Federal Court  Cour fédérale

Date: 20130410

Docket: IMM-8565-12

Citation: 2013 FC 360

Ottawa, Ontario, April 10, 2013

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

RYANN EDWARD CARAAN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review of a decision rendered by the Immigration Appeal Division [IAD] of the Immigration Refugee Board dated July 13, 2012, finding that the Stay Order granted by the IAD on April 23, 2009 (the "Stay Order") to Mr. Ryann Edward Caraan (the "Applicant") was cancelled and that the Applicant's appeal from his removal order was

terminated, by operation of the law, pursuant to subsection 68(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] For the reasons that follow this application is dismissed.

II. The facts

[3] The Applicant is a citizen of the Philippines. He obtained permanent residence in Canada on May 29, 2003.

[4] On September 1, 2006, the Applicant was convicted of several offences relating to forged documents, theft under, possession of property obtained by crime and failure to attend court which took place in incidents in June, July and August 2006. The Applicant received a suspended sentence for these convictions with various terms and conditions.

[5] On May 1, 2007, the Applicant was charged with uttering a forged document contrary to section 368 of the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*]. This offence related to an allegation that on September 8, 2006, the Applicant forged a cheque in the amount of $946.86. On October 8, 2008, a warrant for the Applicant's arrest was issued by a Justice of the Peace.

[6] On November 23, 2006, the Applicant was arrested and charged with breach of probation and theft under. He was subsequently convicted of theft and the breach of probation charge was stayed.

[7] On April 1, 2008, a Canada Border Services Agency [CBSA] enforcement Officer prepared a report pursuant to subsection 44(1) of the *IRPA* for inadmissibility based on serious criminality under paragraph 36(1)(*a*) of the *IRPA* for one of the convictions dated September 6, 2006 of uttering a forged document contrary to section 368 of the *Criminal Code*. The Officer recommended that the Applicant be issued a warning and that the matter not be referred to an admissibility hearing.

[8] On May 13, 2008, a Minister's delegate reviewed the subsection 44(1) report and determined that the allegation of serious criminality be referred to the Immigration Division [ID] for an admissibility hearing. The Minister's delegate noted that the Applicant had 14 convictions as well as an outstanding criminal charge. Due to the number of charges for which the Applicant received a 2 year suspended sentence, the Minister's delegate did not concur with the recommendation of a warning letter.

[9] On November 7, 2008, an admissibility hearing was held before the ID. The ID determined that the Applicant was inadmissible to Canada due to serious criminality and issued a Deportation order (the "Deportation order"). The Applicant was present and represented by an unpaid family friend (who is neither a lawyer or authorized legal consultant). During the hearing, the Applicant confirmed that he received the Minister's disclosure for the admissibility hearing and raised a concern regarding the Minister's delegate's refusal to accept the Officer's recommendation in the subsection 44(1) report.

[10] The Applicant appealed the Deportation order to the IAD. On January 29, 2009, the Minister's representative submitted a disclosure package of information to the Applicant, his representative and to the IAD which included the subsection 44(1) report and the Minister's delegate's referral and reasons for referral to an admissibility hearing.

[11] On April 23, 2009, counsel for the Minister and the Applicant made joint recommendations to the IAD to stay the deportation for a period of 24 months and signed a Summary of Agreement pursuant to an Alternative Dispute Resolution [ADR]) process (the "Summary"). In the Summary, the Minister's representative acknowledged that there were sufficient humanitarian and compassionate considerations [H&C] to warrant special relief. The Summary also noted that the Applicant had the support of his family and had taken positive and meaningful measures to rehabilitate himself and become established in Canada. On the basis of the Agreement, the IAD ordered the stay of the Deportation order, and specified that it would reconsider the case in the first week of April 2011 or at such other date it determined.

[12] In late 2010, the Applicant visited the Winnipeg Police Safety Building for a "Background Check" necessary for his school and employment search. He was there advised that a warrant for his arrest was outstanding since 2008, respecting a charge brought in May 2007 "Uttering" offence which he allegedly committed on September 8, 2006.

[13] On December 2, 2010, the Applicant, who was represented by legal counsel, pleaded guilty to the charge brought in May 2007 and received a sentence of one day's incarceration, 18 months probation and restitution.

