Federal Court  Cour fédérale

Date: 20191211

Docket: IMM-6508-18

Citation: 2019 FC 1586

Ottawa, Ontario, December 11, 2019

PRESENT: Mr. Justice McHaffie

BETWEEN:

KE ZENG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In 2014, the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] was amended to increase the inadmissibility period for misrepresentation from two years to five years. Parliament also added a new prohibition on applying for permanent residence during that period. The question raised on this judicial review application is whether the new longer period applies to individuals who were found inadmissible before the amendments.

[2] Ke Zeng misrepresented his marriage to a Canadian citizen as genuine to obtain permanent resident status. The Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB) found him to be inadmissible. The IAD issued an exclusion order against Mr. Zeng in 2014 before the amendments came into force, but it was enforced—and the clock therefore started running on the inadmissibility period—after that date. Does the two-year or five-year period apply?

[3] Applying an Operational Bulletin relating to the amendments, an immigration officer concluded that the five-year inadmissibility period and prohibition applied, and deemed Mr. Zeng's new application for permanent resident status withdrawn. Although initially recognizing that the five-year period applied, Mr. Zeng now challenges that determination, saying that the two-year period applies and he is no longer inadmissible.

[4] There are no transitional provisions that assist in determining which inadmissibility period applies. Parliament's intention must therefore be assessed based on usual principles of statutory interpretation. Applying those principles, and in particular the presumption against the retrospective application of legislation, I conclude that the two-year inadmissibility period applied to Mr. Zeng, and that the deemed withdrawal of his application was in error. The application for judicial review is therefore granted and Mr. Zeng's application for permanent resident status is returned for assessment on its merits.

II. Mr. Zeng's Misrepresentation, Exclusion and New Application

[5] Mr. Zeng is a citizen of China. He married a Canadian citizen in 2005, who sponsored him for permanent resident status, which he obtained in 2007. They divorced in 2009.

[6] In 2012, the Immigration Division (ID) of the IRB concluded that Mr. Zeng's first marriage was a marriage of convenience, and found Mr. Zeng inadmissible pursuant to paragraph 40(1)(*a*) of the *IRPA*, which reads as follows:

Misrepresentation	**Fausses déclarations**
40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40 (1)** Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	**a)** directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
[…]	[…]

[7] Paragraph 40(2)(*a*) of the *IRPA* sets out the period of inadmissibility that results from a finding of misrepresentation. At the time Mr. Zeng was found inadmissible, that period continued for two years from the date of enforcement of the removal order:

Application	**Application**
(2) The following provisions govern subsection (1):	**(2)** Les dispositions suivantes s'appliquent au paragraphe (1) :
(a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of two years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced;	**a)** l'interdiction de territoire court pour les deux ans suivant la décision la constatant en dernier ressort, si le résident permanent ou l'étranger n'est pas au pays, ou suivant l'exécution de la mesure de renvoi;
[Emphasis added.]	[Je souligne.]

[8] In 2014, three things of significance to this application happened. First, after an intervening, though irrelevant, second marriage, Mr. Zeng had a child in Canada with a Canadian citizen and they married in May, 2014.

[9] Second, in September, 2014, the IAD dismissed Mr. Zeng's appeal of the ID's inadmissibility finding, and issued an exclusion order against him. An exclusion order is one of three types of removal order provided for under the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*]: *IRPR*, ss 223, 225.

[10] Third, on November 21, 2014, provisions of the *Faster Removal of Foreign Criminals Act*, SC 2013, c 16 [*FRFCA*] that amended section 40 of the *IRPA* came into force. Those amendments changed the two-year period referred to in paragraph 40(2)(*a*) to five years (while

leaving the paragraph otherwise the same), and added a new subsection (3) that prohibits applying for permanent resident status during the inadmissibility period:

Inadmissible	**Interdiction de territoire**
(3) A foreign national who is inadmissible under this section may not apply for permanent resident status during the period referred to in paragraph (2)(a).	**(3)** L'étranger interdit de territoire au titre du présent article ne peut, pendant la période visée à l'alinéa (2)a), présenter de demande pour obtenir le statut de résident permanent.

[11] Mr. Zeng left Canada on May 22, 2015. By operation of paragraph 240(1)(*c*) of the *IRPR*, this became the date on which the exclusion order against him was enforced. It therefore marked the start of the inadmissibility period set out in paragraph 40(2)(*a*).

[12] In November 2017, Mr. Zeng again applied for permanent residence in Canada, sponsored by his third wife. In a cover letter to the application, Mr. Zeng's then representative stated that Mr. Zeng was subject to the five-year inadmissibility period under the new paragraph 40(2)(*a*) and was not entitled to apply for permanent resident status during that time under the new subsection 40(3). However, Mr. Zeng sought discretionary issuance of an Authorization to Return to Canada (ARC), citing his current marriage and the best interests of his young son.

[13] After investigation, an immigration officer was satisfied that the marriage was *bona fide*. At first, it appears that the officer believed that an ARC could be obtained. However, upon further review and reference to Operational Bulletin 595 [OB 595], the officer concluded that Mr. Zeng could not apply for permanent resident status, and could not obtain an ARC owing to the five-year inadmissibility period and associated prohibition. The application was therefore

considered withdrawn. In reaching this conclusion, the officer did not consider humanitarian and compassionate [H&C] grounds or treat Mr. Zeng's application as a request made under section 25 of the *IRPA* for H&C relief.

[14] Although his representative had originally accepted that the five-year inadmissibility period applied, Mr. Zeng argues on this application that only the two-year inadmissibility period should apply and that he is no longer inadmissible. The Minister points to this change in position as indicative of the merits and the "overall tenor" of the application, but does not allege that Mr. Zeng is estopped from arguing the issue. Rather, the Minister agrees that if the two-year inadmissibility period does apply at law, it was incumbent on the officer to apply it to Mr. Zeng regardless of the position he took in his cover letter.

III. Applicability of the Five-Year Inadmissibility Period

A. *Standard of Review*

[15] Mr. Zeng submits that the correctness standard of review should apply to the question of which period of inadmissibility applies. Mr. Zeng cites the Federal Court of Appeal's recent decision in *Begum v Canada (Citizenship and Immigration)*, 2018 FCA 181, which dealt with whether the old or new version of an amended section of the *IRPR* applied. Although the Court of Appeal ultimately concluded that it did not matter which version applied, it found that the correctness standard applied to the issue, since the question was one of pure law that fell outside the expertise of the IAD, and was of "general importance for the legal system as a whole," a category of question that attracts no deference: *Begum* at paras 35, 39.

[16] The Supreme Court of Canada has indicated that the category of "questions of law that are of central importance to the legal system as a whole and are outside the decision maker's area of expertise" that attract the correctness standard "are rare and tend to be limited to situations that are detrimental to 'consistency in the fundamental legal order of our country'": *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 at paras 32, 34. Nonetheless, the Court of Appeal in *Begum* concluded that a question of the retrospective or retroactive application of an amendment to the *IRPR* falls within the category.

[17] The Minister concedes that if the question is one of assessing retrospective or retroactive effect of the amendments to the *IRPA*, then *Begum* indicates that the correctness standard applies. However, the Minister argues that that question does not arise, as the officer simply applied the facts to the law, an issue to which the reasonableness standard applies.

[18] I consider that in order to address the issue of whether Mr. Zeng is currently inadmissible, *i.e.*, whether he was subject to a two-year or five-year inadmissibility period, I must of necessity decide which version of section 40 of the *IRPA* applies to his situation. As that question is effectively identical to that arising in *Begum*, I conclude that *Begum* applies to dictate that I should review the issue on the correctness standard.

[19] I note that the officer did not provide reasons for the decision to apply the five-year inadmissibility period other than the operation of OB 595. There is therefore little to defer to in terms of analysis even if the reasonableness standard were to be applied. While the contents of OB 595 could perhaps be taken as effectively the "reasons" for the officer's decision, OB 595

also does not provide any reasons for its approach to transitional cases. It simply sets out a rule and a series of transitional scenarios for application by officers.

B. *Operational Bulletin 595*

[20] OB 595 is titled "*Coming into force of Bill C-43: misrepresentation increased from two to five years for temporary and permanent residents*." It is an internal document prepared for immigration officers by Immigration, Refugees and Citizenship Canada to explain the amendments to section 40 of the *IRPA* made by the *FRFCA*. Mr. Zeng filed evidence indicating that OB 595 is not generally publicly available, although the Minister filed a copy of the bulletin in this proceeding.

[21] OB 595 sets out the legislative provisions, and gives procedural instructions for reporting misrepresentation concerns and handling applications. Of particular relevance here, OB 595 states that the applicable length of the period of inadmissibility for those in Canada is determined by the date on which the removal order is enforced:

> **Period of inadmissibility**
>
> For those found inadmissible for misrepresentation **in Canada**, the period of inadmissibility begins on the date the removal order is enforced. If the removal order is enforced on November 21, 2014, or later, the period of inadmissibility is five years, as is the ban on applications for permanent residence. If the removal order is enforced on November 20, 2014, or before, then the period of inadmissibility is two years and there is no ban on applications for permanent residence.
>
> [Emphasis added; bold in original.]

[22] OB 595 provides a scenario of transitional cases, one of which describes Mr. Zeng's situation:

> - A foreign national in Canada is found by the Immigration Division to be inadmissible for misrepresentation under paragraph A40(1)(*a*) on November 15, 2014. The removal order is enforced on November 23, 2014.
>
> - **On or before November 20, 2014:** Although the Immigration Division reached its decision prior to November 20, 2014, the removal order was enforced after November 21, 2014. Therefore, the exclusion period is five years.

[23] The officer reviewing Mr. Zeng's application concluded that he was inadmissible, and could not apply for permanent residence, based on sections 40(2)(*a*) and 40(3) of the *IRPA* and an application of OB 595.

C. *Statutory Interpretation, Retroactivity and Retrospectivity*

[24] Determining whether the five-year period of inadmissibility and associated prohibition applies to Mr. Zeng is an exercise of statutory interpretation of the *IRPA* and the *FRFCA*. That exercise is to be undertaken on the basis of the modern principle of statutory interpretation, 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": *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at para 23, quoting EA Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at p 87. This reading may be guided by presumptions regarding the intention of Parliament in drafting legislation, such as the presumptions against retroactive and retrospective legislation relevant in

this application: Driedger (1983) at pp 183, 185; R Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: LexisNexis Canada, 2014) (QL) at §§15.1 *ff*, 25.25.

[25] While the terms are at times conflated, the difference between "retroactive" and "retrospective" legislation can be explained by reference to Professor Driedger's article "Statutes: Retroactive Retrospective Reflections" (1978), 56 Can Bar Rev 264 at pp 268-269:

> A retroactive statue is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.
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> [Underline added; italics in original.]

The Federal Court of Appeal adopted this distinction in *Bell Canada v Amtelecom Limited Partnership*, 2015 FCA 126 at para 18; see also Sullivan at §§25.16-25.18, 25.25, 25.76.

[26] In the present case, there is no suggestion that the amendments to the *IRPA* would apply to change the past legal effect of a situation occurring entirely in the past by, for example, imposing a new inadmissibility period on someone whose two-year inadmissibility period had already expired. Rather the question is the application of the law going forward and the potential imposition of new results in respect of a past event. The issue is therefore one of potential retrospectivity, rather than one of retroactivity.

[27] As a matter of statutory interpretation, there is a presumption that a law attaching prejudicial consequences, such as a new penalty, disability or duty, is not intended to have retrospective effect, although this presumption is not as consistently strong as the presumption against retroactivity: Driedger (1978) at pp 266-268, 276; *Tran* at para 43; *Gustavson Drilling (1964) Ltd v Minister of National Revenue*, [1977] 1 SCR 271 at p 279; *Canada (Attorney General) v Almalki*, 2016 FCA 195 at paras 28-34.

D. *Is the Presumption Against Retrospectivity Relevant?*

[28] Mr. Zeng argues that applying the amended version of section 40 of the *IRPA* to his case would inappropriately give the amendments retrospective effect. Mr. Zeng points to the Supreme Court of Canada's decision in *Tran* for the principle that laws should only have retrospective effect where that intent is clearly stated in the legislation: *Tran* at para 43. The Minister argues that the presumption has no application, as Mr. Zeng has no vested or acquired right to have his new application considered under the old provisions of the *IRPA*.

[29] In *Tran*, the Court considered the impact of an amendment to the *Controlled Drugs and Substances Act*, SC 1996, c 19, which increased the maximum sentence for the offence of producing a controlled substance from seven years to 14 years imprisonment. That increase put the maximum term of imprisonment for the offence over the 10-year threshold for "serious criminality" under paragraph 36(1)(*a*) of the *IRPA*. The question was whether that increase resulted in Mr. Tran being inadmissible for serious criminality even though the lower maximum penalty applied when he committed the offence.

[30] Justice Côté for the unanimous Supreme Court concluded that the maximum term of imprisonment under paragraph 36(1)(*a*) of the *IRPA* is to be determined at the time of the commission of the offence. Justice Côté referred to the obligation under the *IRPA* for a permanent resident to behave lawfully, and the importance of such obligations to be communicated in advance: *Tran* at paras 40-42. At the time Mr. Tran committed his offence, it was not an act of "serious criminality" under the *IRPA*. For any change to that definition to apply to Mr. Tran would require clear language, as Justice Côté held at paragraph 42:

> 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.
>
> [Emphasis in original.]

[31] At paragraphs 43 to 45 of *Tran*, Justice Côté also found that the presumption against retrospectivity applied to support her conclusion:

> 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"[.] 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"[.]

> 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"[.] 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".
>
> The presumption against retrospectivity also bespeaks fairness[.] For example, sentencing judges are required to consider immigration consequences[.] 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 marihuana 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.
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> [Underline added; italics in original; some citations omitted.]

[32] The Minister cites Justice Côté's reference to the purpose of the presumption as being to "protect acquired rights," and argues that the presumption has no application at all in the present case. The Minister points to the Federal Court of Appeal's decision in *Austria v Canada (Citizenship and Immigration)*, 2014 FCA 191 at para 76 (*sub nom Tabingo v Canada (Citizenship and Immigration)*, [2015] 3 FCR 346) for the proposition that while Mr. Zeng had a right to apply for permanent resident status and to have that application considered in accordance with the *IRPA*, he had no acquired or vested right to have his new application processed under the *IRPA* as it sat at the time of his exclusion. The Minister also cites the general principle that no one has a vested right to continuance of the law as it stood in the past: *Gustavson Drilling* at p 282.

[33] I cannot accept the Minister's contention that the presumption against retrospectivity has no application at all.

[34] First, the presumption against retrospectivity is a different interpretive presumption from the presumption against interference with acquired or vested rights. While there are conceptual overlaps—as Justice Côté's reasons in *Tran* indicate—the two are separate presumptions. As Justice Gauthier for the Federal Court of Appeal noted, "the presumption against interference with vested rights is quite distinct and does not have the same weight as the presumption against retroactivity or the presumption against retrospectivity": *Almalki* at paras 31, 34; see also Driedger (1983) at pp 185-187, a discussion cited in *Tran*. As Justice Côté wrote, the presumption against retrospectivity engages issues of the rule of law and fairness in addition to simply the protection of acquired rights: *Tran* at paras 44-45.

[35] Even in the *Gustavson Drilling* case the Minister relies on, the presumption against interference with vested rights was addressed separately from the presumption against retrospectivity: *Gustavson Drilling* at pp 279-282; *Tran* at para 43. Notably, the proposition that there can be no expectation that the law will not change was raised in *Tran*, but did not prevent the Court from applying the presumption against retrospectivity: *Tran* at paras 42-43. Similarly, in *Austria*, the Court of Appeal noted that the appellants' arguments regarding vested rights were based primarily on the Supreme Court's decision in *Dikranian*, a case that again underscored the distinction between vested rights and retroactivity: *Dikranian v Quebec (Attorney General)*, 2005 SCC 73 at paras 29-31; *Austria* at para 75.

[36] Second, a retrospective statute is one that attaches new consequences to an event that occurred prior to its enactment: Driedger (1978) at p 276. Whether one considers the "event" to be the misrepresentation or the issuance of an exclusion order arising from the misrepresentation, it occurred prior to the amendments to the *IRPA.* Applying those amendments would attach a new adverse consequence in the form of a longer inadmissibility period.

[37] The situation is therefore not simply an issue of applying the current law to a new application for permanent residence. The reason that the new law could prevent a new application is because it imposes consequences (a period of inadmissibility and prohibition on application) in respect of an event (the misrepresentation and resulting exclusion). If the event in question occurred prior to the enactment, applying the new consequences would give the enactment retrospective effect.

[38] While Parliament can certainly enact legislation with this effect, the presumption is that Parliament did not intend to do so unless "such a construction is expressly or by necessary implication required by the language of the Act": *Tran* at para 43. Indeed, if one were to accept the Minister's submission that an applicant only has a right to have their new application for permanent residence treated in accordance with the new section 40, then an applicant whose two-year inadmissibility period had commenced before the enactment—or had even expired—would still be subject to a five-year inadmissibility period and prohibition, which the Minister agrees is not the case.

[39] Third, the question of retrospectivity in each of *Tran*, *Gustavson Drilling* and *Austria* ultimately turned on the question of whether Parliament had signaled its intention that the new legislation apply: *Tran* at paras 48-51; *Gustavson Drilling* at pp 279-281; *Austria* at paras 76-78. In *Austria*, for example, the Court of Appeal did not find the presumption irrelevant based on a lack of vested rights. Rather, the Court recognized the presumption and that the amendments had retrospective effect, but concluded at paragraphs 77 to 78 that the statute was sufficiently clear to rebut the presumption:

> Parliament has the authority to enact laws governing immigration and to amend those laws from time to time. Parliament also has the authority to enact laws that have retrospective effect, although it is presumed that retrospective effect is not intended unless the law is so clear that it cannot reasonably be interpreted otherwise[.]
>
> I have already concluded, for reasons stated earlier in these reasons, that subsection 87.4(1) of the IRPA is sufficiently clear to terminate the appellants' applications retrospectively. That distinguishes this case from *Dikranian*…
>
> [Emphasis added; citations omitted]

[40] I therefore find that the presumption against retrospective legislation is relevant, and the question becomes two-fold: would the legislation have retrospective effect, and if so, is such effect expressly or by necessary implication required by the language of the Act?

E. *Applying the Five-Year Period Would Give the Amendments Retrospective Effect*

[41] The Minister argues, in keeping with OB 595, that the relevant date for assessing the admissibility period is the date of enforcement. Since the inadmissibility period does not begin to run until the date of enforcement, the Minister argues that there is no acquired right to a two-year period until that period starts to run. The five-year period should therefore apply to any

inadmissibility that is enforced after the new legislation comes into force and this does not amount to retrospective application.

[42] I disagree. As noted above, the presumption against retrospectivity is distinct from the presumption against acquired rights. In any event, the Minister has not pointed to any authority to support the proposition that there is an acquired right to a particular consequence that only arises when that consequence starts being enforced.

[43] A statute has retrospective effect if it attaches new consequences to an event that occurred prior to its enactment. The "event" to which the *IRPA* attaches the consequences of inadmissibility is the determination of misrepresentation, not the enforcement of the resulting exclusion order. The exclusion order comes *into force* when issued, even though it may be *enforced* subsequently: *IRPA*, ss 48, 49; *IRPR*, ss 237, 240. A permanent resident is inadmissible as of the finding of misrepresentation. While the period of inadmissibility continues for a defined period that starts on the date of enforcement, it is not the enforcement that imposes the consequence.

[44] I therefore conclude that applying the five-year inadmissibility period to a foreign national found inadmissible for misrepresentation and subject to a removal order before November 21, 2014 would amount to the retrospective application of the amendments to section 40 of the *IRPA*. Having reached this conclusion, the question becomes whether Parliament intended this retrospective application.

F. *The Legislation Does Not Rebut the Presumption*

[45] "[L]aws 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": *Tran* at para 49. I see nothing in the *IRPA* or the *FRFCA* that provides a clear signal that Parliament intended the five-year inadmissibility period to apply to individuals subject to removal orders for misrepresentation made prior to it coming into force, and nothing that would rebut the presumption against retrospectivity.

[46] Although the *FRFCA* contains a number of transitional provisions, none of them relate to section 40 of the *IRPA*: *FRFCA*, ss 28-35. Four of these provisions set out that new sections of the *IRPA* related to national security apply immediately, and may even apply to orders or certificates already issued: *FRFCA*, ss 30, 31, 34, 35. Three of them state that the former version of the *IRPA* will continue to apply to ongoing H&C applications or appeal rights: *FRFCA*, ss 29, 32, 33. There is little that can be inferred from the absence of a transitional provision relating to section 40, except to note that Parliament clearly intended the retrospective application of the provisions relating to national security in particular, and included clear transitional provisions to that effect.

[47] The amendments to section 40 are not of this nature. Rather, they appear designed to further deter fraudulent applications by increasing the adverse consequences of a finding of misrepresentation: see, *e.g.*, SOR/2014-269, *Canada Gazette Part II*, Vol. 148, No. 25, Dec 3, 2014, at p 3084 (Regulatory Impact Analysis Statement). There can be no new "deterrence" of

conduct that has already passed, which suggests a non-retrospective application of the changes: see *Tran* at paras 41-43.

[48] I also see nothing in the legislation that would indicate an intention to impose the "partial retrospectivity" described by OB 595 and advocated by the Minister, namely to add three years of inadmissibility for those whose exclusion order is in force but has not yet been enforced, but not for those whose exclusion order has been enforced but whose inadmissibility period has not yet expired.

[49] This approach would have the effect of imposing a longer inadmissibility period on those whose exclusion order was not yet enforced regardless of the reason. In some cases, the inadmissibility period might not have started to run owing, in whole or in part, to the exercise of a statutorily available appeal right. This was the case of Mr. Zeng, who was first excluded by order of the ID in November 2012, and whose appeal was not decided until shortly before the amendments came into force. It would take clear statutory language to impose an additional adverse consequence in such a case.

[50] The OB 595 approach might, as the Minister suggests, have provided an incentive to those who were subject to an exclusion order to leave the country to trigger the inadmissibility period and avoid a longer one. However, that incentive would only apply to those who were aware of the pending amendments, and understood that they would be applicable to their exclusion orders. There is no indication that Parliament intended to focus on that particular class

of individuals; to the contrary, the intention appears to have been to deter future misrepresentations.

[51] In the absence of any legislative indication that the amendments to section 40 enacted by the *FRFCA* were intended to apply retrospectively, I conclude that the inadmissibility period imposed by an exclusion order for misrepresentation prior to November 21, 2014 continues to be two years, whether or not the exclusion order was enforced before or after that date.

[52] I note that on a strict application of the principles in *Tran*, one might conclude that the two-year inadmissibility period should apply whenever the *misrepresentation* occurred prior to the change in the legislation, considering that to be equivalent to the "time of the commission of the offence": *Tran* at paras 35-41.

