Federal Court  Cour fédérale

Date: 20190612

Docket: IMM-3347-18

Citation: 2019 FC 806

Ottawa, Ontario, June 12, 2019

PRESENT: Mr. Justice Annis

BETWEEN:

MANDIP SINGH KOONER

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review brought under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for a decision rendered by the Immigration and Refugee Board, Immigration Division [ID] regarding the inadmissibility of the Applicant under paragraph 36(1)(a) of the IRPA.

[2] This application for judicial review should be dismissed.

II. Background

[3] Mandip Singh Kooner [the Applicant], is a 39-year-old citizen of India. He became a permanent resident of Canada in 1992 at the age of 14. On January 19, 2017, the Applicant was convicted of three counts of trafficking heroin. This offence under subsection 5(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19, is punishable by a maximum term of imprisonment for life.

[4] The ID held a three-day admissibility hearing and on June 29, 2018, found the Applicant to be inadmissible to Canada under paragraph 36(1)(a) of the IRPA. Pursuant to subsection 45(d), the ID issued a deportation order against the Applicant.

III. Impugned Decision

[5] At the admissibility hearing, the Applicant conceded that he met the requirements under paragraph 36(1)(a) of the IRPA to be found inadmissible to Canada on the grounds of serious criminality. The main issue was whether the ID can consider the Applicant's rights under sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], at the admissibility hearing. In the alternative, the Applicant argued that the decision should be reserved until the Federal Court of Appeal rendered its decision in the appeal of *Revell v Canada (Citizenship and Immigration)*, 2017 FC 905 [*Revell*].

[6] The ID, relying heavily on the *Revell* decision, concluded that the deportation order is not inconsistent with the *Charter* on the following grounds:

- Engaging section 7 of the *Charter*:
    i. The ID is bound by the decision in *Revell;*
    ii. The Applicant's rights are not engaged at the admissibility hearing as removal is not an automatic result of an admissibility hearing and there are other steps between the hearing and the ultimate removal. The Applicant's *Charter* rights will be engaged once the Canada Border Service Agency [CBSA] begins the process of removing the Applicant from Canada;
    iii. The ID cited *Moretto v Canada (Citizenship and Immigration),* 2018 FC 71 [*Moretto*] for the finding that lifting a stay order (which is a step closer to deportation) is a different process from deportation. If lifting a stay order was a separate proceeding from the deportation process and the *Charter* rights are only engaged once the deportation process begins, then the Applicant's *Charter* rights are not triggered at the inadmissibility hearing stage; and
    iv. The "sufficient causal connection" test from *Canada (Attorney General) v Bedford*, 2013 SCC 72 [*Bedford*] (which determines when a person's section 7 *Charter* right becomes engaged) does not apply in this instance. The ID stated that in *Bedford*, the actor at issue was not a state actor and that the purpose of the test is to ensure the meritorious claims are not barred by applying too high a standard. In this case, there is a direct link between the Applicant and state actions. Therefore, there is no risk his claim will be barred from consideration.

- Engaging section 12 of the *Charter*:

i. The ID found that the administrative control of the state constitutes "treatment"; and

ii. The ID found that the Applicant's argument for the grossly disproportionate treatment stems from the removal of the Applicant from Canada and not from the admissibility hearing. As the two are distinct processes, there is no grossly disproportionate treatment at this stage.

- *Charter* issues are already addressed within the administrative scheme:

  i. Under subsections 44(1) and 44(2) of the IRPA, the Officer or the Minister's Delegate has the discretion to decide whether or not to commence the admissibility proceedings;

  ii. Conversely, if the ID determines that the Applicant is inadmissible at the hearing, then the ID must issue a deportation order for a permanent resident; and

  iii. It is trite law that a CBSA officer has to consider the Applicant's case in line with the *Charter*. As well, the Federal Court can consider the Applicant's *Charter* rights on a motion for a stay order. Therefore, it is premature for the Applicant to raise the issue of a *Charter* rights violation at this stage.

[7] The ID found that the decision should not be reserved until the Federal Court of Appeal has rendered its decision in *Revell*, as the ID has an obligation to address claims expeditiously, and it is unknown when the Federal Court of Appeal will render its decision.

