IMM-1083-96

BETWEEN:

RAMNARAYAN SINGH, NAVIN SINGH and ANOOP SINGH

by his Litigation Guardian, Ramnarayan Singh

Applicants

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

JEROME, A.C.J.:

This application for judicial review of the decision dated March 5, 1996, to the effect that the applicants are not eligible for consideration as "members of the deferred removal orders class" of immigrants came on for hearing before me at Toronto, Ontario, on May 27, 1997. At the close of oral argument, I took the matter under reserve and indicated that written reasons would follow.

Ramnarayan Singh and his son, Anoop, are citizens of Sri Lanka while his wife, Navin, is a citizen of India. The applicants came to Canada via the United States on June 12, 1991, and claimed refugee status. On November 3, 1992, the Convention Refugee Determination Division ("CRDD") determined that Ramnarayan and Anoop Singh did not qualify as Convention refugees. By letter dated May 16, 1994, they were ordered to report for removal on June 9, 1994. However, this order was repealed as a consequence of an announcement by the Minister on May 20. A subsequent letter dated May 24, 1995, requested that they appear voluntarily for removal on June 22, 1995 but the applicants wrote back to state that they would not report for removal because that would mean separation from Navin Singh and would prevent them from applying for consideration under the Deferred Removal Orders Class ("DROC") of immigrants. On September 15, 1995, another letter was sent to the applicants ordering them to report for removal on October 5, 1995. The applicants brought an application for judicial review of this decision and sought a stay of the removal order, which stay was

granted on September 29, 1995. On January 5, 1996, the parties were informed that the leave application had been dismissed due to the applicant's failure to file an application record; the stay granted in September was lifted as a result. That same day, the applicant made an application under the DROC regulation, which was refused on March 5, 1996. Navin Singh's claim for refugee status was deferred, at the request of her counsel, until her husband and son's claim could be processed. On December 18, 1995, she was determined not to be a Convention refugee.

The decision of March 5, 1996, stated simply that the applicants Ramnarayan and Anoop Singh were not eligible for consideration under the DROC regulation because three years had not elapsed since their most recent stay had expired.

The *Immigration Regulations, 1978*, as amended, describe eligibility for DROC as follows:

"member of the deferred removal orders class" means an immigrant

(a) who is subject to a removal order, or to a conditional departure notice, departure notice or conditional removal order within the meaning of subsection 2(1) of the Act as that subsection read immediately before February 1, 1993,

(b) who, on or after January 1, 1989, made a claim to be a Convention refugee and is not a person who was not eligible, under section 46.01 of the Act or under section 46.01 of the Act as that section read immediately before February 1, 1993, to have the claim determined by the Refugee Division,

(c) who has been determined by the Refugee Division not to be a Convention refugee or who has been determined not to have a credible basis for the claim by an adjudicator and a member of the Refugee Division at a hearing held pursuant to subsection 44(3) of the Act as that subsection read immediately before February 1, 1993,

(d) who, on or after July 7, 1994,

(i) has filed with the Federal Court—Trial Division an application for leave to commence an application for judicial review of, or has appealed to the Federal Court of Appeal, to the Supreme Court or to a provincial court, any decision or order made, any measure taken or any matter raised under the Act or any regulations or order made thereunder, where a period of not less than three years has elapsed since the latest of

(A) the making or issuance of any order or notice referred to in paragraph (a),

(B) the most recent determination referred to in paragraph (c),

(C) the cessation of any judicial stay of execution of the removal order referred to in paragraph (a) or any statutory stay of execution of that removal order, and

(D) the expiration or withdrawal of any undertaking given by the Minister or the Government of Canada not to remove the immigrant from Canada, or

(ii) has not filed any application or made any appeal referred to in subparagraph (i), where a period of not less than three years has elapsed since the latest of

(A) the making or issuance of any order or notice referred to in paragraph (a),

(B) the most recent determination referred to in paragraph (c),

(C) the expiration or withdrawal of any undertaking given by the Minister or the Government of Canada not to remove the immigrant from Canada,

(D) the cessation of a stay of execution of the removal order referred to in paragraph (a) under paragraph 49(1)(b) or section 73 of the Act, and

(E) the expiration of the period during which the removal order referred to in paragraph (a) could not be executed under section 50 of the Act,

(e) who, where the immigrant is the subject of a determination referred to in paragraph (c) made on or after July 7, 1994, has, for the purpose of establishing that the immigrant can be removed to the country of which the immigrant is a national or a citizen, the country of the immigrant's birth, the country in which the immigrant last permanently resided before coming to Canada, the country from which the immigrant came to Canada or any other country, provided documentation within ninety days following the latest of

(i) November 7, 1994,

(ii) the most recent determination referred to in paragraph (c),

(iii) the cessation of any judicial stay of execution of the removal order referred to in paragraph (a) or any statutory stay of execution of that removal order,

(iv) the expiration or withdrawal of any undertaking given by the Minister or the Government of Canada not to remove the immigrant from Canada,

(v) the cessation of a stay of execution of the removal order referred to in paragraph (a) under paragraph 49(1)(b) or section 73 of the Act, and

(vi) the expiration of the period during which the removal order referred to in paragraph (a) could not be executed under section 50 of the Act,

(f) who, where the immigrant is subject to an exclusion order or a deportation order, has not hindered or delayed its execution, including failing to present himself or herself for a pre-removal interview or for removal in accordance with removal arrangements made by an immigration officer,

(g) who, where the immigrant is the subject of a removal order or a conditional removal order made on or after July 7, 1994, has complied with a term or condition imposed under subsection 103(3) or (3.1) of the Act requiring the immigrant to notify an immigration officer of any change of the immigrant's address,

(h) who is not and whose dependants in Canada are not persons described in any of paragraphs 19(1)(c) to (g) and (i) to (l) and (2)(a) to (b) of the Act, and

(i) who has not, and whose dependants in Canada have not, been convicted of an offence referred to in subparagraph 27(1)(a.1)(i) or paragraph 27(1)(d) or (2)(d) of the Act; [definition repealed by SOR/97-182)]

The relevant provision for the purposes of this judicial review is paragraph (d)(i)(C) which the applicants attack on the following grounds. First, their eligibility for consideration under the DROC regulation should not be slowed down while they seek to bring themselves within it. Second, since it restricts access to judicial review in the Courts, it should be struck down as against public policy. Third, in the present case the Minister is using the regulation in such a way as to deprive the applicantss of their right to remain in Canada for three years following a negative determination in the CRDD. Finally, that the Minister has used bad faith in the application of the "last in first out" principle.

These attacks assume that the DROC regulation creates a substantive right. However, in two recent decisions, our Court has addressed that very question and reached the opposite conclusion. In *Darmantchev* v. *Canada (Minister of Citizenship and Immigration)*, (1995) 32 Imm. L.R. 65, Mr. Justice Wetston determined that individuals are not entitled to become

members of the DROC but that they must be accepted as such following a selection process:

> It is my opinion that, in this case, there is no duty, express or implied, that arises from the scheme of the Immigration Act and its regulations. Section 48 of the Immigration Act requires that a removal order be executed as soon as reasonably practicable. The purpose of the DROC regulations is not to confer a substantive right or benefit on certain failed refugee claimants, rather, it is to provide the Minister with an improved and more effective method of resolving cases of certain failed refugee claimants who have not been removed over several years. By virtue of section 48 of the Immigration Act, the Minister is under a legal obligation to remove. (*supra* at 68)

Mr. Justice MacKay in *Alexander* v. *Canada (Minister of Citizenship and Immigration)*, (1996) 115 F.T.R. 218, dismissed a similar motion where the applicants had three months to go before becoming eligible for consideration under the DROC regulation. He cited *Darmantchev* and continued:

> The applicants here do not have a right to remain in Canada simply because they are close to qualifying under the DROC regulations. Those regulations provide that a person is eligible to be a member of the DROC only where he or she meets certain criteria, including the requirement that an applicant reside in Canada for three years following refusal of his or her refugee claim. The applicants here do not comply with that criterion and cannot, therefore, be said to have any right to remain in Canada through the application of those regulations, or any others. Nor, as noted above, have the applicants here demonstrated any unfairness in the process here followed. Although the applicants argue it is unfair to remove them at a time when they are close to becoming eligible for the DROC, I am bound by the requirements of the DROC regulations adopted in accord with the statute as enacted by Parliament. The determination of the length of time necessary to reside in Canada to qualify as a member of the DROC class is a matter established by the legislative process and not one for this Court. Thus, since the applicants admittedly have not met the requirement of the DROC regulations, there is no basis on which this Court could intervene in regard to the decision not to cancel or to defer their removal. (*supra* at 262)

In the case at bar, the applicants have not met the threshold test at paragraph (d)(i)(C) since their last stay expired less than three years ago. As a result, they were never eligible for consideration as members of the DROC, as stated in the March 5, 1996 decision under review.

This application for judicial review is therefore dismissed.

O T T A W A

October 23, 1997

"James A. Jerome"
A.C.J.