Federal Court of Appeal | Cour d'appel fédérale

Date: 20191018

Docket: A-50-18

Citation: 2019 FCA 261

CORAM: **STRATAS J.A.**
NEAR J.A.
DE MONTIGNY J.A.

BETWEEN:

MASSIMO THOMAS MORETTO

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Vancouver, British Columbia, on January 16, 2019.

Judgment delivered at Ottawa, Ontario, on October 18, 2019.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: STRATAS J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] The appellant Mr. Moretto appeals from a decision of the Federal Court (Justice McDonald) dated January 24, 2018 (*Moretto v. Canada (Citizenship and Immigration)* 2018 FC 71, 291 A.C.W.S. (3d) 831) (FC Reasons), which dismissed his application for judicial review of a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board, dated December 21, 2016. The IAD determined that his stay of removal from Canada was

cancelled by the operation of subsection 68(4) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) because of a conviction for "serious criminality" within the meaning of paragraph 36(1)(*a*) of the Act during a period when he was subject to a stay of removal.

[2] The Federal Court certified the three following serious questions of general importance:

a) Is section 7 engaged at the stage where a permanent resident's stay of removal is automatically cancelled pursuant to subsection 68(4) and if so, would section 7 be engaged where the deprivation of the right to liberty and security of the person of a permanent resident arises from their uprooting from Canada, not from possible persecution or torture in the country of nationality?

b) Does the principle of *stare decisis* preclude this Court from reconsidering findings of the Supreme Court of Canada in Chiarelli which established that the deportation of a permanent resident who has been convicted of a serious criminal offence, despite that the circumstances of the permanent resident and the offence committed may vary, is in accordance with the principles of fundamental justice? In other words, have the criteria to depart from binding jurisprudence been met in the present case?

c) Is a section 12 determination premature at the stage where a permanent resident's stay of removal is automatically cancelled pursuant to subsection 68(4)?

[3] Essentially for the same reasons that I have given in a companion case heard by the same panel on the same day, in which judgment is also being delivered today (*Revell v. The Minister of Citizenship and Immigration et al.*, 2019 FCA 262 [*Revell*]), I am of the view that the application of section 68(4) of the Act cannot, in and of itself, engage sections 7 or 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 (the Charter). I am also of the view that the application of section 68(4) of the Act does not violate paragraph 2(*d*) of the Charter.

I. Background

[4] Paragraph 36(1)(*a*) of the Act provides that a permanent resident may be found inadmissible to Canada on the ground of serious criminality if convicted for a serious offence:

36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants:
(*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.	*a*) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé.

[5] Inadmissibility on this basis can lead to loss of status and removal from Canada. The Act outlines a broad scheme for the adjudication and enforcement of allegations of inadmissibility.

[6] Section 44(1) of the Act provides that if a Canada Border Services Agency (CBSA) officer is of the view that a permanent resident is inadmissible, that officer may prepare a report setting out the relevant facts and transmit it to the Minister of Public Safety and Emergency Preparedness (the Minister). If the Minister is of the opinion that the report is well founded, the Minister may refer the report to the Immigration Division (ID) of the Immigration and Refugee Board for an admissibility hearing (ss. 44(2) of the Act). However, even if the Minister is of the opinion that the report of the CBSA officer is well founded, he or she still retains some discretion not to refer it to the ID (see, notably, *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289 at para. 6).

[7] If the Minister does refer the report to the ID, an admissibility hearing is held for the permanent resident, and the ID must either recognize that person's right to enter Canada (para. 45(*a*) of the Act), authorize him or her to enter Canada for further examination (para. 45(*c*) of the Act), or make a removal order against that person (para. 45(*d*) of the Act). While inadmissibility decisions by the ID are generally appealable to the IAD, there are circumstances where they are not:

64 (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.	**64** (1) L'appel ne peut être interjeté par le résident permanent ou l'étranger qui est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée, ni par dans le cas de l'étranger, son répondant.
(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(*b*) or (*c*).	(2) L'interdiction de territoire pour grande criminalité vise, d'une part, l'infraction punie au Canada par un emprisonnement d'au moins six mois et, d'autre part, les faits visés aux alinéas 36(1)*b*) et *c*).

[8] Before a removal order is enforced, a foreign national can apply for a Pre-Removal Risk Assessment (PRRA) (ss. 112-113 of the Act). This process seeks to determine whether the removal of a person to their country of nationality would subject them to a danger of torture (para. 97(1)(*a*) of the Act), to a risk to their life or, in certain circumstances, to a risk of cruel and unusual treatment (para. 97(1)(*b*) of the Act).

[9] While section 48 of the Act directs that removal orders be enforced as soon as possible, the person concerned may request that it be deferred. CBSA retains a limited discretion to defer (*Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, [2018] 2 F.C.R. 229 at para. 54 [*Lewis*]).

[10] Of particular relevance in the present case is subsection 68(4) of the Act. This provision deals with the consequences, for a permanent resident found inadmissible on grounds of serious criminality or criminality, of being convicted of another offence referred to in subsection 36(1). It reads:

68 (4) If the Immigration Appeal Division has stayed a removal order against a permanent resident or a foreign national who was found inadmissible on grounds of serious criminality or criminality, and they are convicted of another offence referred to in subsection 36(1), the stay is cancelled by operation of law and the appeal is terminated.	**68** (4) Le sursis de la mesure de renvoi pour interdiction de territoire pour grande criminalité ou criminalité est révoqué de plein droit si le résident permanent ou l'étranger est reconnu coupable d'une autre infraction mentionnée au paragraphe 36(1), l'appel étant dès lors classé.

[11] The facts of the case are briefly summarized by the Federal Court at paragraphs 5 to 10 of the decision below. It nonetheless bears mentioning the most salient of these facts.

[12] The appellant was born in Italy in 1969. When he was around nine months old, he immigrated to Canada with his parents and became a permanent resident of this country. He claims to have only returned to Italy once, for summer vacation when he was eight years old, and to have no family or friends in that country. He has a teenage daughter who resides in Canada.

While he has spent fifty years in this country, the appellant has not applied for Canadian citizenship.

[13] The appellant has accrued a long criminal record since 1997. It consists mainly of theft, breaking and entering, and failure to comply with probation orders.

[14] On May 28, 2008, the appellant was convicted of several counts of theft and breaking and entering for acts committed at seniors' residences in October and November 2007, while bound by a probation order prohibiting him from visiting any senior or long term care facility. As a result, he was sentenced to two years' imprisonment. The appellant challenged his sentence before the British Columbia Court of Appeal. He argued that his permanent resident status had not been brought to the attention of the trial judge, and that a two-year sentence would result, under the Act, in the loss of his right to appeal a deportation order. The appeal was allowed, and his sentence was reduced to two years less a day (*R. v. Moretto*, 2009 BCCA 139, [2009] B.C.W.L.D. 3281).

[15] On August 28, 2008, a CBSA officer made a report, under subsection 44(1) of the Act, finding that the appellant was inadmissible to Canada for serious criminality as defined by paragraph 36(1)(*a*) of the Act, based on the May 2008 convictions.

[16] On November 27, 2008, the delegate for the Minister referred the subsection 44(1) report to the ID for an admissibility hearing. On April 27, 2009, the ID found that the appellant was inadmissible on the ground of serious criminality and issued a deportation order.

[17] On May 31, 2010, the IAD dismissed the appeal brought by Mr. Moretto against the inadmissibility decision of the ID. Although the appellant had admitted to being inadmissible for serious criminality, he had sought a stay based on humanitarian and compassionate grounds. Before the IAD, he attributed his criminal behavior to mental health issues and addiction.

[18] On February 4, 2011, the Federal Court granted his application for judicial review of that decision and sent the matter back for re-determination (*Moretto v. Canada (Citizenship and Immigration)*, 2011 FC 132, 96 Imm. L.R. (3d) 320). The Federal Court found that, in the course of its assessment of whether a removal order should be issued against the appellant, the IAD had misapprehended the evidence, particularly with respect to the hardship factor. The IAD was said not to have considered the fact the appellant was facing removal to Italy, a country he does not know, and that separation from his family could affect his ability to manage his mental health and addiction issues.

[19] On March 31, 2011, based on a joint recommendation of the parties, the IAD ordered that the ID's removal order be conditionally stayed for three years. The conditions of the stay included that the appellant would not commit any criminal offences, that he would immediately report in writing any such criminal offences to the CBSA, and that he would make reasonable efforts to ensure that his mental illness and drug addiction would not endanger others.

[20] On January 22, 2014, the IAD issued the appellant a notice of reconsideration of stay, seeking a written statement of his compliance with his stay conditions. With the aid of counsel, the appellant reported that he had since been charged with four additional criminal offences,

including three counts of theft under $5,000, breaking and entering, and breach of probation order.

[21] On May 6, 2015, the IAD held an oral hearing of the reconsideration of the stay of the removal order. Based again on the joint recommendation of the parties, the IAD granted a further conditional stay of one year. In light of the less severe nature of the recent offences, of the appellant's efforts toward rehabilitation, and of his personal circumstances, the IAD concluded that there were sufficient humanitarian and compassionate considerations to warrant the stay. The conditions imposed on him were similar to those of the first stay. The IAD warned the appellant that the stay would be cancelled if he was convicted of another serious offence.

[22] On February 22, 2016, the IAD notified the parties it would reconsider the appellant's appeal on May 9, 2016 and asked for written submissions about the appellant's compliance with the conditions of the second stay. In response, the appellant completed a form, dated March 5, 2016, stating that he had complied with these conditions. On June 2, 2016, Mr. Moretto was convicted of robbery, which qualifies as a "serious criminality" offence under paragraph 36(1)(a) of the Act.

II. Decision below

[23] On December 21, 2016, the IAD held that, as the appellant had again been convicted of a serious criminal offence under subsection 36(1) of the Act and sentenced to a 15 month prison sentence, subsection 68(4) of the Act applied to his case. The stay of the removal order was thus

cancelled, and the appeal before the IAD terminated by operation of the law. In its reasons, the IAD ruled it did not have jurisdiction to consider the constitutionality of subsection 68(4). The appellant sought judicial review of the stay cancellation decision on the basis that subsection 68(4) of the Act unjustifiably infringes his rights under sections 2(*d*), 7 and 12 of the Charter.

[24] On January 24, 2018, the Federal Court rendered its decision. Contrary to what was found in the companion case of *Revell*, the Judge held that the decisions of the Supreme Court in *Chiarelli v. Canada (Minister of Employment and Immigratio*n), [1992] 1 S.C.R. 711, 90 D.L.R. (4th) 289 [*Chiarelli*] and *Medovarski v. Canada (Minister of Citizenship and Immigration)*; *Esteban v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539 [*Medovarski*] could be revisited. She nonetheless found that section 7 was not engaged on the facts of the case and that, in any event, any deprivation resulting from the removal process was consistent with the principles of fundamental justice (at para. 50). She likewise held that subsection 68(4) of the Act does not unjustifiably infringe rights under sections 2(*d*) and 12 of the Charter.