[8] Based on the Applicant's criminal record, the ID ultimately found the Applicant to be inadmissible to Canada on grounds of serious criminality and issued a deportation order.

IV. Legislative Framework

[9] The following provisions of the Act and *Charter* are applicable in these proceedings:

Serious criminality	**Grande criminalité**
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;
Decision	**Décision**
45 The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions:	**45** Après avoir procédé à une enquête, la Section de l'immigration rend telle des décisions suivantes :
(a) recognize the right to enter Canada of a Canadian citizen within the meaning of the *Citizenship Act*, a person registered as an Indian under the *Indian Act* or a permanent resident;	a) reconnaître le droit d'entrer au Canada au citoyen canadien au sens de la *Loi sur la citoyenneté*, à la personne inscrite comme Indien au sens de la *Loi sur les Indiens* et au résident

permanent;

(b) grant permanent resident status or temporary resident status to a foreign national if it is satisfied that the foreign national meets the requirements of this Act;

b) octroyer à l'étranger le statut de résident permanent ou temporaire sur preuve qu'il se conforme à la présente loi;

(c) authorize a permanent resident or a foreign national, with or without conditions, to enter Canada for further examination; or

c) autoriser le résident permanent ou l'étranger à entrer, avec ou sans conditions, au Canada pour contrôle complémentaire;

(d) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.

d) prendre la mesure de renvoi applicable contre l'étranger non autorisé à entrer au Canada et dont il n'est pas prouvé qu'il n'est pas interdit de territoire, ou contre l'étranger autorisé à y entrer ou le résident permanent sur preuve qu'il est interdit de territoire.

Procedure

162 (2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

Fonctionnement

162 (2) Chacune des sections fonctionne, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et avec célérité.

Sections 7 and 12 of the *Charter* :

Life, liberty and security of the person

7. Everyone has the right to

Vie, liberté et sécurité

7. Chacun a droit à la vie, à la

life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
Treatment or punishment	**Cruauté**
12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.	**12**. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

V. Issues

[10] The following issues arise in this application:

A. Does the admissibility scheme engage section 7 of the *Charter*?

B. Does the admissibility scheme breach section 7 of the *Charter*?

C. Are there grounds to depart from *Canada (Minister of Employment and Immigration) v Chiarelli* [1992] 1 SCR 711, [1992] SCJ No 27?

D. Does the admissibility scheme breach section 12 of the *Charter*?

E. Are any infringements justified under section 1 of the *Charter*?

F. Did the ID err in refusing to reserve its decision until after the Federal Court of Appeal rendered its decision of *Revell?*

G. Should the Federal Court grant the Applicant's request to have three questions certified for appeal?

H. Is this matter distinguishable from *Revell,* and if so does this merit allowing the application?

VI. Standard of Review

[11] The parties agree that the applicable standard of review is reasonableness when reviewing the ID's decision not to reserve its decision until the Federal Court of Appeal has made a decision in *Revell*, and correctness when reviewing the other constitutional issues.

[12] As the constitutional issues fall in line with the issues outlined in *Revell*, Justice Catherine M. Kane's assessment of the appropriate standard of review as correctness is applicable.

[13] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50 [*Dunsmuir*], the Supreme Court of Canada explained correctness as:

> 50 … When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[14] While a reasonableness standard "is concerned mostly with the existence of justification, transparency, and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47).

VII. Analysis

A. *Is this matter distinguishable from* Revell*, and if so does this merit allowing the application?*

[15] For the most part, the issues raised in this matter (identified as subparagraphs A to F in the statement of issues) are the same as those in the *Revell* matter. As noted, these issues were certified for consideration by the Court of Appeal. They have been argued, and a decision is forthcoming. The parties have agreed to certify a question in this matter, such that Mr. Kooner may benefit from the results, to the extent that Mr. Revell succeeds in his appeal. It therefore, serves no purpose for me to review these issues anew.