[14] On November 3, 2011, the Minister's representative made an application to the IAD to cancel the Stay Order pursuant to subsection 68(4) of the *IRPA* because the Applicant had been convicted of an offence on December 2, 2010, for uttering a forged document contrary to section 368 of the *Criminal Code*.

III. Impugned decision

[15] On July 13, 2012, the IAD cancelled the stay of the Deportation order and the appeal was terminated by operation of the law under subsection 68(4) of the *IRPA*. In its Reasons, the IAD noted that the conditions for the automatic application of subsection 68(4) were met, namely: 1) the Applicant was convicted of a crime referred to in subsection 36(1) of the *IRPA* and; 2) the conviction was entered during the period of the stay of the Deportation order.

[16] Citing the decisions in *Canada (Minister of Citizenship and Immigration) v Malarski*, 2006 FC 1007 [*Malarski*] and *Canada (Minister of Citizenship and Immigration) v Bui*, 2012 FC 457 [*Bui*], the IAD noted that "subsection 68(4) applied to cancel a stay and terminate an appeal even where the acts giving rise to the convictions occurred prior to the stay being issued" (IAD Reasons, para 9).

[17] The IAD noted that, unlike in *Malarski*, above, there was no condition included in the IAD's stay excluding the application of subsection 68(4) for charges based on acts occurring before it. The IAD remarked that this was "not surprising given that there was not awareness of the outstanding charge at the time of the [initial IAD] appeal" (IAD Reasons, para 10).

IV. Legislation

[18] Section 68 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] provides as follows:

***Immigration and Refugee Protection Act*, SC 2001, c 27**	***Loi sur l'immigration et la protection des réfugiés*, LC 2001, c 27**
Removal order stayed	Sursis
68. (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	68. (1) Il est sursis à la mesure de renvoi sur preuve qu'il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.
Effect	Effet
(2) Where the Immigration Appeal Division stays the removal order	(2) La section impose les conditions prévues par règlement et celles qu'elle estime indiquées, celles imposées par la Section de l'immigration étant alors annulées; les conditions non réglementaires peuvent être

modifiées ou levées; le sursis est révocable d'office ou sur demande.

(*a*) it shall impose any condition that is prescribed and may impose any condition that it considers necessary;

(*b*) all conditions imposed by the Immigration Division are cancelled;

(*c*) it may vary or cancel any non-prescribed condition imposed under paragraph (*a*); and

(*d*) it may cancel the stay, on application or on its own initiative.

Reconsideration

(3) If the Immigration Appeal Division has stayed a removal order, it may at any time, on application or on its own initiative, reconsider the appeal under this Division.

Suivi

(3) Par la suite, l'appel peut, sur demande ou d'office, être repris et il en est disposé au titre de la présente section.

Termination and cancellation

(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.

Classement et annulation

(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.

V. Issues and standard of review

A. Issues

1. ***Did the IAD err in not finding the application of subsection 68(4) of the IRPA constituted an abuse of process and/or a breach of the duty of fairness in the circumstances?***
2. ***Did the IAD err in not finding an implied condition in the Stay Order excluding the application of subsection 68(4) of the IRPA to the conviction arising from the offence committed on September 8, 2006?***
3. ***Did the IAD err in its application of the case law on the interpretation of subsection 68(4) of the IRPA?***

B. Standard of review

[19] No deference is due on the first issue. The Court must verify whether the requirements of procedural fairness have been followed (see *Lawal v Canada (Minister of Citizenship and Immigration)*, 2008 FC 861 at para 15). Regarding the Applicant's allegation that the Minister's application to cancel the Stay Order pursuant to subsection 68(4) constitutes an abuse of process, the appropriate standard of review is correctness (see *Blake v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 572, [2009] 1 FCR 179; and *Smith v Canada (Chief of Defence Staff)*, 2010 FC 321, [2010] FCJ No 371).

[20] Whether the IAD erred in not finding an implied condition in the Stay Order is a question related to its appreciation of the facts and subject to review on the standard of reasonableness (see *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 SCR 190 at para 53 [*Dunsmuir*]).

[21] The IAD's application of the case law on subsection 68(4) to the facts of this case is a question of mixed fact and law and should be reviewed on a standard of reasonableness (*Dunsmuir*, cited above, at para 53).

