Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

IMM-1031-96

BETWEEN:

MAURICE MEIKLE,

Applicant,

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION,

Respondent.

REASONS FOR ORDER

HEALD, D.J.

This is an application for judicial review of the opinion of the Respondent Minister, pursuant to subsection 70(5) of the *Immigration Act*, that the applicant constitutes a danger to the public in Canada. That opinion was dated February 15, 1996. It is signed by an unidentified "Delegate of the Minister". The applicant seeks a declaration pursuant to section 52 of the *Constitution Act, 1982* that subsection 70(5) of the *Immigration Act* is of no force and effect; an order quashing the subject opinion; and an order referring the matter back to the respondent for reconsideration.

FACTS

The applicant is a citizen of the United Kingdom. He was landed in Canada, at the age of seven, on January 12, 1964. He has been convicted of a large number of offences since 1973. While most are minor offences, one conviction is for possession of a narcotic for the purpose of trafficking.

A deportation order was made against the applicant after an inquiry held on January 18, 1993, on the basis that he was a person described in subparagraph 27(1)(d)(ii) of the *Immigration Act*.[1] On the same day, the applicant commenced an appeal of the deportation order to the Appeal Division of the Immigration and Refugee Board ("IAD"). The notice of appeal was served on the adjudicator at the time of the inquiry on January 18, 1993. Inexplicably, the notice of appeal was not forwarded to the registry of the IAD until October 11, 1994.

Unfortunately, the applicant did not receive a hearing from the IAD because a danger to the public opinion was formed against him on February 15, 1996. On March 21, 1996, the IAD dismissed the applicant's appeal on the grounds that it lacked jurisdiction to hear the matter due to the operation of paragraph 70(5)(c) of the *Immigration Act*.[2]

ISSUES

1. Did the respondent fail to observe a principle of natural justice or procedural fairness in rendering the subsection 70(5) opinion?

2. Did the respondent fail to observe a principle of natural justice or procedural fairness by failing to process the applicant's notice of appeal from January 18, 1993 to October 11, 1994 thus precluding an appeal prior to the introduction of subsection 70(5) of the *Immigration Act*?

3. Does the phrase "constitutes a danger to the public in Canada" in subsection 70(5) violate section 7 of the *Charter* or the principles of procedural fairness?

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[1] Subparagraph 27(1)(d)(ii) reads as follows:
27(1) An immigration officer or a peace officer shall forward a written report to the Deputy Minister setting out the details or any information in the possession of the immigration officer or peace officer indicating that a permanent resident is a person who
(d) has been convicted of an offence under any Act of Parliament for which a term of imprisonment of
(ii) five years or more may be imposed,

[2] Paragraph 70(5)(c) reads as follows:
70(5)(c) No appeal may be made to the Appeal Division by a person described in subsection (1) or paragraph (2)(a) or (b) against whom a deportation order or conditional deportation order is made where the Minister is of the opinion that the person constitutes a danger to the public in Canada and the person has been determined by an adjudicator to be
(c) a person described in paragraph 27(1)(d) who has been convicted of an offence under any Act of Parliament for which a term of imprisonment of ten years or more may be imposed.

ANALYSIS

1. Procedural Fairness in Respect of the 70(5) Opinion

The applicant submits that the procedure by which the subsection 70(5) opinion was formed fails to satisfy procedural fairness: there was no oral hearing; there was no opportunity to cross-examine witnesses; and no written reasons were provided.

In *Williams v. M.C.I.* (1997), 147 D.L.R. (4th) 93 (F.C.A.), it was held that reasons are not required in support of a subsection 70(5) opinion. The Court of Appeal held that such an opinion does not result in deportation, but rather its effect is as follows, at p. 103:

> The effect then of the Minister forming and giving notification of her opinion under subsection 70(5) is to substitute a right of judicial review for a right of appeal of the deportation order, a substitution of the exercise by the Minister of his discretion to relieve from lawful deportation for the exercise of a similar discretion of the Appeal Division under paragraph 70(1)(b), and the substitution of a right to seek a judicial stay in lieu of a statutory stay.

The Court went on, at p. 109, to observe that fairness is satisfied if the party affected may make submissions. Although *Williams* is in *obiter* with respect to the right to an oral hearing and cross-examination of witnesses, the characterization of the effect of a subsection 70(5) opinion in *Williams* dictates that there is no basis to impose an oral hearing requirement or a right to the cross-examination of witnesses. Accordingly, I conclude that there has not been any procedural deficiency in the formation of the subsection 70(5) opinion in this case.

During oral argument, counsel for the applicant also sought to challenge the substantive merits of the subsection 70(5) opinion. Counsel for the respondent argued that insufficient notice had been given that such an argument would be raised. In any case, I do not accept the applicant's argument. The applicant points to the report of Dr. Elterman, a leading Canadian forensic psychologist, who concluded that the applicant is not a dangerous individual. The

Elterman report was before the Minister's delegate, along with other information submitted by the applicant. There is no reason to believe that all of the information before the Minister's delegate was not considered. On the totality of the record, when the applicant's criminal record is considered, and the required deference is afforded to the Minister's delegate, I am unable to conclude that the Minister's delegate made a reviewable error in forming his opinion. It is not an error *per se* for the Minister's delegate to prefer his own interpretation of the evidence to that of Dr. Elterman's. The statute provides that the Minister's delegate, and not the applicant's expert witness, is required to form an opinion as to whether a person is a danger to the public.

