**Date: 20051207**

**Docket: IMM-6655-04**

**Citation: 2005 FC 1658**

**Ottawa, Ontario, December 7, 2005**

**PRESENT: THE HONOURABLE MR. JUSTICE BLANCHARD**

**BETWEEN:**

**MANUEL CHUQUIN AVALOS**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR ORDER AND ORDER

[1] After the applicant's application for judicial review was dismissed, the parties were invited to serve and file a question for certification. The applicant proposed these two questions:

(1) Is section 197 of the *Immigration and Refugee Protection Act* unconstitutional in that it is contrary to section 7 of the *Canadian Charter of Rights and Freedoms*?

(2) Did the Appeal Division err in determining that it did not have jurisdiction to relieve the applicant of his failure to observe the conditions of his stay?

[2] The respondent agrees with the request to certify the two questions, but has reworded them and proposes that the order be reversed since, in the respondent's opinion, they are interdependent.

[3] In light of *Chiarelli v. Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 711, and the recent decision by the Supreme Court of Canada in *Medovarski v. Canada (Minister of Citizenship and Immigration),* 2005 SCC 51, I issued a direction on October 7, 2005, asking the parties to address the following points through written submissions:

(1) Considering section 197, on what premise can we base the Appeal Division's jurisdiction to relieve the appellant of their default once it has noted that the appellant has failed to observe the conditions related to the stay of their removal order?

(2) Considering the Supreme Court of Canada's *Chiarelli* and *Medovasrki*, on what basis may we advance the argument that section 197 is unconstitutional in that it is contrary to section 7of the *Canadian Charter of Rights and Freedoms*?

[4] Following that direction, the parties filed their written submissions on October 17 and on October 28, respectively, and the respondent's reply was filed on November 2.

[5] The respondent is now of the opinion that the two questions should not be certified since they are essentially moot questions, not determinative, which have already been satisfactorily resolved in the case law.

[6] The applicant, in turn, still maintains that the two questions are serious and of general importance, that they must be debated as a matter of Canadian interest.

[7] The Federal Court of Appeal, in *Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, (1994) F.C.J. No. 1637 (C.A.) (QL), stated the requirements necessary for the certification of a serious question of general importance, specifically that the question:

> (1) transcends the interests of the parties to the litigation;
>
> (2) contemplates issues of broad significance or general application;
>
> (3) and is also determinative of the appeal.

[8] Having considered the written submissions of the parties, it is my opinion that the proposed questions do not meet the requirements set out by the Court of Appeal in *Liyanagamage*.

[9] With respect to the first question proposed, the applicant contends essentially that section 197 of the *Immigration and Refugee Protection Act* (IRPA) does not provide for any

analysis of the circumstances of the alleged breach of conditions. Accordingly, he contends that this provision is overbroad and would violate the principles of fundamental justice.

[10] I cannot agree with that argument since it is unfounded in fact and in law. In my decision dated June 10, 2005, I submitted that the Appeal Division has the power to consider any explanation establishing that the applicant did, in fact, respect the conditions of the stay. I also determined that the Appeal Division expressly considered the explanation offered by the applicant and deemed it to be insufficient. It is clear, in my opinion, that the applicant's argument alleging the unconstitutionality of section 197 of the IRPA is therefore not raised in this case, since it relies on an interpretation that has no basis in fact. The Court should not certify questions that are moot. Furthermore, the Supreme Court of Canada, in *Chiarelli*, held that Parliament may abolish a permanent resident's right to appeal without violating the principles of fundamental justice. I also agree with the respondent's argument that *Medovasrki/Estaban* only enforces this finding. The first question proposed by the applicant will therefore not be certified.

[11] The second question proposed by the applicant involves the interpretation of a transitory provision of the IRPA. The applicant continues to insist that the Appeal Division cannot limit itself to noting a breach and then abandon the matter. According to the applicant, the panel must proceed to analyze the circumstances surrounding the alleged breach or omission. Essentially, the applicant claims in this case that the failure to analyze the breach of condition is fatal to the process.

[12] The applicant does not explain on what basis the Appeal Division would have the jurisdiction to hear his appeal. The test under section 197 could not be clearer. As soon as the

Appeal Division observed that the appellant had not respected the conditions of the stay of his removal order, the appeal and the stay ended by operation of the law, according to sections 197 and 64 of the IRPA. Further, contesting the failure to respect conditions cannot be done arbitrarily. In my reasons for decision, I determined that the Appeal Division has the obligation to consider the applicant's justifications explaining the breach of condition, as it did in this case in a reasonable fashion. The interpretation of section 197 proposed by the applicant is factually unfounded and is not consistent with the purpose of this provision, i.e. to make safety a priority and to facilitate the removal of permanent residents who are involved in serious criminality. In my opinion, the second question, as formulated, does not have any elements having serious consequences of general importance. The question will therefore not be certified.

## ORDER

**THE COURT ORDERS:**

1. The dismissal of the application for judicial review.

2. No significant question of general importance is certified.

"Edmond P. Blanchard"
Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-6655-04 |
| **STYLE OF CAUSE:** | Manuel Chuquin Avalos v. MCI |
| **PLACE OF HEARING:** | Montréal, Quebec |
| **DATE OF HEARING:** | May 24, 2005 |
| **REASONS FOR ORDER:** | The Honourable Mr. Justice Blanchard |
| **DATE OF REASONS:** | December 6, 2005 |

**APPEARANCES:**

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| Pierre Tabah<br>Montréal, Quebec | FOR THE APPLICANT |
| François Joyal | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| John H. Sims, Q.C.<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |