IMM-2400-96
IMM-2401-96

BETWEEN:

CUONG MANH NGUYEN

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDERS

McKEOWN J.

The applicant seeks judicial review of two decisions by the Minister. The first is the opinion of the Minister dated May 27, 1996 pursuant to subparagraph 46.01(1)(e)(iv) of the *Immigration Act* that the applicant constitutes a danger to the public in Canada. The second is the opinion of the Minister dated May 27, 1996 pursuant to subsection 70(5) of the *Immigration Act* that the applicant constitutes a danger to the public in Canada.

The issue is whether the Minister breached the principle of fairness and natural justice by reviewing new evidence which was not known to the applicant and whether some of the evidence was mischaracterized in the summaries completed for submissions to the Minister.

FACTS

The applicant was born on December 31, 1969 in Vietnam. In 1987 he left Vietnam to avoid being drafted into the Vietnamese army and being sent to fight in Cambodia. After spending four years in a refugee camp in the Philippines he was granted an immigrant visa and became a permanent resident of Canada on January 21, 1991. His record of landing indicates that he is "stateless".

On February 15, 1994 the applicant was found guilty of eight counts in an indictment which all arose from a single transaction, a robbery in which he was the driver but did not enter the victim's home. The applicant was convicted and sentenced for the following eight offences:

- break enter and commit - 2 years concurrent
- assault causing bodily harm - 2 years concurrent
- aggravated assault - 2 years concurrent
- use of a firearm while committing - 1 year consecutive
- possession of a weapon - 2 years concurrent
- unregistered restricted weapon - 2 years concurrent
- occupant of vehicle containing restricted weapon - 2 years concurrent
- dangerous driving - 1 year concurrent

The applicant was released from prison after serving two of the three years. On February 28, 1996, the applicant received a letter dated February 19, 1996 indicating that the Minister was considering whether to issue a danger to the public opinion. The applicant's counsel sent written submissions to the Minister on April 1, 1996 and on April 24, 1996.

On May 27, 1996 the Minister's delegate issued an opinion that the applicant constituted a danger to the public in Canada under both subsection 70(5) and subparagraph 46.01(1)(e)(iv) of the *Immigration Act*. On June 26, 1996 Canada Immigration arrested and detained the applicant. On June 28, 1996 he was brought before an immigration adjudicator for a detention review. At the detention review the adjudicator was presented with the same documents that had been presented to the Minister. The adjudicator concluded that the applicant is not likely to pose a danger to the public and ordered his release. At the detention review, one of the documents submitted to the adjudicator was a report entitled "Danger to the Public Ministerial Report" dated May 10, 1996, prepared by an immigration officer for the Minister of Immigration. This document was not part of the material disclosed to the applicant on February 28, 1996 as the document had not yet been created.

Further, a document was prepared for the Minister on May 27, 1996 entitled

"REQUEST FOR MINISTER'S OPINION - A70(5) and A46.01". The applicant's counsel had five problems with some of the material contained in these latter two documents. His first complaint is that the writer mischaracterized the applicant's counsel submissions when he stated:

> ... Of interest is that Mr. Riecken states that Nguyen made a poor choice [of] companions by becoming involved with co-accused who were people with gang involvement.

While Mr. Riecken, the applicant's counsel, did not make those statements it was open to the writer to interpret his remarks as stating what was stated above.

The second concern relates to the officer's comments where the officer states:

> I spoke with Nguyen's Parole Officer this morning. He advises that since release Nguyen has not been employed but is looking for work. He is currently collecting welfare. His relationship with his former common-law wife has broken down and he has beg[u]n another relationship with a woman with two young boys. He apparently continues to visit his daughter.

There was information on the file indicating that the applicant was unemployed and collecting welfare. Applicant's counsel had raised the problem in his submissions to the Minister but it was uncertain whether the relationship with the common law wife would continue after the applicant was released from prison and, accordingly, this information confirms that the relationship did not survive. However, the officer pointed out that the relationship with the daughter continued. In my view, there is nothing in this statement which constitutes evidence to which the applicant did not have an opportunity to respond. The applicant submitted that the facts in this case were similar to *Kim v. The Minister of Citizenship and Immigration*, March 5, 1997, Court Files IMM-154-96 and IMM-155-96 (F.C.T.D.). However, in my view, the *Kim* case is distinguishable. In the *Kim* case the documents submitted to the applicant indicated that a probation officer was of one view. In the subsequent oral report from the probation officer which was not made available to the applicant, the probation officer made statements which were either directly in conflict with the written report or in any event, contained additional information which was difficult to reconcile with what was in the written report. I agree with MacKay J. when he states at 13:

> ... I do note there would be no harm or difficulty in providing at least the first

> report to the applicant, before it is forwarded to headquarters in Ottawa, with an opportunity to respond at that stage, However, when documents contain information of significance for the decision in relation to the applicant, which information has not been provided to him with a fair opportunity to comment in advance of the decision, then the decision is faulty and will be set aside as one made in breach of the principle of fairness. If the documents prepared by the respondent's officers do not introduce information other than found in documents provided to the person concerned and in his or her submissions in response, those documents would be unobjectionable ...

In my view, if counsel submits certain matters in a letter to the Minister the Minister's delegates are entitled to make contrary statements as long as the statements are either in the file or are based on information which is available to the applicant. In this case, the applicant knew his common law relationship had terminated.

I now turn to the third concern raised by the applicant, to me the most difficult problem. On May 27, 1996, after the report from the local office in Vancouver was received in Ottawa, the reviewing officer in Ottawa and a senior analyst in the case management branch prepared a further document with a request for the Minister's opinion. Under the subject matter "REMOVAL RISK CONSIDERATIONS", they state:

> Mr. Nguyen's legal representative has forwarded a submission indicating that he does not want to return to Vietnam due to the presence in Canada of a common law spouse and the daughter. According to local Immigration officials, this relationship has broken down since his release from prison ...

In my view, it is ambiguous whether the writers meant that both the relationship with the common law wife and the daughter had broken down or whether only the common law relationship had broken down. If the former interpretation is correct, this is a misstatement of the evidence from the local office since it is clear that the local office was only stating that the relationship with the common law wife had ended. I note that this statement is made in connection with "removal risk considerations". However, I also note that the question of the relationship with the daughter is not covered specifically in the reviewing officer's comments and recommendations although it is referred to when they state:

> I have carefully reviewed the submission forwarded by the subject's lawyer and the material forwarded to Mr. Nguyen ...

The letter from the applicant's counsel on April 24, 1996 to the Minister states, *inter alia*:

> Mr. Nguyen's daughter came to know him through weekly visits in prison and is now living with him in the same household. It is submitted that the relationship between them is a strong humanitarian and compassionate factor in the case.

In the same letter a report by a doctor concerning the effects of separation of children from a parent was submitted together with other submissions in the same light. After the reviewing officers made the above statement they went on to state as follows:

> I find that there are insufficient humanitarian and compassionate considerations present which would outweigh the danger to the public aspect of this case. Mr. Nguyen willingly participated in this particulary heinous type of crime. Mr. Nguyen was denied day and full parole from prison because the National Parole Board felt that he was a high risk to re-offend. He had also expressed little regret for the trauma that was inflicted upon his victims.

I must now review the comments in the request for the Minister's opinion in light of the test that is applicable to this type of case. Strayer J.A. in *The Minister of Citizenship and Immigration v. Williams*, April 11, 1997, Court File A-855-96 (F.C.A.) stated at 18-19:

> I should mention briefly the guidelines issued by the Department for the guidance of officers in recommending that a minister's opinion be issued under subsection 70(5). It was argued that the guidelines do not adequately define and limit the grounds for a finding that a person constitutes a public danger. I would first observe, as did the learned motions judge, that the guidelines are not law, are not binding, and they do not purport to be exhaustive. Indeed if they did purport to be exhaustive the Minister could not so fetter her discretion. I see nothing in the Guidelines that is irrelevant to the proper formation of an opinion under subsection 70(5) (other than, perhaps, humanitarian considerations to which the respondent cannot take exception) but they can in no way be seen as a definition of the totality of the considerations of which the Minister could properly take account.
>
> [footnotes omitted]

Strayer J.A. then continued at 25 by discussing the relevance of the documents which the Minister had supplied the applicant:

> The Court also had those documents as well as the report initially submitted to the Minister's delegate but not to the respondent. It is not suggested that any of those documents are completely irrelevant to the considerations pertinent to a finding of dangerousness. Those documents contained the whole of the respondent's submissions, made after a perusal of the documents being put before the Minister's delegate, so that anything to be said by Williams' counsel in his favour was before the delegate. It may be that a motions judge looking at this material might be of the personal view that the evidence against Williams being a danger was stronger than the evidence for him being a danger but, with respect, that is not the issue. The issue is whether it can be said with any assurance that the Minister's delegate acted in bad faith, on the basis of

> irrelevant criteria or evidence, or without regard to the material ...

In the case before me there is no evidence that the Minister's delegate acted in bad faith or on the basis of irrelevant criteria or evidence or without regard to the material. The concern in the case before me is that the Minister acted on a misstatement of the evidence by one of her officials. It is necessary therefore to look at how much fairness is required. Strayer J.A. went on to say at 26:

> ... The decision-making authorized by subsection 70(5) is not judicial or quasi-judicial in nature involving the application of pre-existing legal principles to specific factual determinations, but rather the formation of an opinion in good faith drawn from the probabilities as perceived by the Minister from an examination of relevant material and an assessment as to the acceptability of the probable risk. In such circumstances the requirements of fairness are minimal and have surely been met for the same reasons as I have concluded that requirements of fundamental justice, if applicable, have been met.

In my view, the requirements of fairness in respect of subsection 70(5) have been met under the circumstances.

I also agree with the comments of MacKay J. in *Pratt v. The Minister of Citizenship and Immigration*, April 30, 1997, Court Files IMM-3043-95 and IMM-3528-95 where he stated at 13:

> ... While it is argued in relation to Mr. Pratt that the specific recommendation to the Minister's delegate by departmental officials was not known to the applicant and he had no opportunity to comment on that, I do not find this to be a breach of fairness or of natural justice. All matters underlying that recommendation were known to, and opportunity was provided for comment by, the applicant. The recommendation itself is simply a conclusion, the possibility of which was known to the applicant who had an opportunity to comment on the record on which that recommendation was based.

The applicant's fourth problem relates to the omission of certain evidence in the report of May 27, 1996. The reviewing officer stated under REMOVAL RISK CONSIDERATIONS:

> ... There is no indication in the submission that Mr. Nguyen would fear for his life or well-being. Accordingly, there is no reason to suggest that Vietnamese authorities would have any political reason to detain or harass him. While the offences he was convicted of are serious, there is no indication in a review of the sources below that overseas offenders who have served their sentences would suffer the same fate. Accordingly, I see no reason why Mr. Nguyen's removal to Vietnam cannot take place.

The applicant submits that this comment was based on the United States Country Report which the applicant had been informed would be before the Minister but that the Country Report makes it clear that the people who are not in danger are those who return to Vietnam voluntarily and who are under the program of the United Nations High Commissioner for Refugees Program. Also the Country Report refers to refugees being returned with financial assistance. In this case, it is clear that there will be no financial assistance in that the applicant will not be returned under the auspices of the U.N.C.H.C.R. There is no evidence to show whether the Vietnam government would know that the applicant was being returned voluntarily or involuntarily. In my view this omission is irrelevant since the applicant had not taken the position that his life would be in danger if he was returned to Vietnam. I agree with the applicant that, as stated by MacKay J., in *Kim, supra* at 13:

> A lack of fairness in the process is sufficient ground to set the impugned decision aside, without the necessity of establishing prejudice to the applicant ...

And then he sets out three cases:

> (See: *Kane v. U.B.C.*, [1980] 1 S.C.R. 1105, 31 N.R. 214 (S.C.C.); *Lazarov v. Secretary of State of Canada* (1973), 39 D.L.R. (3d) 738 (F.C.A.). See also *Kanda v. Government Federation of Malaya*, [1962] A.C. 322 at 377).

However, if there is no issue as to his being in danger if he is returned to Vietnam, I do not see how this misstatement can be relevant.

The fifth and final problem raised by the applicant related to whether there was a different standard of fairness required in the section 46.01 cases than in the subsection 70(5) cases. I agree that the *Williams* case only deals with subsection 70(5). However, *Nguyen v. Canada (Minister of Employment and Immigration)* (1993), 18 Imm. L.R. (2d) 165 (F.C.A.) approves the process under section 46.01. Marceau J.A. stated at 175:

> ... The procedure set up and actually followed affords the individuals concerned full opportunity to make his or her case which, I think, in the circumstances, satisfies the demands of the audi alteram partem maxim. I see no reason to require an oral hearing in this case as in any other similar case ...

Marceau J.A. also ruled out a balancing of the actual danger to the Canadian

public in the fear of persecution of a foreign citizen. He stated at 174:

> ... it is irrelevant to the decisions that, under the law, they are called upon to make.

"They" means the Refugee Division and the Minister. In my view there is no difference in the level of fairness owed under subsection 70(5) and section 46.01. The application for judicial review is dismissed.

William P. McKeown

OTTAWA, ONTARIO
June 16, 1997