[53] I do not need to decide this issue in this case, as both Mr. Zeng's misrepresentation and the resulting exclusion order predated the amendments. However, there are two primary reasons that I do not believe this to be the correct interpretation. First, in *Tran*, Justice Côté recognized that the triggering language in the *IRPA* was the date of conviction, rather than the date of commission of the offence. It was only the operation of subsection 11(*i*) of the *Charter* that in turn made the date of commission of the offence relevant, since the maximum sentence imposable on conviction is that in place at the time of the offence: *Tran* at paras 36-38. Second, a misrepresentation may not be discovered for many years, which would result in both a potentially lengthy "transition" period and an unnecessary debate over when a misrepresentation occurred. The date of the exclusion order that imposes the inadmissibility consequence sets a

clear date for assessing the length of the consequence, even though enforcement may not occur until some time later. The concern regarding retrospectivity is therefore attenuated.

[54] If I were required to decide the issue, I would therefore conclude that the relevant date for assessing the applicable inadmissibility period for misrepresentation is the date of the exclusion order, rather than the date of the misrepresentation. In other words, exclusion orders issued on or after November 21, 2014 impose a consequence of inadmissibility that continues for a period of five years from the date of enforcement; those issued prior to November 21, 2014 impose a consequence of inadmissibility that continues for a period of two years from the date of enforcement.

IV. Conclusion

[55] The exclusion order issued to Mr. Zeng was issued before the amendments to section 40 of the *IRPA* came into force. The consequence of that exclusion order at the time it was issued was that Mr. Zeng was inadmissible, and would remain inadmissible for a period of two years from the date of enforcement of the order. Although the consequences of an exclusion order for inadmissibility were subsequently increased, I find that there is no indication that Parliament intended that increase to apply to exclusion orders that had already been issued, such as that issued to Mr. Zeng, whether or not they had been enforced.

[56] Mr. Zeng remained inadmissible for a period through May 22, 2017. His application for permanent residence filed on November 24, 2017 should not have been considered withdrawn based on Mr. Zeng's continued inadmissibility or the prohibition on application during that

period. While the officer's decision was understandable given both OB 595 and Mr. Zeng's statement that the five-year period of inadmissibility applied, it was incorrect. That decision is therefore set aside and Mr. Zeng's application for permanent residence is referred back for further processing.

[57] As a result, I do not need to address Mr. Zeng's alternative argument that his request for the exercise of discretion amounted to a request for H&C consideration and that the officer fettered their discretion by not considering it as an H&C request under section 25 of the *IRPA*.

V. Certified Question

[58] At the hearing of this application, Mr. Zeng asked that I certify a question regarding the retrospective application of the section 40 amendments pursuant to subsection 74(*d*) of the *IRPA*. In addition to noting that notice had not been given to the Minister in accordance with the Court's *Practice Guidelines for Citizenship, Immigration, and Refugee Law Proceedings* of November 5, 2018, the Minister submitted that the question was not appropriate for certification.

[59] Unlike the situation in *Begum*, the question of whether the amendments to section 40 apply to Mr. Zeng is dispositive of the outcome in this case, and would be dispositive of any appeal: *Begum* at paras 38-39. The question also goes beyond Mr. Zeng's case, as the conclusions herein would apply to any others in the same situation.

[60] However, given the approach taken by the Minister to date as set out in OB 595, for the conclusions herein to apply, a person would have to be the subject of an exclusion order

(a) issued prior to November 21, 2014; and (b) enforced after that date but less than five years ago. While there are no doubt others in that category, recognizing the passage of time since the amendments and noting the Minister's opposition to the certification of a question, I am not satisfied that the issue rises to the level of a serious question of "broad significance or general importance" as required by subsection 74(*d*): *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36. I therefore decline to certify a question.

JUDGMENT IN IMM-6508-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted and Mr. Zeng's application for permanent residence is remitted for further processing.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6508-18
STYLE OF CAUSE:	KE ZENG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 16, 2019
JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	DECEMBER 11, 2019

APPEARANCES:

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