Date: 20080403

Docket: IMM-3517-07

Citation: 2008 FC 431

Toronto, Ontario, April 3, 2008

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

SHAZAM ALI

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application challenges a decision rendered by the Immigration Appeal Division (IAD) pursuant to the transitional provision of s.197 of the *Immigration and Refugee Protection Act* S.C. 2001, c.27 (*IRPA*) which reads as follows:

197. Despite section 192, if an appellant who has been granted a stay under the former Act breaches a condition of the stay, the appellant shall be subject to the provisions of section 64 and	197. Malgré l'article 192, l'intéressé qui fait l'objet d'un sursis au titre de l'ancienne loi et qui n'a pas respecté les conditions du sursis, est assujetti à la restriction du droit

subsection 68(4) of this Act.	d'appel prévue par l'article 64 de la présente loi, le paragraphe 68(4) lui étant par ailleurs applicable.

On the facts presented to the IAD, the question was whether contraventions of the Ontario *Highway Traffic Act (HTA)* constitute a breach of a condition of the stay granted to the Applicant "to keep the peace and be of good behaviour".

[2] It is agreed that the facts presented to the IAD are accurately stated in the Decision under review as follows:

> **1** Shazam ALI (the appellant) is 39 years old. He was born in Guyana on January 23, 1968. He became a permanent resident of Canada when he was landed along with his mother, brother and four sisters on March 10, 1995. He was sponsored by a sister.
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> **2** The appellant was ordered deported from Canada on March 15, 2000, by Immigration Adjudicator A. Martens, pursuant to paragraph 27(1)(d) of the former Immigration Act (the former Act). The basis of his deportation order was criminality, specifically convictions in January 1999 for kidnapping, contrary to paragraph 279(1)(a) of the Criminal Code of Canada, and robbery, contrary to section 344 of the Criminal Code of Canada, for which he was sentenced to 20 months imprisonment in addition to 10 months pre-trial custody. This makes him inadmissible under the Immigration and Refugee Protection Act (IRPA) for serious criminality [1: See Immigration and Refugee Protection Regulations, paragraph 320(5)(a)]. Under the scheme of IRPA, he would have no right of appeal to the Immigration Appeal Division because of sections 197 and 64.
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> **3** The appellant filed a Notice of Appeal on March 15, 2000. His appeal came before the Immigration Appeal Division (IAD) Member E. Whist. In a decision dated January 26, 2001, he granted the appellant a stay of the execution of his removal order for five (5) years subject to terms and conditions. The appellant's criminal record consists of the two criminal convictions which were the basis of his deportation order.

> **4** On November 29, 2005, a Notice of Review was sent out by the IAD saying the appellant's case would be reviewed in chambers unless the Minister requested an oral review. By letter dated January 18, 2006, the Minister (Public Safety and Emergency Preparedness) sent a Notice of Cancellation of Stay to the IAD, the appellant and his counsel, stating the Minister's position was that the appellant's stay was cancelled by operation of law and his appeal is therefore dismissed [2: Exhibit R-1].
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> **5** In an interlocutory decision on January 15, 2007, IAD Member Whist determined that the matter should proceed to an oral hearing to decide whether the appellant has breached the conditions of his stay, consequently, whether his stay has been cancelled by operation of law and his appeal terminated.

The IAD's decision-making with respect to these facts is as follows:

> **12** There was no dispute at the hearing about the HTA offences. The appellant has five convictions under the HTA since his stay was imposed. The appellant did not deny that he had committed and been convicted of these offences. Although the Integrated Court Offences Network (ICON) revealed two outstanding fines, the appellant stated that all his fines had been paid and had evidence that one of the two fines had been paid [6: Exhibit A-3].

> 1. On August 5, 2003, he was convicted in absentia for driving a motor vehicle with no plates or improperly displaying plates. His explanation was that he had the plates with him in the car and was going to a friend's house to put them on his car. He testified that he paid the fine and threw out the receipt.
> 2. On January 7, 2004, he was convicted in absentia for operating an unsafe vehicle and failure to have or surrender insurance. The appellant did not recall these convictions, but stated he has paid all his fines and failed to keep receipts for most of them.
> 3. On January 12, 2006, he was convicted of an unsafe lane change and speeding (70 in 50 zone). The appellant thought the unsafe lane change was an occasion when he went through a yellow light which turned red. He maintained he had paid that fine. He did provide a receipt for payment of the speeding fine.

13 The panel has considered the analysis of its colleague Member Whist in the Cao [7: Cao, Yuke v. Minister of Public Safety and Emergency Preparedness (IAD TA1-06387), Whist, September 26, 2006]. decision. This panel agrees that a failure to be of "good behaviour" may result from a failure to abide by a federal, provincial or municipal statute or regulatory provision, but that a failure to abide by a federal, provincial or municipal statute or regulatory provision does not necessarily mean there has been a failure to be of "good behaviour". It is hard to imagine that a relatively minor or trivial conviction under a federal, provincial or municipal statute or regulatory provision means that a breach of the condition "to keep the peace and be of good behaviour" has necessarily occurred and that the appellant should be given no opportunity to argue this.

14 Relying on R. v. R (D) [8: R. v. R (D) Nfld. C.A. 96/195, Mahoney, Cameron and Green J.J.A., August 1999], Borland [9: Regina v. Borland [M.W.T.]] and Avalos [10: Avalos, Manuel Chuquin v. M.C.I. (F.C., no. IMM-6655-04), Blanchard, June 10, 2005; 2005 FC 830], Member Whist stated:

> The panel is firmly of the opinion that it is not appropriate to conclude, as the Minister would want, that a breach of this condition (to keep the peace and be of good behaviour) has occurred whenever an appellant has been convicted under any federal, provincial or municipal statute. In the panel's opinion, following Borland and Avalos, the appellant has the right to present evidence and provide an explanation in support of a contention that such a conviction does not necessarily mean that a breach has occurred and that a determination as to whether a breach has taken place must be made in the context of evidence and arguments on this specific issue.

