Federal Court Cour fédérale

Date: 20180124

Docket: IMM-218-17

Citation: 2018 FC 71

Ottawa, Ontario, January 24, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

MASSIMO THOMAS MORETTO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] At issue in this judicial review are the provisions of the *Immigration and Refugee Act* [IRPA] relating to the cancellation of a stay of removal for a permanent resident cited for serious criminality. Mr. Moretto's stay of removal from Canada was cancelled by the operation of s.68(4) of the IRPA because of a conviction for "serious criminality" during a period when he was subject to a stay of removal. Mr. Moretto challenges the constitutionality of s.68(4) of the

IRPA. He argues that its automatic application to his circumstances is contrary to ss. 2(d), 7, and 12 of the *Charter of Rights and Freedoms* [the *Charter*].

[2] For the reasons below, this judicial review is dismissed as the Immigration Appeal Division [IAD] did not err in concluding that s.68(4) applies to Mr. Moretto. Pursuant to s.74(d) of the IRPA, I have certified three questions of general importance.

I. Relevant Statutory Provisions

[3] Section 36 of the IRPA states:

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;
(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or	**(b)** être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
(c) committing an act outside Canada that is an offence in the place where it was	**(c)** commettre, à l'extérieur du Canada, une infraction qui, commise au Canada,

committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.	constituerait une infraction à une loi fédérale punissable d’un emprisonnement maximal d’au moins dix ans.

[4] Section 68(4) of the IRPA states:

(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.	**(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.

II. Factual Background

[5] Mr. Moretto was born in Italy in 1969 and came to Canada with his family at nine months of age. He claims to have only returned to Italy on one occasion. For reasons not explained, Mr. Moretto never obtained Canadian citizenship. He is a permanent resident.

[6] Mr. Moretto claims to have a history of addiction and mental health problems. He also has a history of problems with the law.

[7] On April 27, 2009, the Immigration Division [ID] issued a removal order against Mr. Moretto as a result of his conviction for break and enter, which is an offence punishable by a

maximum sentence of life in prison. Mr. Moretto was therefore deemed inadmissible for serious criminality pursuant to section 36(1)(a) of the IRPA. His appeal to the IAD was dismissed. However a judicial review of this decision was granted, see: *Moretto v Canada (Citizenship and Immigration)*, 2011 FC 132.

[8] On March 31, 2011 the IAD granted a stay of his removal for a three year period subject to Mr. Moretto abiding by certain conditions. Relevant for the present application was the condition that he not engage in criminal conduct.

[9] On May 6, 2015, the IAD orally reconsidered Mr. Moretto's stay of his removal. The IAD noted that since the stay was granted in 2011, Mr. Moretto had been charged with four additional criminal offences. Despite this, on May 21, 2015, the IAD allowed the removal order to be stayed for a further one year period.

[10] On September 16, 2016 Mr. Moretto's stay was reconsidered. The Minister of Public Safety and Emergency Preparedness provided evidence to the IAD that on June 2, 2016, Mr. Moretto had been convicted of robbery contrary to section 344(1)(b) of the *Criminal Code.* This is a "serious criminality" offence as described in s.36(1)(a) of the IRPA. As such, s.68(4) applied to Mr. Moretto, cancelling his appeal to the IAD and lifting the stay of removal.

III. IAD Decision

[11] On December 21, 2016 the IAD held: "The stay of the removal order is cancelled by operation of law and the appeal is dismissed."

[12] At the IAD Mr. Moretto argued that s.68 (4) of the IRPA was unconstitutional. However the IAD held that it did not have the jurisdiction to rule on the constitutionality of s.68 (4).

[13] The IAD concluded that s.68 (4) applied to Mr. Moretto's circumstances.

IV. Standard of Review

[14] As Mr. Moretto challenges the constitutionality of s.68(4) of the IRPA and its application to his circumstances, the standard of review is correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 58; *Doré v Barreau du Québec*, 2012 SCC 12 at para 43; *Revell v Canada (Citizenship and Immigration)*, 2017 FC 905at paras 53-54 [*Revell*]).

V. Issues

[15] In his Notice of Application, Mr. Moretto seeks the following relief:

a. A declaration pursuant to s.52(1) of the *Constitution Act, 1982* that section 68(4) of the IRPA violates ss. 7 and 12 of the *Charter* in a manner that cannot be saved under s.1 of the *Charter* and is therefore of no force and effect;

b. An order prohibiting the IAD from applying s.68(4) against Mr. Moretto because it is inconsistent with the *Charter* and therefore of no force or effect;

[16] In his Notice of Constitutional Question, Mr. Moretto also argues that s.68(4) unjustifiably infringes s.2(d) of the *Charter.*

[17] He also poses five questions for certification.