III. Issues

[25] The present appeal raises a number of questions, which can be formulated as follows:

A. Is section 7 engaged when a permanent resident’s stay of removal is automatically cancelled pursuant to subsection 68(4) of the Act?

B. If so, would section 7 be engaged where the deprivation of the right to liberty and security of the person of a permanent resident arises from their uprooting, absent possible persecution or torture in the country of nationality?

C. Does the principle of *stare decisis* preclude this Court from reconsidering the findings of the Supreme Court of Canada in *Chiarelli*? In other words, have the criteria to depart from binding jurisprudence been met in the present case?

D. If so, is the impugned legislative scheme consistent with the principles of fundamental justice?

E. Does the impugned legislative scheme infringe upon the appellant's rights under section 12 of the Charter?

F. Does subsection 68(4) of the Act violate paragraph 2(*d*) of the Charter?

G. Would these infringements be justified under section 1 of the Charter?

[26] I acknowledge that some of these questions have not been certified by the Federal Court. Nevertheless, they have all been argued by the parties and legitimately arise as a result of the Federal Court decision. As this Court has held in *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 at para. 50: "[o]nce an appeal has been brought to this Court by way of certified question, this Court must deal with the certified

question and all other issues that might affect the validity of the judgment under appeal" (see also *Harkat, Re*, 2012 FCA 122, [2012] 3 F.C.R. 635). Since the respondent does not dispute that the certified questions meet the test for a valid certification, I shall therefore address all the above-noted questions.

IV. Standard of review

[27] On appeal from a decision of the Federal Court sitting in judicial review of a decision of an administrative decision-maker, the applicable framework is that of *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47. This framework requires this Court to "step into the shoes" of the Federal Court to determine whether it identified the appropriate standard of review, and whether it applied this standard properly.

[28] The Judge was right to conclude, at paragraph 14 of her reasons, that the standard of review for constitutional questions is correctness (*Tapambwa v. Canada (Citizenship and Immigration)*, 2019 FCA 34, 304 A.C.W.S. (3d) 376 at para. 30 [*Tapambwa*]; *Begum v. Canada (Citizenship and Immigration)*, 2018 FCA 181, 297 A.C.W.S. (3d) 622 at para. 36; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 58).

[29] Before moving on to the analysis of the merits, a preliminary matter must be considered.

V. Preliminary matter

[30] A peculiarity of the present case is that the administrative decision under review—the IAD's decision to cancel the stay and dismiss the appeal—does not directly consider the central issue before this Court: Does subsection 68(4) of the Act unjustifiably infringe the appellant's Charter rights? This is because the IAD held that "[i]t is settled law that [the IAD] does not have jurisdiction to rule on the constitutionality of subsection 68(4) of the [Act]" (IAD Reasons at para. 6). Indeed, the appellant himself acknowledges so much in his representations to the IAD.

[31] The "settled law" to which the IAD refers appears to be based on the decision of Mactavish J. (as she then was) in *Ferri v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1580,[2006] 3 F.C.R. 53 [*Ferri*]. After a careful review of the Supreme Court jurisprudence with respect to the jurisdiction of specialized tribunals to hear and decide constitutional questions, she held (at para. 39) that the IAD did not have jurisdiction to consider the constitutionality of subsection 68(4) of the Act (*Douglas/Kwantlen Faculty Assn. v. Douglas Colleg*e, [1990] 3 S.C.R. 570, 77 D.L.R. (4th) 94; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, 3 O.R. (3d) 128 [*Cuddy Chicks*]; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, 126 N.R. 1; *Cooper v. Canada (Human Rights Commission*), [1996] 3 S.C.R. 854, 140 D.L.R. (4th) 193; *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504).

[32] According to Justice Mactavish, the wording of subsection 68(4) limits the jurisdiction of the IAD to the determination of whether the factual requirements of the subsection have been met. In other words, the IAD loses jurisdiction over an individual once an affirmative answer is given to the following four questions:

1) Is the individual a foreign national or a permanent resident?

2) Has the individual previously been found to be inadmissible on grounds of serious criminality or criminality?

3) Has the IAD previously stayed a removal order in relation to that individual?

4) Has the individual been convicted of another offence referred to in subsection 36(1)?

While noting that a tribunal's jurisdiction to decide questions of law concerning a provision is presumed to include the constitutional validity of that provision, she held that this presumption was rebutted in this case. The wording of subsection 68(4), according to Justice Mactavish, "clearly reflects Parliament's intent to limit the jurisdiction of the IAD" (at para. 42).

[33] I note that this decision has since been relied upon by the Federal Court in several cases. See, for example: *Benavides Livora v. Canada (Minister of Citizenship and Immigration*), 2006 FC 104, 152 A.C.W.S. (3d) 489 at para. 10; *Ramnanan v. Canada (Minister of Public Safety and*

Emergency Preparedness), 2008 FC 404, 166 A.C.W.S. (3d) 295 at paras. 29-36 [*Ramnanan*]; *Canada (Citizenship and Immigration) v. Bui*, 2012 FC 457, 222 A.C.W.S. (3d) 769 at para. 31; *Canada (Public Safety and Emergency Preparedness) v. Rasaratnam*, 2016 FC 670, 268 A.C.W.S. (3d) 170 at para. 15; *Singh v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FC 455, 294 A.C.W.S. (3d) 357 at paras. 41-43, 54-61).

[34] This holding also appears to have been consistently followed by the IAD itself. See, for example: *Young v. Canada (Public Safety and Emergency Preparedness)*, 2016 CanLII 102941 at para. 2; *Adil v. Canada (Public Safety and Emergency Preparedness)*, 2016 CanLII 73708 at para. 2; *Smith v. Canada (Public Safety and Emergency Preparedness)*, 2006 CanLII 52281 at paras. 16-19; *X (Re)*, 2014 CanLII 66637 at para. 21.

[35] Assuming that this line of cases represents an accurate statement of the law with respect to the jurisdiction of the IAD, the issue for this Court is whether the constitutionality of subsection 68(4) of the Act was properly raised before the Federal Court and is now properly before us. The Federal Court acknowledged that the IAD had declined jurisdiction to deal with the constitutional issue, but nevertheless decided to consider this question itself. Was it right to do so?

[36] The respondent has not challenged the appellant's right to raise the constitutional issue either before the Federal Court or before this Court, and has not disputed that the certified questions meet the test for valid certification. Notwithstanding *Ferri*, I am of the view that the

constitutional validity of subsection 68(4) of the Act was properly before the Federal Court and is now properly before us.

[37] In *Ferri*, at paragraph 48, the Federal Court made it clear that the applicant was not left without a forum in which to challenge the constitutionality of subsection 68(4) of the Act: "[i]t is entirely open to him", said the Court, "to commence an action in this Court, seeking a declaration that the legislative provision in issue is unconstitutional. It would then also be open to [the appellant] to adduce the evidence before this Court that he believes will support his challenge". In the case at bar, the proceedings have not been brought by way of an action pursuant to section 17 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, as contemplated in *Ferri*. Rather, the appellant commenced these proceedings under sections 18 and 18.1. Specifically, he applied for judicial review of the IAD's decision, asking the Court to quash it and declare subsection 68(4) of the Act constitutionally invalid.

[38] At first sight, it appears that the Federal Court's decision to consider the appellant's constitutional argument conflicts with its own jurisprudence. I am nevertheless loath to conclude that the Federal Court was not entitled to consider the issue on judicial review, even though the IAD had declined jurisdiction to do so. The Federal Court and this Court have implicitly recognized in a number of decisions the authority of the former, on an application for judicial review, to issue a declaration that a statutory provision is in breach of the Charter even though the issue had not been dealt with by the administrative decision-maker itself. (See *Ramnanan* at para. 55; *Atawnah v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 144, 397

D.L.R. (4th) 177; *Canada (Attorney General) v. Jodhan*, 2012 FCA 161, 215 A.C.W.S. (3d) 847; *Bilodeau-Massé v. Canada (Attorney General)*, 2017 FC 604, 140 W.C.B. (2d) 168.)

[39] Before turning to the substantive issues raised in this appeal, I pause to make this final comment. I do not wish to be understood as endorsing the reasoning developed in *Ferri* with respect to the jurisdiction of the IAD to entertain a constitutional argument. There is no doubt in my mind, and it was accepted by the Federal Court, that the IAD is presumptively clothed with this jurisdiction. Subsection 162(1) of the Act confers upon each division of the Refugee Board the power to consider all questions of law, including ones of jurisdiction. Further, paragraph 3(3)(*d*) of the Act requires that the Act be construed in a manner that ensures decisions taken under its purview are made in a manner that is consistent with the Charter. Finally, Rule 47 of the *Immigration Division Rules*, SOR/2002-229 specifically addresses the procedure for challenging the constitutional validity, applicability or operability of any legislative provision under the Act. When these three provisions are read together, it appears that the statutory scheme as a whole militates in favour of the IAD having jurisdiction to consider the constitutionality of subsection 68(4) of the Act.

[40] Moreover, to require that the IAD apply a provision without giving it the power to determine that provision's constitutionality would appear to run counter to each and every policy consideration identified in the *Cuddy Chicks* trilogy. More specifically, it goes against the principle that invalid laws should not be applied and that rights should be assertable in the most accessible forum available. It also deprives the courts of the benefit of having constitutional questions determined by expert administrative tribunals in the very environment in which the law

operates. (See, by way of analogy, *Stables v. Canada (Citizenship and Immigration)*, 2011 FC 1319, 2009 A.C.W.S. (3d) 637 at paras. 27-29 [*Stables*].)

[41] Can it be said, however, that this presumption is rebutted by the express wording of subsection 68(4)? Or that this express wording "clearly reflects" Parliament's intent to limit the jurisdiction of the IAD and to deprive it of the jurisdiction to determine the constitutionality of subsection 68(4)? In my view, the issue deserves to be fully canvassed with the benefit of fulsome arguments by the parties involved. In the absence of such arguments, it is preferable to leave it for another day.

VI. Analysis

A. *Is section 7 engaged at the stage where a permanent resident's stay of removal is automatically cancelled pursuant to subsection 68(4) of the Act?*

[42] The appellant submits that the Judge's determination that section 7 cannot be engaged at this stage is erroneous, as it immunizes the process leading up to deportation from scrutiny. He says that in this case, there are no remaining steps between the operation of section 68(4) of the Act and his removal: his PRRA was denied, his humanitarian and compassionate (H&C) application is not a bar to removal, and the discretion left to enforcement officers at the removal stage is highly limited. The appellant further argues that this approach runs counter to the Supreme Court's holding in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 [*Bedford*] that, for section 7 of the Charter to be engaged, only a "sufficient causal connection" needs to be shown between the state-caused effect and the prejudice allegedly

suffered. It is also said to run counter to case law in criminal and extradition law, where section 7 is engaged from the start.

