Federal Court  Cour fédérale

Date: 20120419

Docket: IMM-6087-11

Citation: 2012 FC 457

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Quebec City, Quebec, April 19, 2012

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

THANH VAN BUI

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Minister of Citizenship and Immigration (Minister) is challenging the lawfulness of a decision by the Immigration Appeal Division of the Immigration and Refugee Board (IAD), refusing to determine the cancellation by operation of law of the stay of the removal order against the respondent and to order the termination of his appeal following the notice issued by the Canada Border Services Agency (CBSA).

[2] For the following reasons, the intervention of the Court is required because the IAD's refusal was based on a legal misinterpretation of subsection 68(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), making the impugned decision reviewable in this case.

GENERAL BACKGROUND

[3] A brief review of the facts is necessary to provide the context for this application for judicial review.

[4] Since July 30, 1990, the respondent, a Vietnamese citizen, has been living in Canada as a permanent resident. On October 19, 2006, he was convicted by the Court of Quebec for production of cannabis, an offence described in subsection 7(1) and paragraph 7(2)(*b*) of the *Controlled Drugs and Substances Act*, SC 1996, c 19, liable to imprisonment for a term not exceeding seven years. The respondent was sentenced to eighteen months of imprisonment to be served in the community (with twelve months of probation to follow the prison sentence).

[5] On August 27, 2007, a CBSA officer stated in a report that the respondent was inadmissible on grounds of serious criminality pursuant to paragraph 36(1)(*a*) of the IRPA. On October 19, 2007, under subsection 44(2) of the IRPA, the said report was referred to the Immigration Division of the Immigration and Refugee Board (ID) for an admissibility hearing. On November 29, 2007, the ID decided that the respondent was a person subject to paragraph 36(1)(*a*) of the IRPA and issued a removal order against him, a decision that the respondent appealed to the IAD.

[6] On June 12, 2008, the IAD granted the respondent a three-year stay, subject to certain conditions, considering:

a. that the respondent was given the opportunity to serve his sentence in the community when, according to section 742.1 of the *Criminal Code*, the court may only order that a sentence be served in the community if it is satisfied that the service of the sentence in the community would not endanger the safety of the community;
b. that, according to the detailed report under section 44 of the IRPA, the sentence had a deterrent effect;
c. that the respondent expressed genuine remorse at the hearing;
d. that the respondent opened a car wash and that, since his arrival in Canada, he has never received social assistance;
e. that, at the time of the offence, the respondent was having significant financial problems, that he was sending money to his family in Vietnam and that he did not have substance abuse problems; and
f. that, after hearing the respondent's testimony, counsel for the Minister agreed that a three-year stay with the usual conditions be granted to him.

[7] On April 27, 2011, the IAD informed the parties that it would reconsider the appeal without a hearing, asking them to provide it with a written statement concerning the respondent's compliance with his stay conditions. On May 27, 2011, through his counsel, the respondent informed the IAD that he had complied with all of the stay conditions but that, further to the notice of reconsideration of appeal before the IAD, he was sentenced, on May 13, 2011, to a term of two

years less a day to be served in the community for another offence that was committed on or about May 5, 2006. However, that offence was of the same nature as that which led to the removal order.

[8] On May 31, 2011, the CBSA sent the IAD and the respondent a notice of cancellation by operation of law of the stay of the removal order. The notice stated that all of the tests set out in subsection 68(4) of the IRPA were met because the May 13, 2011 conviction corresponds to an offence referred to in subsection 36(1) of the IRPA because a sentence of more than six months was imposed on the respondent. The CBSA therefore urged the IAD to find the stay of the removal order cancelled by operation of law and the respondent's appeal terminated.

[9] On August 18, 2011, the IAD refused to cancel the stay. Being of the opinion that the respondent complied with all of the stay conditions and that the acts that led to his second conviction had been committed prior to the granting of the stay, the IAD allowed the respondent's appeal and set aside the removal order.

IMPUGNED DECISION

[10] The IAD pointed out in the impugned decision that the reference period to determine whether there was a breach of the stay conditions and whether the stay was still valid is that which follows the stay. The IAD noted that there is no dispute that the respondent pleaded guilty on September 29, 2010, to an offence other than that which led to the removal order and that he was convicted of that offence on May 3, 2011.

[11] However, the IAD notes that neither the French version nor the English version of subsection 68(4) of the IRPA specifies when the acts of the subsequent offence subject to this provision had to be committed:

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.
(2) Where the Immigration Appeal Division stays the removal order (*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.	(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.
(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.	(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.

(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.
[Emphasis added.]	[nos soulignements]

[12] However, the Board member recognizes that the IAD has opted for a literal reading of subsection 68(4) of the IRPA in similar circumstances. Thus, in *Aguirre Riascos v Canada (Minister of Public Safety and Emergency Protection)*, [2009] IADD 2558 at paragraph 4, the IAD decided that the provision "provides that a conviction subsequent to the appellant being placed on a stay, not the commission of an offence, is what triggers the automatic termination of an appeal".

[13] Similarly, in *Bennett v Canada (Minister of Public Safety and Emergency Protection)*, [2010] IADD 1950 at paragraphs 11 and 12, the IAD stated the following:

> At the time of his hearing the appellant should or could have been aware of the possibility that if he were placed on a stay and if he were convicted of further offences that found him described by section 36(1)(a) of *IRPA* he would be subject to the cancellation of his stay and the termination of his appeal. This is especially so as he had counsel experienced in immigration law.
>
> The effect of section 68(4) of *IRPA* is to remove the IAD's continuing jurisdiction by operation of law. The role of the IAD in considering a notice made under section 68(4) is to provide

> oversight to ensure that the cancellation of a stay is supported by evidence that the appellant did in fact commit another offence which satisfies the definition of serious criminality. The cancellation of the stay is automatic by operation of law.

[14] That being said, the IAD believed that the interpretation adopted in *Bennett* suggests that an appellant who has a case pending at the time of the appeal to the IAD may legitimately request an adjournment of his appeal hearing pending the outcome of that case, otherwise an injustice is likely to be done to him. The IAD is of the opinion that such a literal interpretation of subsection 68(4) of the IRPA imposes the sluggishness of the judicial system on the appellant and consequently places a beneficiary of a stay who has taken all of the necessary measures to rehabilitate him- or herself by complying with all of the stay conditions in the same situation as a person who does not comply with the conditions and reoffends.

[15] Furthermore, the IAD decided to base its refusal to cancel the stay on other case law that involves the breach of stay conditions rather than a judgment of conviction as the trigger for the cancellation by operation of law of the stay and the termination of the appeal. In fact, this is the interpretation that the IAD gave to the transitional provision of section 197 of the IRPA:

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

[16] In *Bassil v Canada (Minister of Citizenship and Immigration)*, [2004] IADD 534, the appellant argued that the competent tribunal had taken into account the existence of the pending lawsuit when it granted a stay and that subsection 68(4) of the IRPA could only apply to convictions for new offences not known about at the time the stay was granted. The IAD therefore decided that the application of section 197 requires that a breach of the stay conditions had been found:

> With consideration for the opposing view, I am of the opinion that the breach occurs at the time the offence is committed. According to the wording of section 197 of the IRPA, it is "the appellant who has been granted a stay" who has failed to comply with the conditions. This assumes a positive action or an omission on his part. Now, in the case of a criminal conviction, the positive action on his part takes place when he commits the crime. The conviction is more the noting of the offence by a judicial authority. The only positive action by the person in question at this stage is a possible plea of guilty, which to my mind is merely the acknowledgment of an act he previously committed.

[17] Returning to the decision under review, the IAD therefore found that the expression "another offence", as used in subsection 68(4) of the IRPA, means that a new offence must have been committed subsequent to the stay. Furthermore, the IAD specified that, in order to achieve the objectives of safety, those of section 68 of the IRPA, Parliament established a process to guarantee the fundamental rights of those to whom it applies, including, namely, a report on inadmissibility, an admissibility hearing before the ID and the issuance of a removal order (sections 44 and 45 of the IRPA); the Minister must follow this procedure if he wishes to issue a new removal order against someone who, like the respondent, has never breached the conditions of his stay.

[18] Finally, the IAD points out that its interpretation of subsection 68(4) does not to allow people who pose a danger to the security of Canada to stay here. However, the interpretation that a conviction for an offence that was committed prior to the stay—an offence that the IAD knew about at the time the stay was granted—is enough to cancel the stay by operation of law allows the Minister to deport from Canada any person who was considered to be on the right path to rehabilitation and who has complied with all of the conditions that were imposed on him or her.