[18] The issues raised by Mr. Moretto will be analysed below as follows:

A. Discretion to Reconsider Binding Decisions

B. Section 7

C. Section 12

D. Section 2(d)

E. Section 1

F. International Law

G. Proposed Questions for Certification

VI. Analysis

A. *Discretion to Reconsider Binding Decisions*

[19] In relation to s.7 of the *Charter*, Mr. Moretto argues that recent developments in case law, specifically in the Supreme Court cases of *Canada (Attorney General) v Bedford,* 2013 SCC 72 [*Bedford*] and *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter*] allow this Court to reconsider the binding nature of the Supreme Court of Canada decision in *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 [*Chiarelli*]. In *Chiarelli*, the Court held that the automatic cancellation of a stay of removal and appeal due to criminality is constitutional, because "[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada" (*Chiarelli*, at 733).

[20] Mr. Moretto also relies upon *Carter* and *Bedford* to argue that the Supreme Court of Canada's decision in *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 [*Medovarski*] can be revisited. *Medovarski* confirmed that the life, liberty, and security of the person interests in s.7 are not engaged at the stage of determining admissibility to Canada.

[21] These cases must be considered against the backdrop of other cases at the Supreme Court which clearly state that an inadmissibility finding in itself does not engage s.7: *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at paras 74-75 (s.7 is not "typically" engaged at the stage of determining admissibility to Canada); *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at paras 67-69 [*Febles*].

[22] In keeping with this Supreme Court authority, cases in this Court and the Federal Court of Appeal have made the same findings with respect to s.7 and inadmissibility (*Revell; Brar v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1214 at para 21; *Torre v Canada (Citizenship and Immigration)*, 2015 FC 591, aff'd 2016 FCA 48 at para 4; *Stables v Canada (Citizenship and Immigration)*, 2011 FC 1319 at paras 40-41 [*Stables*]; *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at paras 61-63 [*Poshteh*]).

[23] Further, deportation *per se* does not engage s.7 rights (*Medovarski*, at para 46). Only deportation to the "prospect of persecution…torture…or detention in the course of the security certificate process…may engage section 7 rights" (*Revell,* at para 116).

[24] Thus, most of the case law, importantly *Chiarelli* and *Medovarski,* draw a distinction between a finding of inadmissibility and the act of deportation for constitutional consideration purposes. Only the deportation itself may, in certain circumstances, engage s.7 considerations.

[25] Here there is no suggestion that Mr. Moretto is at risk of persecution, torture or detention in Italy. However, he seeks to establish that the finding of inadmissibility is alone sufficient to engage s.7 and that the application of s.68(4) to him is disproportionate and arbitrary, even in absence of deportation to a country of torture or persecution.

[26] While *Chiarelli* and *Medovarski* would normally be considered binding authority and would require dismissing Mr. Moretto's arguments, in *Bedford*, the Supreme Court outlined the circumstances in which a lower court can revisit binding precedent. The Court noted:

> [42] In my view, a trial judge can consider and decide arguments based on Charter provisions that were not raised in the earlier case; this constitutes a new legal issue. *Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law*, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate (emphasis added).

[27] The threshold to revisit a binding precedent is "not an easy one to reach" (*Bedford*, at para 44). In *Bedford*, however, the Supreme Court noted that the trial judge in that case was permitted to revisit a Supreme Court precedent and was "entitled to rule on whether the laws in question violated the security of the person interests under s.7 of the Charter" (*Bedford,* at para 45). In that case, the trial judge first determined whether she could revisit the Supreme Court precedent. Concluding that she could, she then conducted the requisite constitutional analysis.

[28] In keeping with *Bedford* then, before binding precedent can be reconsidered, Mr. Moretto must establish that new legal issues arise because of changes in the law.

[29] In this case, Mr. Moretto primarily argues that the application of s.68(4) engages his right to liberty and security of the person under s.7. Further, he argues that the deprivation of these rights by s.68(4) is grossly disproportionate and arbitrary, and therefore contrary to the principles of fundamental justice. He similarly argues, under s.12, that s.68(4) is grossly disproportionate. He raises new arguments with respect to s.2(d) of the *Charter*, and submits that international law supports his contentions.

[30] The section 7 and section 12 *Charter* challenges to s 68(4) of the IRPA were unsuccessful in this Court in *Dufour v Canada (Citizenship and Immigration)*, 2012 FC 580 [*Dufour*]. On a strict application of *Dufour*, Mr. Moretto's judicial review would be dismissed. However, the more recent interpretation of s.7 from *Bedford* (at paras 125-127) affirms that s.7 and s.1 of the *Charter* are distinct so that overriding public goals are not considered in the s.7 analysis. Further, in *Bedford*, at para 45, the Supreme Court confirmed that the principles of fundamental justice—particularly arbitrariness, overbreadth, and gross disproportionality—have only developed in recent years, after *Chiarelli*. Now, an arbitrary, overbroad, or grossly disproportionate impact on *one* person is sufficient to establish a breach of s.7 and there is no need to consider other interests. Further, this change in the law has been interpreted as impacting the s.1 analysis (*R v Michaud*, 2015 ONCA 585 at para 83).