[43] In my view, the Judge was right to note that there is extensive case law establishing that an inadmissibility finding is distinct from effecting removal and that, as other steps remain in the process, it does not engage section 7 of the Charter (Reasons at paras. 24, 43, 47-48). (See *Tapambwa* at para. 81; *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704 at para. 75 [*B010*]; *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431 at para. 67; *Poshteh v. Canada (Citizenship and Immigration)*, 2005 FCA 85, [2005] 3 F.C.R. 487 at para. 63; *P. (J.) v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 262, 235 A.C.W.S. (3d) 460 at paras. 123, 125, rev'd on other grounds in *B010*; *Torre v. Canada (Citizenship and Immigration)*, 2016 FCA 48, 263 A.C.W.S. (3d) 729 at para. 4, leave to appeal refused, 36936 (25 August 2016).)

[44] The appellant raised essentially the same arguments as in *Revell*, and my reasoning as set out in paragraphs 35 to 57 of that case therefore applies similarly in the case at bar. The impugned provision, subsection 68(4) of the Act, mandates a finding of inadmissibility by lifting the IAD's conditional stay of the ID's inadmissibility decision. In this respect, the Judge was right to conclude that this case concerns the admissibility determination stage, not removal arrangements. In the specific circumstances of this case, the appellant may still apply for a section 24 exceptional temporary resident permit allowing him to remain in Canada for a finite period of time, or he may seek a deferral of removal at a later stage of his deportation process.

This is not to mention that, unlike the appellant in the case of *Revell*, Mr. Moretto can apply for a section 25 exemption from inadmissibility on humanitarian and compassionate grounds.

B. *If so, would section 7 be engaged where the deprivation of the right to liberty and security of the person of a permanent resident arises from their uprooting from Canada, and not from possible persecution or torture in the country of nationality?*

[45] The appellant claims that as subsection 68(4) of the Act renders his deportation order enforceable, it engages his liberty and security interests under section 7 of the Charter. With respect to liberty, he argues that his deportation would deprive him of a fundamental life choice, that of not being uprooted from the country he calls home and from his family and medical networks. As for his security interests, he says that they are engaged by the psychological harm associated with his deportation from Canada, *i.e.* the consequences of his uprooting. He relied in this respect on the evidence detailing his psychological frailty, his need for family support, and the harm that would arise if he were removed from Canada.

[46] For the most part, the legal framework and analysis that I have set out in paragraphs 64 to 79 of my reasons in the case of *Revell* applies equally in this case.

[47] In my view, the Judge was right to rely on *Medovarski* to find that the deportation of a non-citizen does not, in itself, implicate the liberty interests protected by section 7 of the Charter. The appellant has not demonstrated, nor really argued before this Court, that the consequences of his deportation on his liberty interests are more significant than the ones generally associated with deportation, which consequences have been found not to engage section 7. The limits that

would be imposed on the appellant's ability to make a choice about where to live are no greater, in my view, from the ones imposed on the claimant's ability, in *Medovarski*, to choose "to remain with her partner" in Canada. This case is thus dispositive.

[48] As in the case of *Revell*, I would be inclined, were it not for the decision of *Medovarski*, to conclude that the impugned state action in the present case does have a serious enough effect on the appellant's psychological integrity to engage his security interests under section 7.

[49] The evidence on record shows that the appellant has lived in Canada for fifty years, that he is not fluent in Italian, and that he has essentially no connection to medical or social supports in Italy (Appeal Book at pp. 53, 338). It also shows that he has struggled with addiction and mental health issues for some time (*ibid.* at pp. 50-52, 340, 342, 345 and 356-7), and that he relies a lot on his family in Canada for emotional, financial and psychological support (*ibid.* at pp. 337, 340-1, 345-6, 1189). The evidence, notably that of psychologists, also indicates that deportation would have significant negative emotional consequences on the appellant (*ibid.* at pp. 360, 1190, 1203-4). The clearest evidence of that is found in the report of Dr. Williams, which reads:

> Mr. Moretto is quite horrified at the prospect of being deported to Italy. On the basis of the present assessment, there can be no doubt that his enforced separation from his family and from the familiarity of Canada would be devastating to him. As discussed above, at the best of times his coping resources are limited, and his tolerance to stress and his ability to function autonomously are tenuous. Extrapolating from this, almost certainly his deportation to Italy, where he would have minimal or no supports and would be deprived of direct contact with known family members, would expedite his psychological deterioration, incapacitation, and gravitation toward passive and/or active patterns of self-destructive behaviour; as such, it would likely represent a life-shortening event for him.

[Report of Dr. Karl Williams (10 July 2017) Appeal Book at p. 360].

[50] The report of Dr. Peter Hotz reaches a similar conclusion. He states in his psychological opinion:

> Mr. Moretto is completely dependent on his family in Vancouver, and I am of the opinion that were he to be deported, his dysfunctional coping skills would be profound. In fact I cannot see him managing, his loneliness would be profound, and I would think it highly likely that depression would likely worsen and that he would have no ability to manage at all.
>
> I cannot predict specifics of changed mental status, but I would be of the opinion that were he to be deported, current symptomatology would worsen markedly.