STANDARD OF REVIEW

[19] The Court must determine the applicable standard of review in this case.

[20] The Minister claims that the IAD's decision must be reviewed on the standard of correctness because, on the one hand, it is based on an error of law, that is, the inaccurate interpretation of subsection 68(4) of the IRPA and, on the other hand, the interpretation of the provision addresses concepts related to criminal law—rather than immigration law in the strict sense—that go beyond the specific expertise Parliament conferred on the IAD. Furthermore, Parliament did not give the IAD a preclusive and specific privative clause, but a general privative clause setting out that "[e]ach Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction" (subsection 162(1) of the IRPA), which requires less deference from the courts and militates in favour of the adoption of the correctness standard.

[21] The respondent argues, to the contrary, that the applicable standard of review is reasonableness because the question raised by the Minister is a question of mixed fact and law

relating to the decision-maker's home statute as to whether the enforcement of the respondent's removal order may be cancelled by operation of law notwithstanding his compliance with all of his conditions. The respondent submits that, in doing so, the IAD had to interpret the meaning of the terms "convicted of another offence", which appear in subsection 68(4) of the IRPA. The respondent maintains that the IAD's in-depth and specialized knowledge on the subject calls for greater deference from the Court (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraphs 51-55, [2008] 1 SCR 190 (*Dunsmuir*); *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 25, [2009] 1 SCR 339 (*Khosa*)).

[22] According to the Supreme Court in *Dunsmuir*, above, at paragraphs 54 and 55, "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity". More recently, in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paragraph 34, [2011] 3 SCR 654, Justice Rothstein expressed the following regarding the standard of review applicable to administrative decision-makers' interpretation of their home statute:

> The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular

> familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.
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> [Emphasis added.]

[23] However, Justice Binnie, Justice Deschamps and Justice Cromwell expressed reluctance with respect to the existence of the presumption urged by Justice Rothstein. While the approach advocated by Justice Cromwell is to return to "a more thorough examination of legislative intent when a plausible argument is advanced that a tribunal must interpret a particular provision correctly" (paragraph 99), at paragraphs 82-83, Justice Binnie stated that such a presumption cannot function unless the reviewing court has analyzed, in accordance with the teachings in *Dunsmuir*, the decision-maker's area of expertise and the general nature of the legal issue—in this case, statutory interpretation—that was decided by the administrative tribunal:

> It may be recalled that the willingness of the courts to defer to administrative tribunals on questions of the interpretation of their "home statutes" originated in the context of elaborate statutory schemes such as labour relations legislation. In such cases, the tribunal members were not only better versed in the practicalities of how the scheme could and did operate, but in many cases, the legislature tried to curb the enthusiasm of the courts to intervene by inserting explicit privative clauses. Over the years, acceptance of judicial deference grew even on questions of law (see, e.g., *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557), but never to the point of presuming, as Rothstein J. does, that whenever the tribunal is interpreting its "home statute" or statutes, it is entitled to deference. It is not enough, it seems to me, to say that the tribunal has selected one from a number of interpretations of a particular provision that the provisions can reasonably bear, no matter how fundamentally the tribunal's legal opinion affects the rights of the parties who appear before it. On issues of procedural fairness or natural justice, for example, the courts should not defer to a tribunal's view of the extent to which its "home statute" permits it to proceed in what the courts conclude is an unfair manner.
>
> The middle ground between Cromwell J. and Rothstein J., it seems to me, lies in the more nuanced approach recently adopted

> by the Court in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 ("*CHRC*"), where it was said that "if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference" (para. 24 (emphasis added)). Rothstein J. puts aside the limiting qualifications in this passage when he comes to formulating his presumption, which is triggered entirely by the location of the controversy in the "home statute".
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> [Emphasis in original.]

[24] It should be noted that in *Dunsmuir*, the Supreme Court decided that the following elements allow reviewing courts to determine whether there is a basis to defer to a decision: 1) whether the question of law is of "central importance to the legal system" and "outside the specialized area of expertise" of the decision-maker; 2) whether the statute in question contains a privative clause reflecting a statutory direction from Parliament or a legislature indicating the need for deference; and 3) whether there is a discrete and specialized administrative regime in which the decision-maker has special expertise.