2. Delay in Filing of the Notice of Appeal

The record clearly establishes that there was a very lengthy delay in the filing of the notice of appeal herein. The notice of appeal was served by the applicant on immigration adjudicator, R. V. Leach, on January 18, 1993. Adjudicator Leach has signed an acknowledgement on the face of the appeal document stating that he received the notice on that day.[3] We have no explanation of what happened to the document from January 18, 1993 until October 11, 1994, when Randy Jordan of the respondent's Central Removals Unit sent it to the IAD registry.[4]

It is unreasonable to expect the applicant to produce evidence to explain how the document came into the hands of the respondent's officials and remained there for so long. The IAD rules in force at the time, SOR/90-738, require in subsection 9(1), that an adjudicator served with a notice of appeal must "forthwith file it". This did not happen. No explanation has been advanced as to how this serious error occurred and why the notice of appeal was not forwarded immediately to the registry of the IAD.

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[3] Applicant's record, at p. 74.

[4] Applicant's record, at p. 18.

The applicant did all that he was required to do pursuant to the IAD rules. He served his notice of appeal on an immigration adjudicator. He was entitled to expect that the notice would be filed. The consequence of the failure to file on a timely basis was that "the danger to the public opinion" rendered the appeal a nullity. It seems evident that the conduct of some of the respondent's officials has been negligent, to say the least.

This Court has granted remedies where negligent delay has caused undue prejudice in some cases under the family class, such as *Canada (M.E.I.)* v. *Porter* (14 April 1988), A-353-87 (F.C.A.), and *Alvero-Rautert* v. Canada (M.E.I.), [1988] 3 F.C. 163, 18 F.T.R. 50, 4 Imm.L.R. (2d), and in cases respecting humanitarian and compassionate grounds, such as *Rizzo* v. *M.C.I.* (27 January 1997), Imm-282-97, and *Munoz v. Canada (M.C.I.)* (1995), 30 Imm.L.R. (2d) 166. The facts and context of these cases are different from the case at bar, but they speak to the concern of the Court for fairness in administrative decision-making. Ultimately, Parliament is assumed to have intended its laws to be administered in an equitable manner and in conformity with the principles of natural justice.

The applicant submits that this Court has the jurisdiction to grant a remedy under the provisions of paragraphs 18.1(3)(b) and 18.1(4)(b) of the *Federal Court Act*, R.S.C. 1985, c. F-7, which state:

> 18.1...
> (3) On an application for judicial review, the Trial Division may
>
> ...
>
> (b) declare invalid or unlawful, or quash, set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.
>
> (4) The Trial Division may grant relief under subsection (3) if it is satisfied that the federal board, commission, or other tribunal...
> (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;...

The respondent submits that since there is no basis to challenge the subsection 70(5) opinion itself, no remedy under this section should be granted.

Further, if the Court quashes the opinion, then the respondent will simply issue another one.

There is, in fact, a nexus between the breach of the principles of natural justice and the subsection 70(5) opinion issued herein. The causal nexus, and the prejudice to the applicant is that the opinion under subsection 70(5) had the effect of removing a right of appeal - a right that vested before the subsection 70(5) provisions came into effect. As was stated in *Williams*, *supra*, the effect of the Minister forming and giving notification under subsection 70(5) is to substitute a right of judicial review for a right of appeal of the deportation order, a substitution of the exercise by the Minister of his discretion to relieve from lawful deportation for the exercise of a similar discretion of the Appeal Division under paragraph 70(1)(b), and the substitution of a right to seek a judicial stay in lieu of a statutory stay.

The Court of Appeal in *Williams* did not view the "substitution of rights" as being an invasion of fundamental rights. However, in the case at bar, the circumstances are different. Here the delay of more than twenty months had the effect of depriving the applicant of rights already vested in him. That was not the case in *Williams*. In fairness the applicant's appeal to the IAD should be allowed to proceed.

The subsection 70(5) opinion precludes an appeal to the IAD. Therefore, the only way that the applicant can exercise the right that, but for the delay in filing the notice of appeal he is entitled to exercise, is to quash the Minister's subsection 70(5) opinion. In my view, section 18.1 provides for a remedy to be granted in this case without recourse to other equitable doctrines such as estoppel or the doctrine of legitimate expectations. As for the argument that the respondent will simply issue another opinion, this Court cannot refuse to grant an

order on the basis that the respondent will act later so as to negate the effect of that order.

By quashing the opinion of the Minister's delegate, this Court is not granting the applicant a perpetual license to remain in Canada. Rather, the applicant's appeal to the IAD may proceed. If the IAD, after due consideration, does not set aside the deportation order made against the applicant, then the respondent may subsequently be in a position to remove the applicant from Canada.

3. Section 7 of the Charter and the Vagueness Question

This Court is bound by the decision of the Federal Court of Appeal in *Williams supra*. Accordingly, it would not be productive to revisit the issues raised therein.

CONCLUSION

For the foregoing reasons, I have concluded that the unexplained and lengthy delay in filing the applicant's notice of appeal constitutes a failure to observe a principle of natural justice and procedural fairness. The delay created by that failure gave rise, *inter alia*, to the subsection 70(5) opinion which is the subject of this judicial review application. Pursuant to the provisions of paragraphs 18.1(4)(b) and 18.1(3)(b) of the *Federal Court Act* (*supra*) I allow the application. The opinion of the unidentified Minister's delegate, dated February 15, 1996, is quashed.

CERTIFICATION

Both parties were of the view that there are no serious questions of general importance to be certified in this case. I agree. Hopefully, the issues in this case arise from a unique set of facts. No question will be certified.

Deputy Judge

Ottawa, Ontario
October 1, 1997