15 The panel has carefully considered all the evidence, testimony and submissions in this case. While not condoning the appellant's HTA offences, the incidents for which he has been convicted under the HTA are of a relatively minor nature. The evidence did not reveal all the circumstances, but as best the panel could ascertain, at various times in 2003 and 2004, on one occasion each, the appellant had license plates, which he was intending to put on his car, in his vehicle rather than on his vehicle; did not have his insurance with him; drove a vehicle considered unsafe; made an unsafe lane change and was speeding by going 20 kms./hr. over the speed limit. While these are offences under a provincial statute, the panel does not find they are sufficiently serious to be considered failures to "keep the peace and

> be of good behaviour" as that term is commonly understood by members of the IAD when routinely made one of the conditions of a stay of a removal order. Of course, there are many offences or patterns of offences under the HTA which the panel would consider serious enough to be a breach of the condition to "keep the peace and be of good behaviour", but the instant case is not one of them.

As a result, the IAD reached the following conclusion:

> **17** Pursuant to paragraph 74(3)(b) and subparagraph 74(3)(b)(ii) of the former Act, the panel orders that the direction staying the execution of the removal order, made by the IAD on January 26, 2001, be cancelled and the appeal be allowed.

[3] Counsel for the Applicant argues that the Decision under review is made in reviewable error because it is contrary to the decision in *Cooper v. Canada (Minister of Citizenship and Immigration),* 2005 FC 1253 (*Cooper),* which is settled law. That is, to be of "good behaviour" one must abide by federal, provincial and municipal statutes and regulatory provisions and, on this basis, any failure to abide, no matter how trivial, is a breach of the condition "to be of good behaviour" and, therefore, is a breach of a condition of a stay pursuant to s.197. With respect, I disagree that *Cooper* can properly be accepted as settled law.

[4] The decision in *Cooper* is based on a criminal law decision of the Newfoundland Court of Appeal. Paragraph 14 of *Cooper* reads as follows:

> While there is some question as to whether the requirement that an individual be "of good behaviour" can be breached without the individual offending any law or regulation (see R. v. Gosai, [2002] O.J. No. 359 at para. 27), the criminal jurisprudence is clear that to be of "good behaviour", one must abide by federal, provincial and municipal statutes and regulatory provisions: *R. v. R. (D.) (1999), 138 C.C.C. (3d) 405 (Nfld. C.A.).*

[Emphasis added]

In fact, paragraph 13 of *R. v. R. (D.)* and Footnote 2 to that paragraph, qualifies the meaning of the text in *Cooper* upon which Counsel for the Applicant is relying:

> **13** I have concluded, with all due respect to the contrary position stated in Stone, that the concept of failure to "be of good behaviour" in the statutory conditions of a probation order is limited to non-compliance with legal obligations in federal, provincial or municipal statutes and regulatory provisions, as well as obligations in court orders specifically applicable to the accused, and does not extend to otherwise lawful conduct even though that conduct can be said to fall below some community standard expected of all peaceful citizens **[Footnote 2].** I have come to this conclusion after a consideration of the historical development of the concepts of the obligations "to keep the peace" and "to be of good behaviour" and of the appropriate role which those concepts can be expected to play within the context of Canadian constitutional and criminal law.
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> Footnote 2: This is not to say, however, that any breach of law, however trivial, will necessarily result in a finding of failure to be of good behavior. It is sufficient for the purposes of this case to say that a failure to be law-abiding is a necessary prerequisite to a finding of breach of the obligation to be of good behavior. For a discussion of the issue as to whether there may be circumstances when a trivial breach of , say, a regulatory statute may not be regarded as failing to be of good behavior, see Chasse, "Breach of Probation as an Offence", 5 C.R.N.S. 255. See also, R. v. Abbott (1940), 74 C.C.C. 318 (Alta. S.C., App. D.), per Harvey, C.J.A. at pp. 323-324.
>
> [Emphasis added]

[5] Therefore, the decision in *R. v. R. (D.)* does not stand for a strict liability result. In my opinion, *R. v. R. (D.)* is properly interpreted to say that, in order to engage in an analysis of whether a person has breached “good behaviour”, it is first necessary to establish that the person has contravened a federal, provincial or municipal statute or regulatory measure and, upon so finding, the opportunity is triggered to evaluate whether that contravention results in a further finding that a

breach of “good behaviour” has occurred. Therefore, in this analysis, a person’s general conduct is an important factor which must be taken into consideration.

[6] I find that the recent decision in *Canada (Minister of Citizenship and Immigration) v. Stephenson*, 2008 FC 82 (*Stephenson),* which supports the Applicant’s argument on the law, is distinguishable from the Decision under review since it was not decided under the transition provisions of *IRPA.*

[7] As a result, given that the IAD correctly applied the decision in *R. v. R. (D.),* I find no reviewable error in the Decision under review.

[8] Counsel agree that a question proposed for certification in *Stephenson,* but which was not certified, should be certified in the situation of the present case for consideration by the Federal Court of Appeal. I agree it is of general importance and is determinative of the present Application.

ORDER

Accordingly, the present Application is dismissed, but the following question is certified:

> Is the condition "keep the peace and be of good behaviour" as imposed in stay of deportation orders by the Immigration Appeal Division of the I.R.B. breached each and every time the person concerned is convicted of an offence under and/or found to have violated any federal, provincial and/or municipal statute and regulation throughout Canada?

"Douglas R. Campbell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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