[25] However, in *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at paragraph 37, [2011] 1 SCR 160, the Supreme Court recently specified that the fact that a "question of law" was raised by a party in judicial review does not automatically result in the application of the correctness standard. Furthermore, in paragraphs 38 and 39 of *Smith*, the Court added that the fact that the application of the reasonableness standard can open the door to the coexistence of more than one interpretation of a provision by a specialized tribunal should not prevent its adoption:

> Characterizing the issue before the reviewing judge as a question of law is of no greater assistance to Alliance, since a tribunal's interpretation of its home statute, the issue here, normally attracts the

> standard of reasonableness (*Dunsmuir*, at para. 54), except where the question raised is constitutional, of central importance to the legal system, or where it demarcates the tribunal's authority from that of another specialized tribunal — which in this instance was clearly not the case.
>
> . . . In *Dunsmuir*, the Court stated that questions of law that are not of central importance to the legal system "may be compatible with a reasonableness standard" (para. 55), and added that "[t]here is nothing unprincipled in the fact that some questions of law will be decided on [this] basis" (para. 56; see also *Toronto (City) v. C.U.P.E.*, at para. 71).
>
> Indeed, the standard of reasonableness, even prior to *Dunsmuir*, has always been "based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute" such that "courts ought not to interfere where the tribunal's decision is rationally supported" (*Dunsmuir*, at para. 41).

[26] In this case, the interpretation of the terms "convicted of another offence", as used in subsection 68(4) of the IRPA, is a pure question of law. That being said, the Minister refers to *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 (*Pushpanathan*), to support that the generalized application of the interpretation of subsection 68(4) to numerous future cases must warrant its review by the Court if it is in disagreement with the ID because Parliament can only have expressed one intention in that respect.

[27] The following observations by Justice Bastarache in *Pushpanathan*, above, at paragraph 43, are very instructive:

> . . . s. 83(1) [*currently subsection 74(d) of the IRPA*] would be incoherent if the standard of review were anything other than correctness. The key to the legislative intention as to the standard of review is the use of the words "a serious question of general importance" (emphasis added). The general importance of the question, that is, its applicability to numerous future cases, warrants the review by a court of justice. Would that review serve any

> purpose if the Court of Appeal were obliged to defer to incorrect decisions of the Board? Is it possible that the legislator would have provided for an exceptional appeal to the Court of Appeal on questions of "general importance", but then required that despite the "general importance" of the question, the court accept decisions of the Board which are wrong in law, even clearly wrong in law, but not patently unreasonable? The only way in which s. 83(1) can be given its explicitly articulated scope is if the Court of Appeal — and inferentially, the Federal Court, Trial Division — is permitted to substitute its own opinion for that of the Board in respect of questions of general importance. This view accords with the observations of Iacobucci J. in *Southam*, *supra*, at para. 36, that a determination which has "the potential to apply widely to many cases" should be a factor in determining whether deference should be shown.
>
> [Emphasis added.]

[28] Why would it be different for the trial judge who is of the opinion that a serious question of general importance was raised?

[29] I am of the opinion that this application for judicial review raises a serious question of general importance to which this Court has not yet replied: does subsection 68(4) of the IRPA apply to a permanent resident convicted of, during his or her stay, an offence of serious criminality when the acts alleged to constitute the offence were committed before the beginning of the stay?

[30] However, to reply to the question, it is necessary to interpret subsection 68(4) of the IRPA and determine whether the interpretation accepted by the IAD is correct in law.

[31] It appears to me that a consistent and harmonious interpretation of the IRPA requires this Court to intervene to quash a decision by the IAD with legal implications beyond the matter heard.

This finding is further justified based on the fact that the IAD has only a limited discretion in the application of subsection 68(4) of the IRPA. Thus, in *Ferri v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1580, [2005] FCJ 1941 (*Ferri*), the Court stated that the IAD's jurisdiction by virtue of subsection 68(4) consists in verifying whether the following factual requirements were met: 1) whether the IAD has stayed a removal order; 2) whether the individual is a permanent resident or a foreign national who was found to be inadmissible on grounds of serious criminality or criminality; and 3) whether the individual has been convicted of another offence referred to in subsection 36(1) of the IRPA.

[32] Madam Justice MacTavish stated the following at paragraph 39 of *Ferri*:

> I am of the view that while the IAD may have a general power to decide questions of law and jurisdiction necessary for the resolution of cases coming before it, the effect of the wording of subsection 68(4) is to expressly limit the jurisdiction of the IAD in relation to individuals in Mr. Ferri's situation to the determination of whether the facts of an individual case bring the applicant within the wording of the provision, thus rebutting the presumption in favour of Charter jurisdiction.
>
> [Emphasis added.]