[Report of Dr. Peter Hotz (23 March 2014) Appeal Book at p. 1190].

[51] In light of the above, I accept that the harms alleged here are far greater than the "ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action", which the Supreme Court excluded from the ambit of the right to security of the person in *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, 177 D.L.R. (4th) 124 at para. 59 [G. (J.)]. There is evidence on record (contrary to the situation in *Stables* at para. 42) that Mr. Moretto's removal would have a profound and serious impact on his psychological integrity, which need not rise to the level of nervous shock or psychiatric illness to offend s.7 of the Charter, as the Supreme Court cautioned in *G. (J.*) at paragraph 60.

[52] That being said, in light of *Medovarski* I am nevertheless unable to find in favour of Mr. Moretto. While the evidence here is stronger than in *Revell*, notably because of the mental health and addiction issues faced by the appellant, I have not been convinced that the consequences of removal for him rise beyond the "typical" ones associated with this procedure. After all, the Supreme Court stated in that case that deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by section 7 of the Charter, since such a protection would negate Canada's right to decide who it will allow to remain in its territory. As this Court stated in *Lewis* at paragraph 63:

> It is convenient to first address the Charter argument as it may be disposed of quickly. The starting point for the discussion is what the respondent terms a "foundational principle in the immigration context", namely, that section 7 of the Charter does not prevent the removal of non-citizens from Canada if those being removed will not upon return to their country of origin face risks of the sort that would qualify for protection under section 97 of the IRPA…As there is no suggestion that Mr. Lewis would face any such risk, his section 7 Charter rights are not impacted by the removal order. In short, his constitutionally-protected rights to life, liberty and security of the person will not be impacted if he is returned to Guyana.

[53] In any event, even assuming if the appellant had shown a deprivation of his security interest, I would still find, for the reasons below, that the deprivation accords with fundamental justice.

C. *Does the principle of stare decisis preclude this Court from reconsidering the findings of the Supreme Court of Canada in Chiarelli? In other words, have the criteria to depart from binding jurisprudence been met in the present case?*

[54] In the appellant's view, the Judge was right to conclude that, in light of the developments in the law related to fundamental justice under section 7 of the Charter, the threshold to revisit

Chiarelli was met. The appellant argues that there have been developments in the concepts of "gross disproportionality" and "overbreadth" as principles of fundamental justice, and that these concepts require an individualized assessment of the impact of the impugned law on the rights bearer, which he says the Court did not undertake in *Chiarelli*. The appellant also says that the Court in *Chiarelli* considered societal interests in its section 7 analysis, which, he says, is inconsistent with modern case law. The appellant also points to developments in international law in support of his position.

[55] These arguments are essentially the same as those raised in the companion case of, *Revell*. For the reasons set out at paragraphs 80 to 106 of that case, I am of the view that the appellant's arguments must be rejected.

[56] Before moving on to the next question, one last comment is in order with respect to *stare decisis*. The Judge held that the appellant's raising of a new Charter provision, namely paragraph 2(*d*), also weighed in favour of revisiting *Chiarelli* and *Medovarski* (Reasons at para. 34). With respect, this conclusion is mistaken.

[57] While it is true that the Supreme Court held, in *Bedford*, that a "judge can consider and decide arguments based on Charter provisions that were not raised in the earlier case", as this "constitutes a new legal issue" (at para. 42), this is in no way a relevant factor as to whether an earlier case should be revisited. If the earlier case did not deal with a provision, there is no need to "revisit" it in this regard. The fact that a new Charter provision is raised to challenge the

validity of a legislative scheme has no bearing on whether precedents concerning other Charter provisions should be reconsidered.

[58] If I were to find that the appellant's right to security of the person was engaged at the inadmissibility determination stage and that this Court is free to revisit the Supreme Court's decision in *Chiarelli*, the next question would be whether the impugned legislative scheme is nonetheless consistent with the principles of fundamental justice.

D. *If so, is the impugned legislative scheme consistent with the principles of fundamental justice?*

[59] Counsel for Mr. Moretto, like counsel for Mr. Revell, submits that it would be grossly disproportionate to apply section 68(4) of the Act to his client, and that the Judge failed to conduct the individualized assessment that section 7 of the Charter requires. According to counsel, the prior procedures which the Judge characterized as "safety valves" and which have allowed Mr. Moretto's circumstances to be taken into consideration are irrelevant to this challenge, since subsection 68(4) takes away any further opportunity to explain his circumstances to a decision-maker.

[60] In my view, this argument is flawed for the reasons already provided in *Revell* at paragraphs 107 to 122. Mr. Moretto has not demonstrated that the Judge erred. Lifting the conditional stay of an ID inadmissibility decision and terminating the IAD appeal in circumstances where a non-citizen has been convicted of a further serious crime is neither overbroad nor grossly disproportionate. The underlying purpose of subsection 68(4) is to allow

for the prompt removal of dangerous criminals who continue to commit serious criminal offences after being given a second chance. It is in light of this purpose that overbreadth and gross disproportionality have to be considered.

[61] Even assuming that section 36 of the Act could cover conduct that bears no relation to its purpose, the numerous processes provided for by the Act to assess admissibility save it from any charge of overbreadth by effectively narrowing its scope. To repeat, these provisions include the section 44 referral process, the H&C application under section 25, the pre-removal risk assessment and the possibility of a deferral of removal.

