is determined?

   — It refers to the maximum term of imprisonment available at the time of the commission of the offence.

Appeal allowed.

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