[31] These developments are relevant here as Mr. Moretto argues that the constitutional flaw in s.68(4) is its automatic application, which does not permit analysis of individual circumstances. According to Mr. Moretto, *Chiarelli* adopts a societal principle into the s.7 assessment, namely the concept that the government has the right to decide which non-citizens can remain in Canada, so that Canada does not become a safe haven for criminals. This is true: *Chiarelli,* at 733 expressly adopts this principle. However according to *Bedford*, this question ought to be approached from the individual's perspective in assessing this common law principle against the Constitution.

[32] With respect to s.12, *Chiarelli*, at para 735 left for another day the issue of whether deportation could constitute "treatment" under s.12. Further, in *R. v Nur*, 2015 SCC 15 at para 71[*Nur*], the Supreme Court also held that a law upheld under s.12 can later be challenged by a different claimant, because "stare decisis does not prevent a court from looking at different circumstances and new evidence that was not considered in the preceding case."

[33] These developments with respect to s.12 *Charter* arguments are relevant to the arguments raised in this case.

[34] Further, based on *Bedford*, at para 42, the fact that Mr. Moretto raises a new *Charter* provision, s.2(d), in attacking the constitutionality of s.68(4) also weighs in favour of revisiting *Chiarelli* and *Medovarski*.

[35] As such, I am satisfied that developments in the case law on the interpretation of ss.7 and 12 of the *Charter,* and the raising of s.2(d), permit the revisiting of *Chiarelli* and *Medovarski*.

B. *Section 7*

(1) Relevant Legal Principles

[36] Mr. Moretto argues that his s. 7 *Charter* rights to life, liberty, and security of the person are engaged because of the exceptional circumstances of his case. Namely, he has been in Canada since he was an infant and Canada is the only country he knows. He also claims to suffer from mental illness. He relies upon reports from doctors, in particular a psychologist, Dr. Karl Williams, who states that Mr. Moretto's forced return to Italy will be a "life shortening" event.

[37] Considerations under s.7 are two-fold. First a claimant must demonstrate that the challenged law deprives him or her of life, liberty, or security of the person. If so, section 7 is engaged. Once s. 7 is engaged, the claimant must then demonstrate that the deprivation in question is not in accordance with the principles of fundamental justice (*Carter*, at para 55).

[38] Applying these principles, Mr. Moretto seeks to demonstrate that the finding of inadmissibility mandated by s.68(4) engages his s.7 interests and is contrary to the principles of fundamental justice. In order to do so, he must demonstrate that recent Supreme Court case law, particularly the development of the principles of fundamental justice in *Bedford* and *Carter,* mandates a different result under s.7 then the analysis and result undertaken in *Chiarelli, Medovarski* and the cases at this Court.

[39] As necessary context, s. 7 of the *Charter* has not been interpreted to impose positive obligations on the government, much less to provide a statutory appeal process, to continue a stay of removal order, or to grant refugee status (*Gosselin v Québec (Attorney General)*, 2002 SCC 84 at para 82; C*anadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at para 8; *Y.Z. v Canada (Citizenship and Immigration)*, 2015 FC 892 at para 143; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 136 [*Charkaoui*]; *Febles*, at para 68).

[40] Further, this Court in the s.7 context has previously held that to strike down s.68(4) would, in effect, impose a positive obligation on the government to provide a statutory appeal (*Dufour*, at para 5). This interpretation is relevant to this case, as Mr. Moretto makes the same argument here in light of the recent developments in the principles of fundamental justice.

(2) Engagement

[41] Mr. Moretto must first demonstrate that one of the protected interests under s.7 is engaged by the automatic operation of s.68(4). In his submissions, Mr. Moretto focused on the liberty and security of the person interests.

[42] Liberty, under s.7, is described as having both a physical and personal component (*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 49 [*Blencoe*]). Mr. Moretto's submissions focused on the personal component. The personal component provides that liberty is engaged where state compulsions or prohibitions affect fundamental life choices (*Blencoe*, at para 49). The sphere of personal autonomy afforded by the liberty interest

does not "encompass any and all decisions that individuals might make in conducting their affairs" (*Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 66).

[43] Here, Mr. Moretto has failed to demonstrate what "fundamental life choice" is engaged by s.68(4). On principle, the choice to remain in Canada after violating the terms of the stay order cannot be the sort of fundamental choice protected by the *Charter*. Section 68(4) merely lifts a discretionary, statutory stay. As noted above, a declaration of inadmissibility and deportation are two different mechanisms (*Poshteh,* at paras 61-63). Even then, deportation *per se* does not affect the liberty interest (*Medovarski*, at paras 45-46). Mr. Moretto has not demonstrated how the changes in the s.7 jurisprudence would affect this conclusion regarding the liberty interest and the fundamental distinction between inadmissibility and deportation.