[62] In the case at bar the appellant's circumstances—the nature of his criminal convictions and his risk of reoffending, as well as his deep roots in Canada, his family situation, his addiction and mental health issues, and the impact removal may have on him—were considered extensively at the report and referral stage. In addition, the appellant benefitted from a quasi-judicial hearing before the ID to address the merits of the inadmissibility allegations. Mr. Moretto was then allowed to appeal that decision to the IAD and to seek a stay based on the IAD's humanitarian and compassionate jurisdiction. The Federal Court then granted Mr. Moretto's judicial review application and set aside the negative IAD decision, and upon redetermination the IAD ordered the ID's removal order be conditionally stayed for three years.

[63] Upon reconsideration of the stay of the removal order, the IAD granted a further conditional stay of one year despite Mr. Moretto breaching the stay of conditions and having been convicted of four criminal offences between March 2012 and February 2014. In coming to

this conclusion, the IAD again examined the specific circumstances of the appellant and summarized what it deemed to be relevant considerations in deciding whether it should exercise its authority to grant special relief under sections 67 and 68 of the Act:

> [7] These factors are the seriousness of the offence or offences leading to the removal order, the possibility of rehabilitation, the length of time the appellant has been in Canada and the degree to which the appellant is established, the impact the appellant's removal from Canada would have on members of the appellant's family, the appellant's family in Canada, and the dislocation to that family that the removal of the appellant would cause, the support available for the appellant not only within the family but also within the community and the degree of hardship that would be caused to the appellant by his return and the hardship the appellant would face in the country to which he would likely be removed.

[64] In light of the above, the appellant cannot claim that his personal circumstances were not considered. Throughout the various stages of the process, the appellant was provided with several chances to remain in Canada based on an individualized assessment of his particular situation. I agree with the Judge that the appellant had access to the "full spectrum of individualized processes" within the Act's broader inadmissibility scheme before the automatic operation of subsection 68(4). It would be a mistake to focus entirely on this last provision, as it is but one process in a complex, multi-tiered inadmissibility determination and removal regime.

[65] Moreover, even at this late stage, Mr. Moretto can still avail himself of a few more processes to avoid being removed. These include applying to remain in Canada on humanitarian and compassionate grounds under section 25 of the Act, applying for both a temporary resident permit and a pre-removal risk assessment, and requesting to defer removal. All of these processes are subject to judicial review by the Federal Court. They are "safety valves" that ensure against any gross disproportionality and overbreadth. The system as a whole is replete

with meaningful opportunities for an individual's situation to be considered, in order to mitigate the rigidity of the law and avoid unconstitutional results.

[66] The appellant was given several chances to remain in Canada based on an individualized assessment of his personal circumstances. Yet, he has continued to violate the essential condition of his right to remain in Canada that he not engage in serious criminality. In this context, I find that there is nothing draconian or "out of sync" about giving effect to the appellant's obligation to behave lawfully while in Canada by lifting the stay of removal and rendering him inadmissible to Canada. The impact of subsection 68(4), at least in the particular circumstances of this case, is not grossly disproportionate to its objective.

E. *Does the impugned legislative scheme infringe upon the appellant's rights under section 12 of the Charter?*

[67] For the same reasons as those set out in paragraphs 123 to 137 of *Revell*, I find that the Judge was correct to conclude that section 12 was not engaged in this case.

F. *Does subsection 68(4) of the Act violate paragraph 2(d) of the Charter?*

[68] The appellant reiterates the claim, rejected by the Judge, that the impugned scheme infringes his section 2(*d*) Charter right as the effect of his deportation would be to sever his association with his family. He argues, referring to international norms, that the family unit is the "foundational social institution", and that it should thus enjoy Charter protection. While undoubtedly creative, these submissions must fail.

[69] In the *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161 [*Alberta Reference*], Justice McIntyre, writing for himself, explained why institutions like the family do not fall easily under the rubric of s. 2(*d*) (at para. 174):

> (…) The purpose of freedom of association is to ensure that various goals may be pursued in common as well as individually. Freedom of association is not concerned with the particular activities or goals themselves; it is concerned with how activities or goals may be pursued. While activities such as establishing a home, pursuing an education, or gaining a livelihood are important if not fundamental activities, their importance is not a consequence of their potential collective nature. Their importance flows from the structure and organization of our society and they are as important when pursued individually as they are when pursued collectively.

[70] It is true that the jurisprudence of the Supreme Court has evolved towards a more generous interpretation of section 2(*d*) of the Charter. Recent cases have departed from the view adopted in what has come to be known as the Labour Trilogy (the *Alberta Reference*; *P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424, 38 D.L.R. (4th) 249; and *R.W.D.S.U. v. Saskatchewan*, [1987] 1 S.C.R. 460, 8 D.L.R. (4th) 277). Under the old view, freedom of association protects a right to engage collectively in activities that are constitutionally protected for each individual. Today, the Supreme Court espouses the broader view that Chief Justice Dickson put forward in dissent. It is now beyond dispute that freedom of association protects not only the right to join with others and form associations (the "constitutive" approach) and the right to join with others in the pursuit of other constitutional rights (the "derivative" approach), but also the right to join with others to meet on more equal terms the power and strength of other groups or entities (the "purposive" approach). (For a good recapitulation of that evolution, see *Mounted Police Association of Ontario v. Canada (AG)*, 2015 SCC 1, [2015] 1 S.C.R. 3 at paras. 52-66 [*MPAO*].)