VI. Parties' submissions

A. Applicant's submissions

[22] The Applicant submits that if the Minister intended that a future conviction would trigger the application of subsection 68(4) and terminate the ADR Stay Order, then accordingly he had a duty to clearly disclose this underlying intention to the Applicant. He additionally claims that the Board Member, in the course of the joint recommendation for the Stay Order, also had a duty to inform the Applicant accordingly. The Applicant finally asserts that the failure to do so constitutes an abuse of process and a breach of the duty of fairness to which he is entitled.

[23] The Applicant also states that the following factors support his allegation of an abuse of process and/or a breach of the duty of fairness by the Minister: 1) the context of the ADR stay; 2) the Applicant's effective lack of legal representation; 3) the ambiguity of subsection 68(4); and 4)

the fact that had he known the Minister's intention, he could have foregone the Stay Order at the time and resolved the outstanding charge before proceeding further with his appeal.

[24] The Applicant submits that the context of the ADR stay led him to believe that in order to remain in Canada, his only obligation was to refrain from committing any further criminal offences. The Minister signed the Stay Order because it was satisfied that: 1) the Applicant provided credible information on his criminal past and on his efforts at rehabilitation; 2) the Applicant had made important changes in his personal life including disassociating with previous associates; 3) the Applicant had taken positive and meaningful measures towards establishing himself in Canada such as finding employment and gaining the support of his family; and 4) there existed sufficient H&C considerations to warrant the Stay Order.

[25] The Applicant argues that the Minister committed an abuse of process by supporting the stay on grounds that the Applicant had improved his life but then reversing that decision and asking to have it cancelled for acts committed prior to those improvements.

[26] The Applicant posits that even though the Summary Agreement he signed clearly indicated that his stay would be cancelled by operation of law under subsection 68(4) if he was convicted of another offence referred to subsection 36(1) of the *IRPA*, the duty of fairness required the Minister to inform him on the implications of these provisions of the *IRPA* to his case. The Applicant was not represented by legal counsel and could not have reasonably been expected to understand that a conviction for the offence he committed on September 8, 2006 would automatically cancel his stay and terminate his appeal. The Applicant insists that this is all the more true in light of the current

debate over the correct interpretation of the phrase "convicted of another offence" in subsection 68(4); a question that was complex enough to have been certified by Justice Martineau in *Bui*, above.

[27] The Applicant also claims that had he fully grasped the meaning of subsection 68(4), he would have asked for an adjournment of his appeal and dealt with his outstanding charge first. He alleges to have effectively lost his chance to an appeal (cf subsection 64(2) of the *IRPA*) due to the Minister's breach of the duty of fairness.

[28] If the Minister did not want, for a conviction on the Applicant's outstanding charge, to cancel the stay through subsection 68(4), then the Applicant contends that he must have intended an implied exception be included in the terms of the ADR Stay Order. The implied exception would be similar to the explicit one that was included by the Minister in *Malarski*. In that case, the Minister included an express term in the Stay Order which specified that the condition that Malarski "not commit any criminal offences" would not be broken by a conviction on certain outstanding charges. The Court held that the express exception was sufficient to prevent the operation of subsection 68(4) from cancelling the stay.

[29] The Applicant submits that "the underlying rationale in Malarski was that the Minister's intentions in consenting to stay orders should be binding and not subsequently reversed by strict operation of law" (Applicant's Memorandum, para 17). He also contends that the same "rationale is applicable to the facts of this case and that the Minister's conduct in the ADR proceedings is

consistent with there being no intention that a subsequent conviction for the September 8, 2006 offence altering the Minister's consent to the stay order" (Applicant's Memorandum, para 17).

[30] According to the Applicant, the IAD's failure to recognize this implied exclusion in the stay constitutes both an error of law and fact. The error can be partially attributed to the IAD's incorrect appreciation of the facts when it stated that the Minister did not know about the Applicant's outstanding charge at the time.

[31] Alternatively, the Applicant submits that the Minister's ADR disclosure of the outstanding charge together with its recommendation to resolve the matter by means of a stay order created a legitimate and reasonable expectation for the Applicant "that his subsequent conviction for an "old" offence had no bearing on his Stay Order or appeal from deportation" (Applicant's Memorandum, para 17).

[32] The Applicant's final argument addresses the IAD's determination that Federal Court case law bound it to hold the Applicant's conviction for the outstanding offence activated subsection 68(4) and cancelled his Stay Order. The Applicant claims that this finding by the IAD constitutes an error in law. The IAD incorrectly held that the decision in *Malarski*, above, stands for the principle that subsection 68(4) finds application when there is a post-stay conviction for a pre-stay charge.