[16] Nonetheless, the Applicant argues that the facts in this matter are distinguishable from those in *Revell*. The Applicant argues that unlike the circumstances in *Revell* where there was no risk of persecution or torture in the UK, the Applicant in the case at bar would be at risk of harm upon deportation. The Applicant's submission is best described at paragraph 14 of his memorandum as follows:

> [14] Mr. Kooner states that the issuance of a deportation order will have devastating consequences on him. He is a heroin addict. His removal to India will severely diminish his prospects for receiving methadone. The lack of available and effective drug treatment and the absence of family support will cause a downward spiral that will have dire consequences on his health and well-being. As such, his rights under section 7 of the *Charter*, specifically the right to security of the person, will be impacted.

[17] The Applicant cites the medical report of Dr. Euler. According to her diagnosis, the Applicant is a recovering heroin addict who is experiencing high levels of anxiety, depression and distress due to his actions, and the threat of being deported. Should the Applicant be removed to India, she foresees that he will suffer incredible hardship, and that he would be at significant risk to relapse and experience long-standing mental health issues, due to the absence of treatment facilities in India and the loss of family support.

[18] The Applicant argues that he lacks an adequate forum in which to assert his *Charter* rights apart from having this issue considered at the admissibility hearing. This Court in *Stables v Canada (Citizenship and Immigration),* 2011 FC 1319 indicated at paragraph 56 that various "safety valves" have been built into the IRPA ensuring that an applicant's concerns will be addressed throughout the deportation process. This reasoning was relied upon in *Revell*.

[19] The Applicant points out that unlike the situations in *Revell* or *Stables*, the availability of a PRRA affords him no protection against his risk, as this process specifically excludes risk caused by the inability of an applicant's home country to provide adequate health or medical care (IRPA, subparagraph 71(1)(b)(i)). This submission appears at paragraph 42 of the Applicant's memorandum:

> [42] In the present case, all the same processes or steps outlined by Justice de Montigny in *Stables* at para 56 are or were open to Mr. Revell. Mr. Revell made submissions at the section 44 report stage on three occasions and the CBSA officer made detailed reports. He sought reconsideration and leave for judicial review, both of which were denied. He made extensive pre and post-hearing submissions to the ID and had an oral hearing. While the PRRA process, which would occur before his deportation, is not designed to assess the type of harm he submits he will suffer – that of his uprooting and the psychological impact of his removal – the PRRA assesses the risks that section 7 of the *Charter* seeks to protect against (*Stables*, para 59).

[20] While I agree that the PRRA assessment may not be able to address issues arising from the inability of India to provide adequate health or medical care, it does not follow that there are no other processes which can address these submissions. Specifically, the Applicant may apply for permanent residence on humanitarian and compassionate [H&C] grounds on the basis of exceptional circumstances in relation to his personal safety. The Applicant could also seek a

motion to stay his removal at this Court. This procedure would also provide an opportunity to ensure that he is not removed to a country where his section 7 *Charter* rights to life, liberty and security of the person would be imperiled.

[21] In this latter regard, I quote extensively from the decision of my colleague Justice Anne L. Mactavish in the matter of *Atawnah v Canada (Public Safety and Emergency Preparedness*), 2015 FC 774 upheld by the Federal Court of Appeal in 2016 FCA 144:

> [72] The applicants also acknowledge that this Court has already found the "PRRA bar" contained in paragraph 112(2)(b.1) of IRPA to be constitutionally valid in *Peter v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 1073, [2014] F.C.J. No. 1132, a constitutional challenge to paragraph 112(2)(b.1) that was brought in the context of an application for judicial review of an enforcement officer's decision refusing to defer Mr. Peter's removal to Sri Lanka.
>
> [73] The applicants submit that the facts in this case are materially different from those in *Peter* as there has been no prior assessment of the applicants' risk in this case, whereas the applicant in *Peter* had already had a refugee hearing, and the focus of the enforcement officer was on "whether there [was] sufficient new probative evidence of the applicant's exposure to a risk of death, extreme sanction, or inhumane treatment": Peter, at para. 254.
>
> [74] However, a review of the decision in *Peter* reveals that in assessing whether paragraph 112(2)(b.1) of IRPA violated Mr. Peter's section 7 rights, consideration was given by the Court to the role played by enforcement officers in assessing new evidence of risk asserted at the removals stage, including evidence relating to risks that had not previously been the subject of a full risk assessment: see, for example, paras. 246-7, 254, 262 and 266.
>
> [75] One of the issues in *Peter* was whether the evolution in the country conditions within Sri Lanka following the conclusion of the civil war created a new, different or greater risk than the risk assessed by the Refugee Protection Division. Thus the question was whether the applicant in *Peter* was at risk in Sri Lanka as a result of current country conditions. While it is true that Mr. Peter had had the benefit of a refugee hearing, the RPD had not assessed

the conditions facing Tamils in Sri Lanka as of the date of the application for judicial review.