[33] The nature of the question of law raised in this case does not call for a high level of deference. The term "convicted" is a criminal law concept, which the IAD is in no better position to interpret than any court even though the concept is not totally foreign to its specific area of expertise.

[34] Being a pure question of law, when the courts share expertise, judicial deference does not apply. This position was adopted by the Supreme Court in *Canada (Attorney General) v Mossop*,

[1993] 1 SCR 554 at paragraph 69, with respect to a decision by the Canadian Human Rights Tribunal:

> The rationale for deference is also influenced by the nature of the question or interest being considered. Some questions are appropriately left to boards, others should be determined by courts. Courts have recognized that statutory interpretation is not such a strict science, and that there are situations where it may be less appropriate to speak of "the correct answer", and more appropriate to speak about ranges of acceptable answers. Where the answer depends upon a policy choice, the question is simply who is best placed to make those choices. Where the administrative body has the jurisdiction to make policy choices, there are good reasons for the court to show a more deferential stance. However, there are questions where it would be clearly inappropriate to defer. Constitutional questions, for example, are not appropriate ones for showing deference. This is not to say that administrative boards are not competent to hear these concerns. . . . The standard of review on such questions, however, will be one of correctness.
>
> [Emphasis added.]

[35] In this case, the IAD does not have discretion based on a "policy choice". In fact, Parliament can only have expressed one intention by including a mechanism for cancellation by operation of law of the stay of the removal order in accordance with subsection 68(4) of the IRPA. Arriving at the opposite finding would clearly go against the principle of the rule of law.

[36] For all of these reasons, I find that the standard of review applicable to the impugned decision of the IAD is correctness.

ANALYSIS

[37] Regarding the wording of subsection 68(4) of the IRPA, the Minister maintains that the use of the term "convicted" (in French, "*reconnu coupable*") refers only to the conviction itself. The

Minister submits that the IRPA makes a clear distinction between the "recognition" or finding of guilt and the "commission" of an offence. Further, providing the example of paragraph 36(1)(*c*) of the IRPA, the Minister alleges that an individual who commits an offence punishable by a maximum term of imprisonment of at least ten years will be inadmissible only if the individual was convicted of an offence punishable by the same sentence or punishable by a term of imprisonment of more than six months. The Minister therefore contends that the use of the terms "are convicted of another offence" in subsection 68(4) of the IRPA does not refer to when the act alleged to constitute the offence was committed, but specifically to the conviction judgment.

[38] Thus, the Minister argues that the IAD erred in law by assimilating subsection 68(4) and section 197 of the IRPA when it relied on *Bassil*. The Minister submits that section 197 of the IRPA was a transitional provision that specified the application of section 64 and subsection 68(4) to stay beneficiaries under the former Act and provided that failure to comply with the conditions of the said stay would lead to the loss of the right of appeal and the cancellation by operation of law of the stay. The Minister submits that if, in accordance with that provision, the date on which the offence was committed, as opposed to the date of the conviction, triggers the consequences stated in section 197 of the IRPA, the trigger in subsection 68(1) of the IRPA would not be identical to what the IAD decided in *Bassil* because the term "convicted" is used expressly therein.

[39] Moreover, the Minister submits that the existence of two systems that could put an end to the stay, either upon the Minister's request when there was failure to comply with the conditions (subsections 68(2) and (3) of the IRPA), or by cancellation by operation of law (subsection 68(4) of

the IRPA), suggests that Parliament knew that a permanent resident who, like the respondent, was convicted twice of offences committed prior to the stay could lose the benefit of his or her stay and right of appeal even if that individual had complied with all of the stay conditions.

[40] However, the interpretation adopted by the IAD does not make it possible to achieve the correct purpose of subsection 68(4) of the IRPA. The Minister contends that the purpose of that provision is not to punish the permanent resident who is the subject of it, but to protect the public from the danger that that individual could pose. The Minister maintains that, with respect to paragraphs 3(1)(*h*) and (*i*) of the IRPA, one of Parliament's objectives in adopting the new IRPA is to facilitate the expeditious removal of permanent residents who are engaged in serious criminality and who pose a risk to the security of Canada.