[71] Broadening the scope of section 2(*d*) had a major impact on the right to collective bargaining, but there is no indication that the "voluntariness" aspect of that right has been cast aside, nor that the above-quoted excerpt of Justice McIntyre's has lost its currency. It would appear, on the contrary, that family relationship has little (if anything) in common with the underlying purpose of freedom of association as re-articulated by the Supreme Court in *MPAO* at paragraph 58:

> This then is a fundamental purpose of s. 2(*d*) — to protect the individual from "state-enforced isolation in the pursuit of his or her ends": *Alberta Reference*, at p. 365. The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society.

[72] The appellant was unable to refer the Court to a single case where family relationship was recognized as falling within the ambit of freedom of association. In fact, the jurisprudence has consistently and unanimously found the opposite. The decision of the Court of Appeal of Ontario in *Catholic Children's Aid Society of Metropolitan Toronto v. S.* (1989), 69 O.R. (2d) 189, 60 D.L.R. (4th) 397 provides a good illustration. Holding that provisions requiring a termination of access by birth parents upon placement for adoption do not violate section 2(*d*) of the Charter, the Court wrote (at para. 41):

> The freedom of assembly and association are necessarily collective and so mostly public. Our constitutional concerns have not been with assemblies within families or associations between family members. Rather, the protections we have been concerned with are for those assemblies and associations that take us outside the intimate circle of our families. The family is a collective, but the desire of one family member to associate with another is not so much for the purpose of pursuing goals in common, nor even pursuing activities in common…, as it is merely because they are members of a family. A parent and child may associate

> for an economic goal, for example, but the motivation comes from their relationship, rather than a relationship being created because of the economic motivation. The desire of a parent to be with a child has no goal or purpose like that of associations for economic, political, religious, social, charitable or even entertainment purposes. If it has any purpose it is that of loving or being loved, of comforting and protecting or being comforted and protected.

[73] In addition to several first-instance courts, appellate courts in both Quebec and Alberta have relied on this decision to conclude that the right to freedom of association does not apply to association of family members (See *Droit de la famille - 1741,* [1993] R.J.Q. 647 (C.A.) at pp. 23-24, 38 A.C.W.S. (3d) at 315, leave to appeal to S.C.C. refused (21 May 1993); *C.(L.) v. Alberta*, 2010 ABCA 14, 316 D.L.R. (4th) 760 at para. 20.) The appellant has not convinced me that the recent section 2(*d*) case law mandates departing from this reasoning.

[74] Finally, I cannot accept the appellant's arguments based on international law. It is true that the human rights instruments to which Canada is a party, such as the International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47 [ICCPR], can serve as interpretative tools in delineating the breadth and scope of Charter rights (*Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176 at para. 150 [*Kazemi*]). However, for international norms to be relevant in this manner, the international obligation invoked and the Charter right at issue must at least be conceptually similar. As the Supreme Court clearly noted in *Kazemi*, the Charter is understood to "provide protection at least as great as that afforded by similar provisions in international human rights documents to which Canada is a party" (*ibid.*, emphasis added).

[75] Articles 17 and 23 of the ICCPR expressly protect the right to family life and privacy. As was acknowledged by the appellant, the Charter does not explicitly contain such a right. The idea

that the right to freedom of association in section 2(*d*) of the Charter should be interpreted in light of international protections that bear no connection to that right is without merit. It should also be noted that Article 22 of the ICCPR, which, like section 2(*d*) of the Charter, is concerned with the right to "freedom of association", has been interpreted as not extending to association with family members. (See, on this question, Sarah Joseph, Jenny Schultz, and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed. (Oxford: Oxford University Press, 2004), at pp. 575-576.)

G. *Would these infringements be justified under section 1 of the Charter?*

[76] Having found that the appellant has not been subjected to any infringement of his rights under sections 2(*d*), 7 or 12 of the Charter, it is not necessary to consider the section 1 analysis.

VII. Conclusion

[77] For all of the above reasons, I would dismiss the appeal. The parties have not sought costs, and therefore none will be awarded.

[78] I would answer the certified questions as follows:

> *Question 1:*
>
> Is section 7 engaged at the stage of determining whether a permanent resident's stay of removal is automatically cancelled pursuant to subsection 68(4) and if so, would section 7 be engaged where the deprivation of the right to liberty and security of the person of a permanent resident arises from their uprooting from Canada, and not from possible persecution or torture in the country of nationality?

Answer to Question 1:

The cancellation of the stay of an ID's inadmissibility determination pursuant to subsection 68(4) of the IRPA does not engage section 7 of the Charter, and even if it does, the deportation of the appellant in the specific circumstances of this case would not infringe his section 7 right to liberty or security.

Question 2:

Does the principle of *stare decisis* preclude this Court from reconsidering the findings of the Supreme Court of Canada in *Chiarelli*, which established that the deportation of a permanent resident who has been convicted of serious criminal offence, despite that the circumstances of the permanent resident and the offence committed may vary, is in accordance with the principles of fundamental justice. In other words, have the criteria to depart from binding jurisprudence been met in the present case?

Answer to Question 2:

The criteria to depart from binding jurisprudence have not been met in the present case, and this Court is therefore bound to conclude that subsection 68(4) of the IRPA is consistent with section 7 of the Charter.

Question 3:

Is a section 12 determination premature at the stage where a permanent resident's stay of removal is automatically cancelled pursuant to subsection 68(4)?

Answer to Question 3:

For the same reasons already given in the context of section 7, it is premature to determine whether deportation infringes section 12 at the stage where a stay of removal is cancelled.

"Yves de Montigny"

J.A.

"I agree.
David Stratas J.A."

"I agree.
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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