[44] On the other hand, security of the person considerations under s.7 have a physical and psychological component (*Blencoe*, at para 55). Mr. Moretto's submissions focused on his psychological security of the person. In order for psychological security of the person to be constitutionally affected, Mr. Moretto must demonstrate that he is affected by "serious state imposed psychological stress" (*Blencoe*, at para 57). Mr. Moretto must also show a "sufficient causal connection" between government action and the security of the person violation (*Bedford*, at para 75).

[45] Here, Mr. Moretto argues that s.68(4) violates his psychological security of the person because it does not take account of his status as a long-time permanent resident, with mental

illnesses and addictions, whose criminality is related to his disability. Mr. Moretto relies upon the evidence of Dr. Williams and other medical evidence.

[46] A similar argument was considered and rejected in the recent case of *Revell.* Like the situation here, it was argued in *Revell* that deportation, given the applicant's circumstances, would constitute "serious state-imposed psychological stress" sufficient to impact his psychological security of the person. Justice Kane considered the evidence offered by Revell, and ultimately concluded that though the evidence noted that deportation would cause significant stress, the normal incidences of deportation will not meet the threshold of "serious, state-imposed psychological stress" set out in *Blencoe* because there was no risk of persecution, torture, or detention in the removal of Revell from Canada (as in the cases of *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177, *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, and *Charkaoui).*

[47] Mr. Moretto's circumstances are analogous to those in *Revell*. As noted, the effect of s.68(4) is to lift a discretionary statutory stay, which was granted by the IAD in light of the Mr. Moretto's particular individual circumstances. However, the distinction between a finding of inadmissibility and deportation described above applies. Namely, the lifting of the stay and the bringing into force of a removal order cannot, according to existing case law, constitute serious, state-imposed psychological stress. Developments in Supreme Court case law do not change these fundamental facts of immigration law.

[48] Accordingly, Mr. Moretto has failed to show a nexus between the lifting of the stay order and his mental illnesses because, as noted, the lifting of the stay order and his deportation are two different processes. The ordinary stresses associated with a declaration of inadmissibility in immigration law cannot rise to the level of a security of the person breach (*New Brunswick (Minister of Health and Community Services) v G. (J.),* [1999] 3 SCR 46 at para 81).

[49] For these reasons, I conclude that s.7 is not engaged on these facts.

(3) Principles of Fundamental Justice

[50] Having concluded that s.7 is not engaged on these facts, it is unnecessary to address the principles of fundamental justice. However, in any event, Mr. Moretto has failed to establish that s.68(4) is inconsistent with the principles protecting against gross disproportionality or arbitrariness.

[51] In *Chiarelli* and *Medovarski* at para 47, the Supreme Court held that deportation does not breach the principles of fundamental justice.

[52] Subsequently, in *Bedford*at para 125 the Court clarified the role of the principles of fundamental justice (specifically, arbitrariness, overbreadth, and gross disproportionality) in the s.7 analysis:

> All three principles — arbitrariness, overbreadth, and gross disproportionality — compare the rights infringement caused by the law with the objective of the law, not with the law’s effectiveness. That is, they do not look to how well the law achieves its object, or to how much of the population the law

> benefits. They do not consider ancillary benefits to the general population. Furthermore, none of the principles measure the percentage of the population that is negatively impacted. The analysis is qualitative, not quantitative. The question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.

[53] The question is whether the revised s.7 principles in *Bedford* mandate a different result than the application of the principles of fundamental justice in *Chiarelli*. Mr. Moretto has failed to demonstrate that there is a grossly disproportionate or arbitrary effect on anyone created by s.68(4).

(1) *Gross Disproportionality*

[54] Gross disproportionality "only applies in extreme cases" where the seriousness of the deprivation is totally out of keeping with the objective of the measure (*Bedford*, at para 120). A grossly disproportionate effect on one person is sufficient to found a s.7 violation (*Bedford*, at paras 120, 122). Mr. Moretto argues that s.68(4) is grossly disproportionate because it applies automatically, without any consideration of his particular circumstances.

[55] In assessing this argument, the *Charter* must be interpreted in light of the context in which it is invoked (*R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295; *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at 1355-56). In fact, the legislative objective at issue is directly relevant in the assessment of the principles of fundamental justice, including gross disproportionality: *Bedford*, at para 120. In this sense, *Chiarelli* correctly notes that the

overriding principles of immigration law, as represented in the IRPA, are relevant to the constitutional analysis.

[56] Therefore, the constitutional effect of s.68(4) of the IRPA must be interpreted in light of the larger context of the IRPA and its objectives.

[57] Section 68(4) reflects the overall objectives of the IRPA, which "indicate an intent to prioritize security" and "communicate a strong desire to treat criminals and security threats less leniently than under the former Act" (*Medovarski*, at paras 10-11).

[58] At the same time, as noted in *Medovarski* regarding other provisions of the IRPA, "[P]rovisions allowing judicial review mitigate the finality of these provisions, as do appeals under humanitarian and compassionate grounds and pre-removal risk assessments." These comments apply to the effect of s.68(4) as Mr. Moretto has and will continue to receive the individualized proportionality assessment which he argues is mandated by the *Charter* under other provisions of the IRPA.