[41] Finally, the Minister claims that the narrow interpretation that was adopted by the IAD could have undesirable consequences on the implementation of the purpose intended by subsection 68(4) of the IRPA in that it could cause a permanent resident accused of a crime to delay the conclusion of criminal proceedings until the stay is decided even in conditions where the seriousness of the crime he or she is accused of weighs against the granting of a stay. The Minister claims that this interpretation of subsection 68(4) of the IRPA may also cause a permanent resident to try to hide the existence of cases pending against him to be able to enjoy an irrevocable stay.

[42] The respondent submits that the impugned decision is well founded in fact and in law because the second offence was committed before a stay was granted to him; this therefore does not constitute "another offence" within the meaning of subsection 68(4) of the IRPA. The respondent

maintains that it is unjust to punish a permanent resident for the conviction date and not for the date the offence was committed. Furthermore, the respondent submits that it is illogical to impose a harsher immigration sentence on him, that is, deportation despite criminal rehabilitation, when the respondent received a sentence to be served in the community.

[43] The respondent maintains that the purpose intended by subsection 68(4) of the IRPA is nothing other than the quick removal of criminals who pose a current risk to public safety and who do not embrace the opportunity given to them to change their ways for the term of the stay of their removal order. The respondent submits that the count for the offence committed in May 2006, for which he was convicted in 2010, was identical to that of the offence that led to his removal order and arose from the same facts, that is, the production of cannabis. The respondent submits that that was a period when he was experiencing significant financial problems and that, since then, he has not reoffended.

[44] According to the so-called modern or contextual principle of statutory interpretation, emphasis must be put on the ordinary meaning of the words used by Parliament. To quote the exact formula, "the words used in the *IRPA* must be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Németh v Canada (Justice)*, 2010 SCC 56 at paragraph 26, [2010] 3 SCR 281).

[45] In this case, I am of the opinion that the IAD failed to give all of the legal significance owed to the expression "convicted" by focussing only on the terms "another offence". This resulted in an

erroneous meaning that is not that of subsection 68(4) of the IRPA and that which Parliament intended in this case. I agree with the Minister, whose arguments I fully accept.

[46] The respondent maintains that the Minister should have simply asked the IAD to review its decision on the basis of subsection 68(2) of the IRPA because of the second conviction because the trigger for the cancellation by operation of law of a stay can only be a breach of his conditions. The Court cannot accept this approach. The focus must instead be on why subsections 68(2) and 68(4) of the IRPA exist. They are clearly two separate legal mechanisms for different situations. If we consider that subsection 68(4) of the IRPA deals only with situations where the beneficiary has not complied with his or her stay conditions, this provision would have no practical duty. It should be noted that subsection 68(2) can always be raised to cancel a stay when conditions have been breached because one of the conditions of stay of any removal order is to not commit any criminal offences (paragraph 251(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227).

[47] The respondent also submits that a broader interpretation of subsection 68(4) of the IRPA puts him at an unfair disadvantage because he would not have lost his right of appeal in accordance with subsection 64(2) of the IRPA. When the removal order becomes effective, in the absence of the right of appeal, the permanent resident has no other choice but to file a pre-removal risk assessment application; a mechanism largely subject to the Minister's discretion. The respondent submits that this result causes him injustice and is not consistent with the object and spirit of the IRPA whereas the IAD knew of the criminal case pending against him when it granted him, on June 20, 2008, a stay of the removal order (transcript of the hearing before the IAD, page 131). I also do not believe

that the practical considerations raised by the respondent are very helpful for us here in determining the interpretation of subsection 68(4) of the IRPA.

[48] I begin with a few basic concepts. In law, there is a clear distinction between the following: the commission of a proscribed act that constitutes the offence within the meaning of the law; the conviction judgment; and, the sentence. I agree with the Minister that, legally speaking, the conviction coincides with the delivery of the conviction judgment, that is, the judge's recording of the verdict rendered by the jury. When the accused pleads guilty, the judge first accepts the plea and then records the conviction. If a discharge is granted, there is no conviction despite the plea or the finding of guilt. Furthermore, when the accused presents both a defence on the merits and an application for a stay of proceedings because of police provocation, the jury rules on the defence to decide on the guilt and it is only if the accused is convicted that the judge will rule on the opportunity to stay the proceedings or not, that is, to deliver the conviction. The acknowledgement of guilt, which is translated by the conviction, is therefore a specific and autonomous step in this process. Furthermore, it is evident that the conviction is distinct from the sentence: Pierre Béliveau and Martin Vauclair, *Traité général de preuve et de procédure pénales*, 16th ed., Cowansville: Éditions Yvon Blais, 2009, pages 866-868.