[76] More important for our purposes, however, is the fact that Mr. Peter also identified a risk factor in his request to defer his removal that he had not raised before the RPD, and which had thus not been assessed by the Board. That is, Mr. Peter alleged for the first time in his request to defer that he would face a serious risk of harm in Sri Lanka because he had worked as a driver for a non-governmental organization. Allegedly on the advice of his interpreter, Mr. Peter had not provided any information regarding his employment with the NGO or the problems that he experienced as a result of this employment in either his PIF or at his refugee hearing: *Peter*, above at para. 14.

[77] Thus, contrary to the applicants' assertion in the case before me, Justice Annis did indeed turn his mind to a scenario where an enforcement officer would act as the sole assessor of a risk factor. While the RPD had assessed some of the applicant's risk allegations in *Peter*, there had never been any assessment of the risk allegedly faced by Mr. Peter in Sri Lanka as a result of his work as a driver for an NGO prior to the issue being raised before the enforcement officer.

[78] In concluding that paragraph 112(2)(b.1) of IRPA did not breach the applicant's rights under section 7 of the *Charter*, the Court observed in *Peter* that enforcement officers could assess new evidence of risk, and that "the availability of the removals process generally provides a complete answer to the constitutionality challenge to section 112(2)(b.1)": above at para. 86.

[79] This conclusion is consistent with the jurisprudence that has developed regarding the role of enforcement officers in assessing allegations of risk that have not previously been assessed. For example, in *Canada (Minister of Public Safety and Emergency Preparedness) v. Shpati*, 2011 FCA 286 at paras. 43-44, [2012] 2 F.C.R. 133, the Federal Court of Appeal held that enforcement officers were obliged to consider risks that had not previously been assessed if they exposed the applicant to "a risk of death, extreme sanction or inhumane treatment; see also *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 at para. 48, [2001] 3 F.C. 682.

[80] The Federal Court of Appeal noted that the applicant in *Shpati* had not produced any evidence of a new risk that had not been assessed through the PRRA process. The Court inferred that "if Mr. Shpati had such evidence, the officer would have

considered whether it warranted deferral and exercised his discretion accordingly": at para. 41. The Court noted that such an approach was consistent with its earlier decision in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 F.C.R. 311, and was "an accurate statement of the law": *Shpati*, above at para. 42.

[81] The Federal Court of Appeal thus found that it was incumbent on enforcement officers to assess the sufficiency of the evidence adduced by a person seeking a deferral of their removal to allow for a full risk assessment in cases where there is a new allegation of risk that had not previously been assessed. Indeed, as Justice Zinn observed in *Etienne v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 415, [2015] F.C.J. No. 408, enforcement officers are not just required to consider "new" risks that only arose after a refugee determination or other process. Enforcement officers are "also required to consider risks that have never been assessed by a competent body": at para. 54. See also *Toth*, above, at para. 23.

[82] An enforcement officer can therefore defer removal to allow for a fulsome risk assessment where an applicant facing removal adduces sufficient evidence of a serious risk in his or her country of origin, and that risk has not previously been assessed. Conversely, if an enforcement officer refuses to defer removal and an applicant believes that the officer erred in assessing the sufficiency of the evidence of a new risk, or otherwise treated the applicant unfairly such that the applicant's section 7 *Charter* rights have been infringed, the individual can seek judicial review of the officer's decision in this Court and bring a motion to seek a stay his or her removal pending disposition of the application.

[83] This approach has now been incorporated into CBSA's Operational Bulletin: PRG-2014-22, entitled Procedures relating to an officer's consideration of new allegations of risk at the deferral of removal stage. The Operational Bulletin states that enforcement officers should not conduct full assessments of an alleged risk, but are instead to consider and assess the evidence that has been submitted, to determine whether a deferral is required to allow for consideration under section 25.1 of IRPA on humanitarian and compassionate grounds.