[59] In *Stables*, the Court noted such individualized legislative "safety valves" which are built into the IRPA leading up to a deportation order:

> [56] I agree with the Respondent that when considered as a whole, the process by which an applicant could face a finding of inadmissibility and consequent enforcement of a removal order, reveals that the process is consistent with the principles of fundamental justice:
>
> - The Applicant is afforded the opportunity to advance submissions why a s.44 report should not be prepared or referred to the Immigration Division for assessment;

> • The Applicant is afforded a hearing before the Immigration Division on the merits of the inadmissibility allegation (s.45 IRPA). The Immigration Division process affords the Applicant a hearing, before an impartial arbiter, a decision on the facts and the law, and the right to know and answer the case against him, the very things that fundamental justice would require in the circumstances;
>
> • Prior to removal, the Applicant is afforded an opportunity to apply for PRRA to assess any alleged risks in his or her country of origin (s. 112 IRPA);
>
> • Should the PRRA determine that the Applicant is a person in need of protection, his or her removal cannot proceed unless he or she is found to be a danger to the public (s.115(2) IRPA);
>
> • Each of the above processes is subject to this Court's oversight by way of judicial review.

[60] While the facts of *Stables* differ from the ones here, the principle remains. Mr. Moretto had the full spectrum of individualized processes noted in *Stables* available to him in advance of the automatic operation of s.68(4). Namely:

- Mr. Moretto had full participatory rights before the ID.
- Mr. Moretto had the opportunity to appeal the removal order issued by the ID to the IAD and was able to successfully judicially review the negative IAD decision.
- Mr. Moretto received a three year stay from the IAD, wherein his personal circumstances were considered.
- Despite his convictions for crimes during the period of the stay, Mr. Moretto received a further one year stay, which was granted on the basis of his compelling humanitarian and compassionate [H&C] considerations.

[61] In other words, under the provisions of the IRPA, Mr. Moretto has already received the proportionate assessments he seeks, specifically H&C consideration. The IRPA, while prioritizing security, also has provisions for individualized assessment which protects against gross disproportionality. For that reason, it cannot be said that the security objective of the IRPA under s.68(4) is attained by grossly disproportionate legislative means with respect to Mr. Moretto's circumstances.

[62] Further, Mr. Moretto has access to H&C relief going forward, which means that his circumstances will be further considered in the context of that discretionary relief, as noted by the Court in an analogous s.68(4) fact situation: *Bhoonahesh Ramnanan v Canada (Citizenship and Immigration)*, 2008 FC 404 at para 57. While Mr. Moretto argues that H&C relief is not a remedy because he may have to file his application outside of Canada, that is not a bar to the *availability* of the discretionary relief, which acts as a safety valve against any gross disproportionality.

[63] A similar situation was addressed in *Stables,* at para 40. There, the Court held that:

> [E]ven if it is true that the Applicant, not being a refugee, could be deported while he awaits the processing of his ministerial relief application, it would still not be sufficient to trigger the application of s.7 rights.

[64] Following *Stables*, simply because the discretionary assessment may occur outside of Canada does not mean it does not meet constitutional standards.

[65] I therefore conclude that the IAD did not err in applying s.68(4) to Mr. Moretto. Any grossly disproportionate effects of the mandatory lifting of a stay order are mitigated by the availability of a number of individualized safety valves in the law, which Mr. Moretto has accessed in the past, and can access in the future.

(2) *Arbitrariness*

[66] Arbitrariness exists where there is *no* connection between the objective of a law and its effects on a claimant's rights (*Bedford*, para 98). In this case, a connection exists between the object of s.68(4) in the context of the IRPA and any effect it imposes on liberty or security of the person.

[67] As noted above, the goals of the IRPA in this context are designed to "prioritize security and to protect the public" (*Medovarski* at paras 9-12; *Dufour*, at para 41).

[68] This goal is accomplished by the mandatory lifting of the stay and termination of appeal under s.68(4). The goal is not reached by unconstitutional means—again, s.68(4) exists in a statutory scheme which takes the interests of the individual into consideration.

[69] Therefore, the provision is not arbitrary.

C. *Section 12*

[70] Mr. Moretto makes similar arguments with respect to s.12 of the *Charter* as made with respect to s.7 of the *Charter*. He argues that the application of s.68(4) of the IRPA infringes his s.12 *Charter* rights because the automatic suspension of his stay upon a finding of serious criminality is cruel and unusual punishment. He argues that it is grossly disproportionate as there is no consideration of his personal circumstances such as the gravity of his offences, his blameworthiness, or mitigating factors. According to Mr. Moretto, it also does not account for the fact that he has been in Canada since he was an infant, has no family in Italy, does not speak Italian and has mental health issues.

[71] There is a two-part test for s.12: (1) is there treatment? (2) if there is treatment, is the treatment cruel and unusual?