[33] As for the IAD's reliance on *Bui*, above, the Applicant concedes that Justice Martineau did determine that subsection 68(4) was triggered when there is a post-stay conviction for a pre-stay charge but notes that a question was certified.

[34] The Applicant also argues that another court might reasonably disagree with several of the key reasons offered in *Bui*, above, to justify its interpretation and find, *inter alia*, that:

1) contrary to the reason provided at paragraph 46 of *Bui*, subsection 68(4) does serve a practical purpose even when limited to offences committed after the stay, namely, "the mandatory cancellation of a stay and termination of appeal when a person under stay subsequently commits a subsection 36(1) offence, rather than leaving it [to] the discretion of the Appeal Division in reconsideration, as is the case when the person commits a non-subsection 36(1) offence" (Applicant's Memorandum, para 20(iii)); and

2) "where a strict interpretation of the literal language in ss. 68(4) leads to a consequence that serves no legitimate criminal purpose and no legitimate immigration enforcement purpose of ensuring safety and security of the residents in Canada […] an alternate interpretation of the language [of the subsection is preferable]" (Applicant's Memorandum, para 20(iii)).

[35] It was finally submitted by the Applicant that the facts in *Bui*, above, were distinct from those in the case at hand on several important facts, namely: 1) there is no indication that Mr. Bui was not represented by legal counsel; 2) the Stay Order was not issued by the IAD in circumstances of a Minister's recommendation in ADR but after hearing, Mr. Bui's testimony in the Appeal proceedings; and 3) the Minister in *Bui*, above, did not have knowledge of the outstanding offence and charges at the time of the Stay Order.

B. Respondent's submissions

[36] The Respondent submits that there was no abuse of process or breach of procedural fairness in the case at hand because the Applicant was made aware of the outstanding criminal charge against him in both the admissibility hearing and the IAD appeal. The Summary Agreement executed by the Applicant clearly indicates at paragraph 5 that his stay will be cancelled and appeal terminated pursuant to subsection 68(4) if he is convicted of another offence referred to in subsection 36(1).

[37] The Respondent insists that the Applicant's failure to deal with his outstanding criminal charge before the IAD's ADR proceedings cannot be imputed on the Minister and that this was his responsibility. The Applicant's excuse that he was represented by a family friend and could, therefore, not have known that his post-stay conviction for a pre-stay charge would cancel the stay is invalid. The Respondent maintains the case law is clear that a party must suffer the consequences of his counsel.

[38] On the implied exclusion condition, the Respondent notes that the IAD considered the argument and found that there were no conditions (implied or express) in the Stay Order. Regardless of whether or not there were any exclusion conditions, the Respondent maintains that the Minister is not permitted to exclude the application of subsection 68(4) through conditions in a stay order. The Respondent argues that the situation in *Malarski*, above, is distinguishable from the case at bar in that *Malarski* involved the application of section 197 of the *IRPA*. Section 197 provides that "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 subsection 68(4) of this Act". The Applicant submits that under the *IRPA*, a breach of a condition of a stay order does not trigger subsection 68(4) but may lead to the application of subsection 68(2). The only event that activates subsection 68(4) is a post-stay conviction under subsection 36(1).

VII. Analysis

A. Abuse of process/breach of the duty of procedural fairness

[39] The Applicant submits that if the Minister intended that a post-stay conviction on the pre-stay charge would trigger subsection 68(4) and cancel the ADR Stay Order then this constitutes an abuse of process on its part and/or a breach of the duty of fairness. More specifically, it was an abuse of process and breach of procedural fairness for the Minister to have encouraged the Applicant to enter into the Stay Order without first resolving a known outstanding charge.

[40] The case law is clear that establishing an abuse of process "requires overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice" (*R. v Power*, [1994] 1 SCR 601 at para 17 [*Power*]). More specifically, there must be "conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed" (*Power*, above, at para 17). Establishing an abuse of process in this case, therefore, requires overwhelming evidence that the Minister had improper motives or was acting in bad faith. The Court does not find that the Applicant adduced sufficient evidence to establish an abuse of process

by the Minister. The Applicant offers but circumstantial evidence that the Minister intended to mislead the Applicant into entering into the stay knowing that it would be cancelled by operation of law if the Applicant was convicted of his pre-stay charge.