[84] The significant evidentiary challenge that confronts most applicants seeking a deferral of removal is that their risk factors will have already been thoroughly evaluated by the Refugee Protection Division (and possibly the Refugee Appeal Division as well), or through the PRRA process, or both: *Peter*, above, at para.

256. Evidence of a significant change in circumstances or an entirely new risk development will therefore usually be required to demonstrate the need for a full risk assessment.

[85] However, individuals whose allegations of risk have never been assessed (such as the applicants in the case before me) will face a lesser burden in demonstrating that their evidence constitutes new evidence of risk. In the absence of a prior risk assessment, almost any evidence of risk adduced by such an applicant could be considered to be "new". Whether it is "sufficient" is a matter for determination by the enforcement officer.

[86] An enforcement officer's assessment of a request to defer is also not the only avenue open to individuals in the position of the applicants. Regard must also be had to the oversight provided by this Court through the stay process. As Justice Annis observed in *Peter*, above, "[t]he oversight function of the Federal Court provides a heightened degree of reliability to the decisions of the enforcement officer": at para. 271. Justice Annis found that this oversight "mitigates to a large extent any concerns of competency or legal standards argued by the applicant": *Peter*, above at para. 271. As the Federal Court of Appeal observed in *Shpati*, above at para. 51, this Court can often consider a request for a stay more comprehensively than can an enforcement officer consider a request to defer.

[87] Moreover, as Justice Annis observed in *Peter*, the role of the Federal Court "extends not only to considering legal issues, such as mootness or the *Charter*, but most obviously to assessing the reasonableness of the officer's decision on risk": at para. 175.

[88] As Justice Zinn further observed in *Toth*, above, at para. 24, if clear and convincing evidence of a real risk of harm has been presented in support of a deferral request, then an applicant "may persuade a judge of this Court that he is likely to succeed on judicial review of the rejected deferral request". In the alternative, an applicant "may convince a judge that he has a *prima facie* case that his removal will deprive him of his right to liberty, security and perhaps life as protected by section 7 of the *Charter*". Justice Zinn concluded that "neither possible avenue entails that the limitation on the right to a PRRA as found in paragraph 112(2)(b.1) of IRPA is constitutionally invalid". In his view, "[t]he fact that an applicant who is prevented from accessing the PRRA process due to the 12 month bar [or 36 months in this case] has these other alternatives available to him strongly suggests [...]that

> section 112(2)(b.1) of IRPA is not invalid": at para. 24 (my emphasis).
>
> [89] Although Justice Zinn's comments in *Toth* were made in the context of an order refusing a motion for a stay and have to be read in that context, I nevertheless find Justice Zinn's logic to be compelling.
>
> [90] As Justice Annis noted in *Peter*, enforcement officers are required to assess the sufficiency of the evidence that has been provided with respect to the alleged risk of harm: at paras. 247, 266. If an applicant is able to adduce sufficient probative evidence of a risk that had not previously been assessed, then a deferral of removal will be granted in order that the risk can receive due consideration.
>
> [91] This makes sense. One can easily imagine the potential for abuse if applicants were automatically entitled to have their removal from Canada deferred to allow for a PRRA every time they raised a new allegation of risk that had not previously been assessed. Such automatic entitlement would create an incentive for refugee claimants to raise their allegations of risk in a piecemeal fashion, rather than a comprehensive fashion during the refugee or PRRA processes, in order to delay their removal from Canada. Requiring that individuals who raise new issues of risk at the very last minute be able to meet a base threshold of evidentiary sufficiency before their removal from Canada will be deferred is thus entirely reasonable.

[22] Accordingly, I conclude that although this matter is distinguishable to some extent from the facts in *Revell*, there is no basis to conclude that there is no adequate alternative forum to consider the Applicant's *Charter* arguments.

B. *Did the ID err in refusing to reserve its decision until after the Federal Court of Appeal rendered its decision of* Revell*?*

[23] In *Ospina Velasquez v Canada (Citizenship and Immigration),* 2013 FC 273 at para 9, this Court held that a pending appeal in a related matter does not entitle a party to an

adjournment, insofar as the issue in their case might be considered by the higher court. The Court referred to *Poggio Guerrero v Canada (Citizenship and Immigration),* 2012 FC 937 at para 22 [*Guerrero*] in which Justice Near noted:

> [22] Although the Federal Court of Appeal has yet to answer the certified questions noted by the Applicant, the general principle in litigation is that a decision stands until such time as it is overturned on appeal. The existence of a pending appeal or a certified question does not alter the final nature of the decision. This is not an instance where the appellate court granted leave to bring the appeal and where it can therefore be inferred that the appeal is likely to change the law; here, there is nothing to indicate how the Federal Court of Appeal will respond to the certified questions.

[24] While Justice Near noted that the applicant in that case could have sought an adjournment of his refugee hearing pending a decision on the certified question in another matter, the ultimate decision regarding whether to adjourn or reserve remains with the tribunal. As the Supreme Court has recognized, "these tribunals are considered to be masters in their own house" and "[a]djournment of their proceedings is very much in their discretion" *Prassad v Canada (Minister of Employment and Immigration),* [1989] 1 SCR 560, [1989] SCJ No 25 at para 17.

[25] The Federal Court in *Revell* and *Moretto* rendered final decisions with the benefit of full evidentiary records and extensive submissions from the parties. The existence of certified questions and pending hearings and decisions from the Federal Court of Appeal does not create uncertainty. At this time, as in *Poggio* at para 22: "there is nothing to indicate" that the state of the law on the issues raised will change.

[26] Accordingly, there was no error in the ID refusing to reserve its decision regarding the Applicant's admissibility.

C. *Should the Federal Court grant the Applicant's request to have three questions certified for appeal?*

[27] The test to grant a certified question to proceed to an appeal was recently stated in *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36 [*Lewis*]:

1. The question must be dispositive of the judicial review;

2. The question must transcend the interests of the parties;

3. The question must raise an issue of broad significance or general importance; and

4. The question must arise from the case itself.

[28] The Federal Court of Appeal further noted that "for a question to be one of general importance under section 74 of the IRPA, it cannot have been previously settled by the decided case law" (*Lewis* at para 39).

[29] The Applicant has requested that the following questions be certified for appeal:

> 1. Is section 7 engaged at the stage of determining whether a permanent resident is inadmissible to Canada 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?
>
> 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?

> 3. Is the removals procedure set out in combination of sections 36(1), 37(1), 44(1), 44(2), 45 and 64 of *IRPA* inconsistent with the principles of fundamental justice because it does not provide the Applicant the right to a consideration of whether or not his removal would be grossly disproportionate as required by sections 7 and 12 of the *Charter of Rights and Freedoms*?

[30] The Respondent does not oppose the first two questions as these are the same questions that were raised in *Revell*, and are currently being reviewed by the Federal Court of Appeal. The Respondent opposes the third question. The Respondent argues that this question does not raise a serious question of general importance, as the case law is well settled on this point. The Respondent also notes that the Applicant's counsel raised similar questions to be certified in *Revell* which were denied for being too broad, hypothetical, and non-dispositive.

[31] The first two questions should be certified to "preserve [the Applicant's] procedural rights in the even that appellate jurisprudence change[s] the law in his favour" (*Ajaj v Canada (Citizenship and Immigration)*, 2015 FC 928 at para 70).

[32] With regards to the third question, based on the above analysis, the case law is clear that there is no deficiency in the admissibility proceeding. Therefore, there is no question of serious importance. Even if there were, this issue is not dispositive, as the Applicant alleges deficiencies in other steps of the process and not the step under review.

VIII. Conclusion

[33] The application for judicial review should be dismissed and two of the three questions described above are certified for appeal.

JUDGMENT in IMM-3347-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. The style of cause is amended to replace the "Minister of Immigration, Refugees and Citizenship" with the "Minister of Citizenship and Immigration"; and

3. The following questions are certified for appeal:

   (a) Is section 7 engaged at the stage of determining whether a permanent resident is inadmissible to Canada 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?

   (b) 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?

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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