(1) Is there "treatment"?

[72] The test for determining treatment under s.12 is broad. In *Chiarelli*, the Supreme Court outlined an expansive definition of treatment "as a process or manner or behaving towards or dealing with a person or thing." The Court at para 29 held that deportation may "come within the scope of 'treatment' in s.12."

[73] Considering that "treatment" is to be given an expansive interpretation, and accepting for the sake of this analysis that Mr. Moretto is subject to the "special administrative control of the

state" (*Rodriguez v British Columbia (Attorney General),* [1993] 3 SCR 519 at 611), I accept that the application of s.68(4) of the IRPA may be considered "treatment".

(2) Is the treatment cruel and unusual?

[74] For "treatment" to be cruel and unusual under s.12, it must be *grossly disproportionate* (*Nur*, at para 39).

[75] Mr. Moretto argues that s.68(4) is not "highly individualized" and the lack of discretion in s.68(4) means that his personal circumstances have not been taken into account. Therefore according to Mr. Moretto, its application to him is "grossly disproportionate." Mr. Moretto draws analogies to mandatory minimum sentences in the criminal context, which have been struck down under the *Charter* as being grossly disproportionate. For example, in *Nur* at para 43, the Court struck down a mandatory minimum sentence for gun possession, describing the determination of a proportionate sentence as a "highly individualized exercised, tailored to the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime."

[76] Mr. Moretto's reliance upon criminal cases dealing with the imposition of mandatory minimum sentences is misplaced. The principle of proportionality in criminal sentencing is fundamental: *R. v Ipeelee*, 2012 SCC 13 at para 37. Mandatory minimums have the potential to depart from the principle of proportionality by their very nature (*Nur*, para 44). However the considerations underpinning sentencing in the criminal context are very different from the considerations here. Here what Mr. Moretto challenges is a discretionary, statutory right of

appeal. An individual has a constitutional right to a proportionate sentence, but he does not have a constitutional right to a statutory appeal.

[77] Furthermore, the distinction between a finding of inadmissibility and deportation itself must be considered. This Court and the Federal Court of Appeal have found that s.12 can only be engaged at the stage of deportation itself (*Barrera v Canada (Minister of Employment and Immigration)*, [1993] 2 FCR 3 (FCA) [*Barrera*]*; Norouzi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 368 at para 36 [*Norouzi*]; *Brar v Canada (Citizenship and Immigration)*, 2017 FC 820 at para 32 [*Brar*]). Even when it comes to deportation, courts have held that s.68(4) is not a form of "punishment" and deportation itself is not punishment (*Dufour*, at paras 41, 43-46; *Canepa v Canada (Minister of Employment and Immigration)*, [1992] 3 FCR 270 at para 14 (FCA)).

[78] At this stage, although the previous removal order is no longer stayed in Mr. Moretto's favour, deportation proceedings have not yet been undertaken. Therefore, at this stage, the arguments raised by Mr. Moretto are premature with respect to s.12 considerations.

[79] Even if Mr. Moretto's s.12 arguments were not premature, *Charter* arguments must be considered in the context in which they arise. As noted above regarding s.7 of the *Charter*, s.68(4) is part of the broader IRPA legislative scheme, which contains a number of avenues for Mr. Moretto before and after the determination of inadmissibility by the IAD (including s.25 H&C relief). These avenues mitigate against any gross disproportionality in the application of s.68(4).

[80] While *Nur* at para 91 explains that the constitutionality of a law cannot depend on its proper implementation by state agents, here the individualized proportionality assessment is built into the IRPA itself in the form of the ID and H&C consideration accessed by Mr. Moretto. He also had access to special consideration in the form of appeal rights to the IAD.

[81] Overall, Mr. Moretto has had the benefit of two stays of his removal from Canada. His actions in continuing to reoffend triggered the application of s.68(4) to his circumstances. The application of s.68(4) in this case is consistent with the security objective of the IRPA, as noted in *Medovarski*. Mr. Moretto's ongoing criminal behaviour militates against his cruel and unusual punishment arguments.

[82] As such, I conclude that s.12 of the *Charter* is not infringed based upon the facts of this case.

D. *Section 2(d)*

[83] Mr. Moretto argues that s.68(4) of the IRPA infringes his s.2(d) *Charter* rights as the effect of his deportation would be to sever his association with his family. He argues that the intimate association of the family "is the foundational social institution" and therefore should enjoy *Charter* protection. In support of this argument he relies upon the purposive interpretation of s.2(d) from *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 [*MPAO*], and international law.

[84] The *Charter* freedom of association protection is focused on three sorts of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities (*MPAO*, at para 66).

[85] Generally the activity protected by s.2(d) ensures that the state does not substantially interfere with voluntary associations in their meetings, formation, pursuit of other rights, or activities which enhance the strength of the association to “achieve collectively what they could not achieve individually” (*MPAO*, para 62).

