

PHAM, IMMIGRATION CONSEQUENCES AND FAIRNESS IN SENTENCING

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Overview

The Supreme Court decision in **Pham** recognized that in sentencing an offender, collateral immigration consequences must be taken into account, along with other sentencing principles such as parity and proportionality. However, the Court also warned that consideration of such consequences must not “lead to a separate sentencing scheme with a de facto if not de jure special range of sentencing options where deportation is a risk.”¹ This article provides a commentary on this important decision, with a focus on the exercise of judicial discretion and the importance of the fairness principle in the sentencing process, arguing that a fair sentence must be based on accurate information and a proper appreciation of the relevant immigration legislation, the procedures that apply to the offender and the likelihood that the sentence in question may ultimately result in his deportation.

R. v. Pham, 2013 SCC 15

In **Pham**, the Supreme Court of Canada (‘SCC’) reduced the sentence of imprisonment of Hoang Anh Pham from two years to two years less a day on the basis that the sentencing judge failed to take into account the collateral immigration consequences of the accused as a relevant factor in sentencing. The decision effectively reversed the ruling of the Alberta Court of Appeal which refused to vary the sentence of the accused by one day.

Facts

Mr. Pham was convicted of drug related charges and was sentenced to two years of imprisonment. The sentence was the result of a joint submission by the Crown and Mr. Pham’s counsel.

In Canada, pursuant to section 36 of the **Immigration and Refugee Protection Act** (‘IRPA’), non-citizens convicted in Canada of (1) A criminal offence punishable by a maximum term of imprisonment of at least 10 years; or, (2) An offence for which a term of imprisonment of more than six months is imposed, become inadmissible on grounds of serious criminality.² A finding of inadmissibility by the Immigration Division will subsequently result in the issuance of a removal

order.³ A removal order can be appealed and overturned if the individual can raise “sufficient humanitarian and compassionate consideration [which] warrant special relief in light of all the circumstances of [his] case”.⁴

Despite this, a non-citizen convicted of a crime that is punished by a term of imprisonment of at least two years automatically loses his right of appeal and faces deportation regardless of the circumstances of his case.⁵ Effectively, the non-citizen loses his right to be heard and to make compelling arguments, including but not limited to the right to explain the devastating impact his deportation may have on the best interests of a child.⁶

In the case of Mr. Pham, the Crown, counsel for the accused, and the judge were all unaware of these all-important IRPA provisions and Mr. Pham lost his right of appeal by one day of imprisonment. Mr. Pham sought to reduce his sentence by one day on the basis that the sentencing judge was not aware of the IRPA provisions and failed to consider the collateral consequences on his immigration status.

On appeal, the Crown conceded that it would have agreed on a joint submission for a sentence of two years less a day had it been aware of the collateral consequences. Nevertheless, the majority of the Court of Appeal dismissed the appeal on the basis that (1) Varying the sentence would inappropriately undermine the provision of the IRPA, (2) Mr. Pham had a prior criminal record; and, (3) Mr. Pham had abused the hospitality afforded to him by Canada.⁷

SCC Decision

In a unanimous decision written by the Honourable Mr. Justice Wagner, the SCC reviewed the fundamental principles of sentencing, namely the principles of proportionality, parity, sentence individualization, and the objectives of sentencing.⁸ Specifically, Justice Wagner highlighted the fact that the application of these principles is paramount to reaching a **just** sanction for **each** particular offender. The Court also endorsed the proposition that “if the personal circumstances of the offender are different, different sentences will be justified.”⁹

Furthermore, the SCC determined that the collateral consequences (or the indirect consequences) of a sentence on an offender are not “strictly speaking, aggravating or mitigating factors”, but rather, “flows from the application” of the aforementioned principles and may be

taken into account in sentencing as personal circumstances of the offender.¹⁰ The SCC also reasoned that the weight to be given to collateral consequences should be determined on a case-by-case basis and balanced with the nature and seriousness of the offence.¹¹

The SCC concluded that the “collateral immigration consequences may be just as relevant in sentencing as the collateral consequences of other legislation or of circumstances specific to the offender.”¹² Nevertheless, the Court warned that the “flexibility of our sentencing process should not be misused by imposing inappropriate and artificial sentences in order to avoid collateral consequences.”¹³ The Court also made a point of stating that the collateral consequences ought not to create a separate sentencing scheme for non-citizens facing deportation.¹⁴

When applying its reasoning to the facts of Mr. Pham’s case, the SCC ruled that the court’s intervention was justified because the sentencing judge’s decision was made without having knowledge of all the relevant factors, including the fact that counsel for the accused failed to articulate the collateral immigration consequences during sentencing.¹⁵ In light of this and the particular circumstances of the accused, most importantly the collateral immigration consequences at play, the SCC ruled that it was appropriate to reduce the sentence of Mr. Pham by one day, which was still within the range of a fit sentence.¹⁶

Exercise of Judicial Discretion and the Importance of the Fairness Principle in the Sentencing Process: Practical Considerations of Applying the Pham SCC Decision

In the **Pham** decision the SCC recognized that in addition to principles of proportionality and parity, individualization also informs the sentencing process.¹⁷ The sentencing judge must carefully consider “the objective and subjective factors” as they relate to the accused’s personal circumstances, including any immigration consequences arising from the sentence. The significance of the collateral immigration consequences is to be determined in accordance with the facts of the particular case.¹⁸ Thus, the sentencing judge must ultimately “exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender.”¹⁹

But what exactly does this exercise of discretion entail? On the one hand, the court does not wish the sentencing process to become dominated and distorted by immigration consequences.²⁰ Such consequences cannot justify the imposition of unfit dispositions, which “skew the sentencing process either for or against deportation.”²¹ On the other hand, in order for individualization to actually inform the sentencing process, and for immigration consequences to be taken into account at all, there will necessarily have to be a difference between an offender

that is facing serious immigration consequences, versus an offender that is not. This is particularly important for a youthful or first-time offender that will end up being permanently separated from the rest of his or her family as a result of the conviction. For example, even one conviction for an indictable offence whereby the offender receives a sentence of more than six months will result in removal from Canada, without any right of appeal to the immigration appeal division.²²

Thus, what may otherwise be a ‘fit’ sentence for an accused who does not face immigration consequences will not be fair if, to some extent, the sentence is not tailored by the disproportionate impact on an offender that faces deportation from Canada. A fit sentence is one that is proportionate to the seriousness of the offence so that the public can be satisfied “that the offender ‘deserved’ the punishment he received and feel a confidence in the fairness and rationality of the system” [emphasis added].

Thus, balance, proportionality and fairness are all important elements of the sentencing process. When there are serious immigration consequences facing an offender, fairness, balance and proportionality all require the court to take a more flexible approach, based on the full information and understanding of the immigration consequences in that particular case. In fact, even before **Pham**, in a number of decisions, the courts have considered immigration consequences as a mitigating factor in imposing more lenient or reduced sentences.²⁴

However, the real question, which has not been fully addressed by **Pham** is how the court will exercise its discretion in a balanced manner to ensure both fairness and at the same time observe the other sentencing principles. In other words, how can the judiciary evaluate the risk of deportation and then what factors ought to be applied in determining the appropriate weight of immigration consequences in the sentencing process?

In evaluating the risk of deportation, the criminal court requires accurate information in order to understand the exact implications for the offender. As recognized by the SCC in **Jones**, accurate information is critical to the sentencing process:

As with all sentencing, both the public interest in safety and the general sentencing interest of developing the most appropriate penalty for the particular offender dictate the greatest possible range of information on which to make an accurate evaluation of the danger posed by the offender. [emphasis added]²⁵

Herein lies the challenge. The criminal courts and the judiciary effectively need to understand the exact immigration consequences at play in any given case. Defence counsel, of course, must prepare and provide the court with an immigration opinion and place the court in a position to fully appreciate the situation of the accused, outlining which immigration procedures apply to the

accused. Some of the information the sentencing judge will require includes:

- If convicted, will the accused be found inadmissible?
- Does the accused have a prior conviction – has he already been found inadmissible?
- At what stage are the immigration proceedings?
- Will the sentence foreclose his ability to appeal his inadmissibility to the Immigration Appeal Division?²⁶
- If a removal order has been issued against him, how imminent is the removal?
- Will the accused be facing any risks upon his return and has he received a pre-removal risk assessment?
- Has the accused filed a humanitarian and compassionate application for a permanent resident visa?
- Will there be an immigration hold on the accused upon his release?