[41] While the Minister may have known that subsection 68(4) would be triggered if the Applicant was subsequently convicted of his outstanding charge, the Applicant was clearly made aware of this fact at paragraph 5 of the Summary Agreement. Neither the Minister nor the ADR Member were the Applicant's legal counsel and they had no obligation to explain the law to him. The Court also notes that the wording of paragraph 5 was unambiguous.

[42] The jurisprudence of this Court is clear that the duty of procedural fairness does not increase when a party is self-represented. In *Agri v Canada (Minister of Citizenship and Immigration)*, 2007 FC 349 at para 13, Justice Harrington explained that "one has no right to expect, by not retaining counsel, that the Board will act both as a decision-maker and as advocate for the applicant". In *Ngyuen v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1001, [2005] FCJ No 1244 at para 17, Justice Teitelbaum reasoned:

> "It is not the obligation of the Board to act as the attorney for a claimant who refuses to retain counsel. It is not the obligation of the Board to tell the claimant that he may ask for an adjournment of the hearing and it is not the obligation of the Board to "teach" the Applicant the law on a particular matter involving his or her claim."

[43] The Court also underlines the fact that at the time of the ADR proceedings, the Applicant was presumed innocent of his outstanding charge. There is no evidence on file to establish that the Minister recommended the stay assuming the Applicant was guilty or that he would be pleading guilty. Furthermore, when the Applicant subsequently pleaded guilty on his outstanding charge, he

was represented by counsel. Given of all of the above, the Court concludes that there was neither an abuse of process nor a breach of procedural fairness.

B. Implied condition

[44] The Court also finds that there is no evidence that either the Minister or the ADR Member intended to include an implied condition excluding the activation of subsection 68(4) for a post-stay conviction of the outstanding charge. As the Court reviewed the wording of the Summary Agreement executed by the Applicant, there is no possible interpretation or inference leading to the existence of an implied condition excluding the application of subsection 68(4). Paragraph 5 of the Summary Agreement is quite clear on a potential application of subsection 68(4).

C. Did the IAD err in applying the decisions in *Malarski* and *Bui above*?

[45] The IAD did not err in either relying on or applying the decisions in *Malarski* and *Bui*, above. The Applicant submits that, contrary to what the IAD found, the Court in *Malarski* did not hold that post-stay convictions for pre-stay charges triggered subsection 68(4) of the *IRPA*. The Court disagrees. At paragraph 18 of *Malarski*, above, Justice Simpson found that the Respondent's post-stay conviction for his pre-stay charges did not trigger subsection 68(4) because there was an explicit exclusion in the stay order preventing just that:

> "The Cancellation refers only to the Conviction and, in view of the Exception, the Conviction did not breach the Second Condition of the Stay. Accordingly, subsection 68(4) of the IRPA did not, in fact, cancel the Stay by operation of law based on a breach of the Stay. For this reason, the Cancellation is of no force and effect."

[46] The IAD correctly concluded that *Malarski*, above, supported the principle that, but for an explicit exclusionary term in the stay order, post-stay convictions for pre-stay charges trigger the operation of subsection 68(4).

[47] The Court finds that subsection 68(4) of the *IRPA* was enacted to remove the discretionary power normally held by the IAD to grant a stay of a removal order when a person who has already benefited from a positive decision of the IAD commits another serious offence, as defined in subsection 36(1) of the *IRPA*, thereby demonstrating that he is not rehabilitated. It automatically cancels their stay and their appeal is terminated.

[48] Contrary to the Applicant's claim, there are decisions of the Federal Court supporting the triggering of subsection 68(4) in the event of a post-stay conviction for a pre-stay charge namely *Bui* and *Malarski*, above. The IAD was justified in relying on those decisions in arriving at its conclusions.

[49] The Applicant's other argument that the IAD erred in failing to distinguish the facts in *Bui* from the case at hand is correct but not determinative for the following reason. While it is true that the IAD member failed to appreciate that, in contrast to the situation in *Bui*, the Minister in the present case was aware of the specific charge pending against the Applicant before the ADR proceedings, it was nonetheless justified in relying on the interpretation of subsection 68(4) reaffirmed by that decision. The facts distinguishing *Bui* from the case at bar are relevant to the Applicant's abuse of process and procedural fairness arguments. Given the Court's findings on the abuse of process and breach of procedural fairness claims, the IAD's error is not fatal.