[86] Courts have held that the associational activities protected by s.2(d), as described in *MPAO*, do not envision the family as a constitutionally protected unit. In *Catholic Children’s Aid Society of Metropolitan Toronto v S. (T.)*, [1989] OJ No 754 (Ont CA), the Ontario Court of Appeal noted that a family’s association with one another is not for the primary purpose of an economic, political, religious, or social purpose.

[87] Similarly, the recent s.2(d) case law does not mandate the inclusion of family. With respect to family associations, generally, there is no “goal” in common which families seek to advance; and families do not pursue “activities” in common in the same way as labour unions, for example. Moreover, there is an element of voluntariness which arises in the Supreme Court’s definition of associational rights: s.2(d) protects the right to *join with others* and *form associations.* In this case, Mr. Moretto did not join his family voluntarily.

[88] Mr. Moretto's arguments on s.2 (d), while novel, do not demonstrate a constitutional infringement.

E. *Section 1*

[89] As I have concluded that Mr. Moretto's *Charter* rights have not been violated, it is not necessary for me to assess the section 1 arguments.

F. *International Law*

[90] Mr. Moretto submits that developments in international law are relevant to the *Charter* analysis.

[91] He relies upon international law for the proposition that s.2(d) should be interpreted to protect the family unit as an association.

[92] Relevant to his ss.7 and 12 submissions, Mr. Moretto argues that developments in international law, specifically, decisions of the European Court of Human Rights and the United Nations Human Rights Committee, require that a "proportionality assessment" be conducted prior to any removal of a long-term permanent resident. If the deportation is grossly disproportionate, then deportation should not follow. Mr. Moretto argues that *Chiarelli* and *Medovarski* should be revisited in light of these international law developments.

[93] This issue was addressed in *Revell,* at paras 180-183 where Justice Kane held that while principles of international law may inform the interpretation of the *Charter*, the developments in international law do not require that the principles of fundamental justice be reinterpreted in the context of deportation and are not sufficient to justify departing from the principles established in the domestic law. This is particularly so because the Federal Court of Appeal held in *Charkaoui v Canada (Citizenship and Immigration),* 2007 FCA 80 at para 15 (leave to appeal ref'd) that the principle in s.3 (3)(f) of the IRPA (providing that the IRPA be construed and applied in a manner that complies with international human rights instruments to which Canada is a signatory) does not elevate international law to that of domestic law.

[94] Thus, while international law instruments signed and ratified by Canada can inform constitutional interpretation, they cannot supplant the *Charter* and domestic law (*De Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 at para 58). In relation to the IRPA, international law does not materially change the proportionality assessment which already exists under the statute. Further, for the reasons noted above, international law cannot effectively "read in" a provision into the *Charter* respecting the family. As such, the principles of international law do not change the substantive outcomes in this case.

G. *Proposed Questions for Certification*

[95] Mr. Moretto proposes the following 5 questions for certification:

(1) Is section 7 engaged at the stage where a permanent resident's stay of removal is automatically cancelled pursuant to s.68(4) and if so, would section 7 be engaged where the deprivation of the right to liberty, 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?

(2) 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?

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

(4) Can the psychological, social, and linguistic impact of uprooting of a long term permanent resident be found to be grossly disproportionate in the context of a deportation?

(5) Is the family an association under s.2(d) of the *Charter* and, if so, can deportation infringe the freedom of the family to associate?

[96] The Respondent opposes certification of the proposed questions and argues that they do not satisfy the requirements of s.74(d) of the IRPA which states:

74 Judicial review is subject to the following provisions:	**74** Les règles suivantes s'appliquent à la demande de contrôle judiciaire :
[…]	[…]
(d) subject to section 87.01, an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious	**(d)** sous réserve de l'article 87.01, le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge

question of general importance is involved and states the question.	certifie que l’affaire soulève une question grave de portée générale et énonce celle-ci.

[97] The test for certification was recently restated in *Torre v Canada (Citizenship and Immigration),* 2016 FCA 48 at para 3 as follows:

> Under subsection 74(d) of IRPA, only a serious question of general importance may be certified and thus open the possibility of an appeal from a judgment following an application for judicial review. This requirement has been interpreted by the Court several times, and the law is now well settled: to be certified, a question must be dispositive of the appeal and transcend the interests of the immediate parties to the litigation due to its broad significance: *Canada (Minister of Citizenship and Immigration) v. Liyanagamage* [1994], FCJ No. 1637 at paragraph 4, 176 N.R. 4; *Zhang v. Canada (Minister of Citizenship and Immigration)*, 2013 FCA 168 (CanLII) at paragraph 9, [2013] FCJ No. 764. In other words, a certified question is not to be a reference of a question to this Court, and a certified question must have been raised and decided by the court below and have an impact on the result of the litigation: *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 (CanLII) at paragraphs 11–12, [2004] FCJ No. 368; *Lai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FCA 21 (CanLII) at paragraph 4, [2015] FCJ No. 125.

[98] A certified question will only be sufficiently general and important where the law is unsettled on the question (*Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at para 36; *Leite v Canada (Citizenship and Immigration)*, 2016 FC 1241 at para 28).

[99] Against this backdrop I will consider each of the proposed questions.

(1) Question 1

[100] The proposed question is similar to the question certified in *Revell.* Although Justice Kane held that a finding of inadmissibility cannot engage s.7 as there are further steps in the immigration process, she did note that some cases do not recognize this distinction (for example, *Romans v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 466). She therefore certified a question.

[101] Although there were different provisions of the IRPA at issue in *Revell* as compared to this application, the facts of both cases are similar and the ultimate impact of the relevant provisions of IRPA are the same – namely deportation of long term permanent residents of Canada, away from their family and to a country in which they have never or only briefly resided.

[102] Accordingly and in keeping with the principle of comity, I will certify the same question as follows:

> 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) Question 2

[103] This question is the same as the second question certified in *Revell* relating to the principle of *stare decisis* and the impact of the Supreme Court of Canada's decision in *Chiarelli* on the s.7 and s.12 analysis.

[104] Given my comments about judicial comity above, this question will also be certified, as follows:

> 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) Question 3

[105] This question relates to the prematurity issues respecting s.12 of the *Charter* and the differences which appear to arise in the reported cases.

[106] In *Brar* at para 31, Justice Manson relied on existing case law providing that s.12 *Charter* arguments were premature prior to actual removal. In *Revell*, Justice Kane found that her s.12 conclusions were not at odds with *Brar*.

[107] Much of the case law on this matter rests on the distinction between admissibility and deportation. In *Barrera*, there was no actual Ministerial decision made yet to deport a refugee

who committed crimes in Canada, with no assessment of risk in the home country. In *Norouzi*, a recent decision, Justice Bell decided that s.12 arguments were premature where the Refugee Protection Division imposed a cessation of the applicant's refugee status, but the applicant had not yet been referred to an admissibility hearing.

[108] In *Santana v Canada (Public Safety and Emergency Preparedness),* 2013 FC 477, however, the facts were similar to this case; the applicant was cited for serious criminality, and was issued a removal order which was appealed to the IAD. Justice Shore found that the s.12 matter was premature because his removal was yet to be decided.

[109] However, as noted in *Revell*, there is uncertainty whether there is a distinction between a finding of inadmissibility and deportation. This distinction is relevant in the s.12 context as well. A section 12 analysis will be premature if there is a distinction between a finding of inadmissibility and deportation. If there is no distinction, a s.12 challenge will not be premature.

[110] Here, Mr. Moretto has been subject to a removal order since 2011. Although he has had the benefit of a stay of his removal, that stay has now been lifted, bringing into force a previously dormant removal order. This was not the case in *Brar*, *Norouzi*, or *Barrera*.

[111] Therefore the situation is not hypothetical, and if there is no distinction between admissibility and deportation, then Mr. Moretto can challenge the lifting of his removal order under s.12. As such, though this question was not at issue in *Revell*, the following question is appropriate to certify:

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

(4) Question 4

[112] This question relates to the consequences of deportation as it relates to psychological, social, and linguistic impacts. In *Revell*, Justice Kane refused to certify a similar question which asked whether "there are circumstances" in which the deportation of a permanent resident would violate the principle of gross disproportionality. She held that this question was too broad.

[113] Here the question posed does not transcend the interests of the parties. Further the question of Mr. Moretto's "psychological, social, and linguistic" circumstances is largely hypothetical.

[114] This question will not be certified.

(5) Question 5

[115] This question relates to whether the family is an association contemplated by s.2(d) of the *Charter*, and whether deportation could infringe the right of individuals to associate with the family.

[116] In my view, this question is too broad to be certified and it does not arise from the facts of the case. The main thrust of Mr. Moretto's s.2(d) arguments did not relate to whether family was an association within s.2(d) or whether deportation in all circumstances could infringe

s.2(d). Rather, he argued that s.68(4) violated the s.2(d) right of a long-term permanent resident, with family ties within Canada, who was to be deported to a country with no family supports. Mr. Moretto supported these arguments by relying upon international law which focus on international norms regarding deportation of long-term permanent residents.

[117] However, Mr. Moretto's argument regarding s.2(d) was specific to his circumstances, yet the question sought to be certified is not specific to the circumstances of this case, and relates to an academic question of whether the family is a protected unit under the *Charter*.

[118] For this reason, the s.2(d) question is too broad to be certified.

JUDGMENT in IMM-218-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review of the IAD decision is dismissed; and
2. The following questions are certified:
    i. Is section 7 engaged at the stage where a permanent resident's stay of removal is automatically cancelled pursuant to s.68(4) and if so, would section 7 be engaged where the deprivation of the right to liberty, 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?
    ii. 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?
    iii. Is a s.12 determination premature at the stage where a permanent resident's stay of removal is automatically cancelled pursuant to s.68(4)?

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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