Thus, to fully appreciate the impact on the accused, the court effectively needs to consider the relevant immigration and refugee law legislation (**IRPA** and the **Immigration and Refugee Protection Regulations**) as well as the potential outcome of any immigration procedures, appeals and mechanisms that would be open to the accused, and the likelihood that he will ultimately face deportation should he receive the sentence in question.

However, even with the benefit of an immigration opinion, which may not always be made available, the criminal court may not be fully informed and equipped to determine the potential immigration consequences for a particular offender. The criminal court lacks the expertise in the area of immigration legislation and case law, when compared for example to the Immigration and Refugee Board, which is a specialized body. As such, the information the court has may be limited and the potential immigration consequences may not always be accurately conveyed and understood. It is only with that accurate understanding and information, however, that individualization can properly inform the sentencing process.

This raises the question of the extent to which, independent of any opinion or information that defence counsel provide to the sentencing judge, the judiciary must receive their own independent training in this area to truly appreciate the potential immigration consequences faced by an accused. This is particularly important if the accused is self-represented and simply does not have the means to consult with an immigration lawyer or obtain an immigration opinion.

Finally, not only does the court need to accurately

evaluate the immigration consequences (i.e. the risk of deportation) for the person in question, but fairness, balance and proportionality also require the court to assess the collateral impact on the other individuals affected by a decision, such as any children or other vulnerable individuals that may rely on or need the accused's presence in Canada. While there is a clear jurisdictional parameter that the criminal court has to observe, particularly in light of its limited expertise in this area, there is also a need to consider the real and permanent human consequences on the life of the accused and his immediate family of receiving a particular criminal sentence. Proportionality, balance and fairness may well require that the accused who is facing serious immigration consequences receive a more lenient sentence than an offender that is a full-fledged Canadian citizen.

Endnotes

- 1 **R. v. Pham**, 2013 SCC 15, at para 16 [**Pham**].
- 2 **Immigration and Refugee Protection Act**, S.C. 2001, c. 27, s. 36(1)(a), [**IRPA**].
- 3 **Ibid.**, s. 45(d).
- 4 **Ibid.**, s. 67(1)(c).
- 5 **Ibid.**, s. 64(1)(2). Note: The two year of imprisonment bar for the appeal has been reduced to only six months by Bill C-43. The amendment came into force on June 19, 2013.
- 6 **Ibid.**, s. 67(1)(c).
- 7 **R. v. Pham**, [2012] A.J. No. 672, at paras 23-25.
- 8 **Pham**, *supra*, at paras 6-12.
- 9 **Ibid.**, at para 9, citation from C. C. Ruby, G. J. Chan and N. R. Hasan, *Sentencing*, (8th ed. 2012) at s.2.41.
- 10 **Ibid.**, at para 11.
- 11 **Ibid.**, at para 12.
- 12 **Ibid.**, at para 22.
- 13 **Ibid.**, at para 15.
- 14 **Ibid.**, at paras 16-17.
- 15 **Ibid.**, at para 24.
- 16 **Ibid.**, at paras 25-26.
- 17 **Ibid.**, at para 8.
- 18 **Ibid.**, at para 13.
- 19 **Ibid.**, at para 14.
- 20 **Boualem c. R.**, 2013 QCCA 602, at paras 14-17.
- 21 **R. v. James**, [2013] O.J. No. 2804, at para 22.
- 22 **IRPA**, *supra*, s. 64(1)(2), as amended.
- 23 **Reference re s. 94(2) of Motor Vehicle Act**, [1985] S.C.J. No. 73, at p. 325.
- 24 See: **R. v. Sullivan**, [1972] O.J. No. 769; **Regina v. Johnston and Tremayne**, [1970] O.J. No. 1489; **R. v. Arias** (Alta. C.A.), [1987] A.J. No. 64; **R. v. Chiu**, [1984] M.J. No. 473; **R. v. Brat-sensis**, [1974] N.S.J. No. 182; and, **R. v. Lacroix**, [2003] O.J. No. 2032.
- 25 **R. v. Jones**, [1994] S.C.J. No. 42, at para 123.
- 26 **IRPA**, *supra*, s. 64(1)(2), as amended.