[50] The words of the statute are clear and they must be assigned their ordinary meaning. The word convicted as used in subsection 68(4) of the *IRPA* means a finding of guilt or a conviction. Parliament was well aware of the presumption of innocence- hence the use of the words "and they are convicted of another offence" (see Sullivan in *Driedger on the Construction of Statutes*, 3rd ed., Toronto: Butterworths, 1994, at 7).

[51] The Court rejects the Applicant's argument that subsection 68(4) should not be interpreted as cancelling the stay of the Applicant's removal order for a post-stay conviction of a pre-stay charge on the basis that the interpretation of subsection 68(4) in *Bui*, above, leads to an absurd conclusion in that different persons would be receiving different treatment for inadequate reasons (see Sullivan in *Driedger on the Construction of Statutes*, 4th ed., Toronto: Butterworths, 2002, pages 235-257). The interpretation outlined by Justice Martineau in *Bui*, above, is correct and this Court finds no valid reason to depart from it. If persons are treated differently, it is not due to the interpretation of subsection 68(4) as limiting the jurisdiction of the IAD but rather, as in the case at bar, because of the Applicant's failure to properly deal with his outstanding charges.

[52] Counsel for the Applicant has underlined before the Court the injustice that would result from a dismissal of this application. The Court espouses the following paragraphs from *Bui*, cited above, inasmuch as they are applicable to the present case.

> [53] If the rule of law is of primordial importance, justice also requires that the respondent be treated with fairness by the Minister. On this point, the respondent is not without any recourse today. Thus, he may continue to remain in Canada if a temporary resident permit is issued to him by an immigration officer in accordance with section 24 of the IRPA. We are talking about, of course,

> discretionary power, the exercise of which is governed by departmental policy, IP1, Temporary Resident Permits (CIC). Even though the officer is not bound by this, we can nevertheless expect the officer to take the Minister's directives into account.
>
> [54] However, a temporary resident permit may be issued to a person who is inadmissible on grounds of criminality who is the subject of a removal order when, for example, the need to remain in Canada is compelling and sufficient to outweigh the risk. Without opining on the issue, at first glance, it seems that, in the respondent's case, the risk to Canadians or to the Canadian society is minimal, especially since the offence for which the respondent was convicted, i.e. that which resulted in the closure of his appeal file, was committed before the IAD issued a stay based on humanitarian and compassionate grounds. The respondent was therefore very engaged in the rehabilitation process when he was convicted a second time for the same type of non-violent offence as the first time, with the result that it cannot be assumed in advance that a temporary resident permit application would automatically be refused here. To the contrary, the officer cannot act in a perverse or capricious manner, and must be able to provide reasons for his or her decision to refuse or grant a temporary resident permit, which is reviewable by the Court in principle.

[53] The Applicant also has the option of making a section 25 claim for H&C considerations.

VIII. Certification

[54] When canvassed on the possibility of certifying a question of general importance, the parties jointly suggested that the following question be certified:

> ***"Does subsection 68(4) of the IRPA apply only to convictions, during a stay of removal order, for offences committed after the beginning of the stay?"***

[55] The Court believes the question is better phrased as follows:

"During a stay of removal order, does subsection 68(4) of the IRPA only apply to convictions for subsection 36(1) offences committed after the beginning of the stay?"

[56] This question is quite similar to the question certified by Justice Martineau in *Bui*, above. Unfortunately, that case failed to proceed before the Federal Court of Appeal.

[57] In order for a question to be certified, it must be a serious question of general importance that is dispositive of an appeal (see *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at para 11). A serious question of general importance is one that transcends the particular factual context in which it arose and the answer to which it leads should be of general application (see *Boni v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 68 at para 10).

[58] In this case, the requirements are met and the Court will, therefore, certify a question.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. The following question of general importance is certified:

"During a stay of removal order, does subsection 68(4) of the IRPA only apply to convictions for subsection 36(1) offences committed after the beginning of the stay?"

"André F.J. Scott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8565-12
STYLE OF CAUSE:	RYANN EDWARD CARAAN v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 8, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	SCOTT J.
DATED:	April 10, 2013

APPEARANCES:

Gordon H. Maynard	FOR THE APPLICANT
Helen Park	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Maynard Kischer Stojicevic Vancouver, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT