

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