[49] The Minister maintains that the meaning that must be given to the term "convicted", as used in subsection 68(4) of the IRPA is either finding of guilt (even if the sentence intervenes later) or conviction. The Court also shares this point of view, which seems to me to be consistent with the strict words of the statute. There is no doubt that Parliament knew the legal principle that any accused is presumed to be innocent until proven guilty, and it is for this reason that it wanted to

exclude those persons from the application of subsection 68(4) of the IRPA as long as they have not been convicted or sentenced in law.

[50] I note that, in *Singh v Canada (Minister of Citizenship and Immigration)*, 2005 FC 137 at paragraphs 27 and 28, it was a question of the application of the transitional measure set out in section 197 of the IRPA. It was specified therein that the application of the loss of the right of appeal and of the cancellation by operation of law of the stays granted under the former system was subsection 68(4), where Parliament expressly used the word "convicted". The Court found that the date used to determine whether section 197 applies is that of the conviction, and not that of the offence. The Federal Court of Appeal upheld this judgment (2005 FCA 417 at paragraph 28) by specifying that no equation can be made between the declaration of wrongdoing from an authoritative source and the commission of the act of wrongdoing for the purposes of interpreting those provisions.

[51] Finally, I note that the stay granted to the respondent by the IAD was issued with the consent of the Minister of Public Safety and Emergency Preparedness. However, in a response addressed to the IAD on May 31, 2011, the CBSA stated the following: [TRANSLATION] "we did not know that the arrest warrant filed on May 6, 2008, was issued for another cannabis production case. The CPIC (Canadian Police Information Centre) system noted the existence of a warrant but did not give the number of the corresponding case".

[52] That being said, I agree with the respondent that the termination of his appeal file would have negative practical consequences. However, for all of the above-mentioned reasons, it seems to

me that this is an effect expressly intended by Parliament. Unfortunately, the interpretation adopted by the IAD is inconsistent with the wording of subsection 68(4) of the IRPA and the intention clearly expressed by Parliament thus I have no other choice but to quash the IAD's decision. *Dura lex, sed lex*, in the words of the Latin maxim well known to litigants. However, it seems necessary to me to make a certain number of additional observations concerning the result of this 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.

CONCLUSION

[55] This application for judicial review will be allowed. The decision by the Immigration Appeal Division of the Immigration and Refugee Board will be quashed and the matter will be referred back to it so that an order cancelling the stay and terminating the appeal is rendered in application of subsection 68(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[56] Given the result of the application, the nature of the question of intense debate by the parties, its determinative nature and its serious and general importance, the Court has decided to certify the following question:

> [TRANSLATION]
>
> Does subsection 68(4) of the IRPA apply to a permanent resident convicted of, during his or her stay, an offence of serious criminality when the acts alleged to constitute the offence were committed before the beginning of the stay?

[57] In the interest of justice, it is also appropriate to suspend the effect of the order to quash the decision and to refer the matter back to the IAD pending the expiration of the appeal deadlines and, if any appeal is filed, pending a final decision following the exhaustion of any appeal.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed;

2. The decision by the Immigration Appeal Division of the Immigration and Refugee Board is quashed and the matter is referred back to it so that an order cancelling the stay and terminating the appeal is rendered in application of subsection 68(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27;

3. The effect of the order to quash the decision and refer the matter back stated in paragraph 2 of the judgment is suspended pending a final decision further to the exhaustion of all appeals; and

4. The following question is certified:

> [TRANSLATION]
>
> Does subsection 68(4) of the IRPA apply to a permanent resident convicted of, during his or her stay, an offence of serious criminality when the acts alleged to constitute the offence were committed before the beginning of the stay?

"Luc Martineau"
Judge

Certified true translation,
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6087-11
STYLE OF CAUSE:	THE MINISTER OF CITZENSHIP AND IMMIGRATION v THANH VAN BUI
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 21, 2012
REASONS FOR JUDGMENT:	MARTINEAU J.
DATED:	April 19, 2012

APPEARANCES:

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