IMM-2257-96
IMM-2258-96

BETWEEN:

DUNG TIEN NGO

Applicant

- AND -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDERS

McKEOWN J.

The applicant, a citizen of Vietnam and a Convention refugee, seeks judicial review of two decisions by the Minister. The first is that the applicant constitutes a danger to the public pursuant to subsection 70(5) of the *Immigration Act*, R.S.C. 1985, c. I-2 (as am.) (the Act), while the second is the decision of the Minister that the applicant constitutes a danger to the public pursuant to paragraph 53(1)(d) of the Act.

The issues are: 1. Is there is a higher standard of fairness required under paragraph 53(1)(d) as opposed to subsection 70(5)? 2. Did the Minister's officials err in refusing the applicant an extension of time of three weeks as requested and by granting an extension of only one week? 3. Was the Minister's opinion patently unreasonable? 4. Did the Minister breach her duty of fairness by miscategorizing, omitting evidence and misstating evidence?

The applicant was born in Vietnam and found to be a Convention refugee on January 12, 1990 by the Refugee Status Review Board in Kowloon. He is married and

has a son and was granted landed immigrant status on August 26, 1992. Since his arrival in Canada, he has been convicted of the following criminal offences: theft under $1,000 in November 1992, possession of a narcotic in March 1993 and in December 1993, and trafficking in a narcotic and possession of property obtained by crime in December 1993. Two other charges made in December 1993 were dropped and stayed, respectively.

The applicant, after being released on bail, moved to Vancouver in June 1994 and remained there until August 1995 when he returned to Calgary for sentencing. He was sentenced to 33 months in August 1995 for the convictions under the December 1993 charges. On May 14, 1996, while still in prison, the applicant received notice of the Commission's intention to seek the Minister's opinion that the applicant constituted a danger to the public in Canada. The letter set out the documentation which might be presented to the Minister for consideration of the applicant's case and invited the applicant to respond to the evidence by the Minister by providing representations, information or evidence relating to the issue of whether he is a danger to the public and whether compelling compassionate and humanitarian considerations were present in his case to outweigh any danger he may present.

The applicant received the letter while he was hospitalized in isolation in prison. He submits that because of his limited English skills, he did not fully understand the letter and did not realize he had only 15 days to make submissions. The applicant claims that upon his return to prison from the hospital, another inmate explained that the letter was about deportation and at that stage the applicant contacted a friend to retain a lawyer for him. The applicant retained counsel on May 28, 1996.

The applicant's counsel then made several requests to the senior immigration officer for an extension of two to three weeks to make submissions. The senior immigration officer advised counsel that an extension of one week only would be granted because the applicant could be paroled in July 2, 1996 and she wanted to get

the Minister's opinion before that date. The senior immigration officer also stated that counsel's concerns regarding the extension would be included in the request for the Minister's opinion. Counsel's concerns were not included in the request for the Minister's opinion.

On June 7, 1996, the applicant's counsel forwarded submissions on the applicant's behalf to the Canada Immigration Centre in Edmonton. Counsel for the applicant set out the unfavourable circumstances in which the submissions were formulated as a result of the short amount of time she was granted to prepare them. The applicant's counsel requested that the Minister take into consideration in forming her opinion the fact that the applicant had been granted significantly less than a full opportunity to be heard and that, had the applicant been granted an extension, counsel would have interviewed the applicant in person, obtained letters of reference for the applicant, obtained a psychological assessment of the applicant, and spoken to other individuals who knew the applicant.

The documents filed by the applicant submit that the applicant had no history of violence and is not a violent man. The applicant had participated in criminal activity in order to support his drug addiction. However, he had not used drugs or been involved in criminal activity since moving from Calgary to Vancouver with his family in June of 1994, more than a year before he was incarcerated. The applicant had supported his family by working in a fish processing plant and delivering newspapers. He planned to return to his old jobs upon his release from prison and felt that he would receive support from the people he worked with and his family. Finally, the applicant is a Convention refugee who escaped from Vietnam because he was persecuted for his political opinion. The applicant submits that he will be at serious risk of imprisonment and death upon return to Vietnam.

On June 19, 1996, the Minister served the applicant with the opinion pursuant

to subsection 70(5) and paragraph 53(1)(d) of the Act that the applicant constitutes a danger to the public in Canada.

On July 2, 1996, the applicant was released into custody and on July 4, 1996, a detention hearing was heard and the applicant was released.

The relevant provisions of the Act are as follows:

> 53(1)Notwithstanding subsections 52(2) and (3), no person who is determined under this Act or the regulations to be a Convention refugee, nor any person who has been determined to be not eligible to have a claim to be a Convention refugee determined by the refugee Division on the basis that the person is a person described in paragraph 46.01(1)(a), shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group on political opinion unless
>
> > (a)the person is a person described in subparagraph 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 and the Minister if of the opinion that the person constitutes a danger to the public in Canada.
>
> 70(5)No appeal may be made to the appeal Division by a person described to 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.

In *The Minister of Citizenship and Immigration v. Williams*, April 11, 1997, Court File A-855-96, the Court of Appeal found that subsection 70(5) of the Act does not engage interests affecting liberty and/or security of the person pursuant to section 7 of the *Charter of Rights and Freedoms* (the Charter). Strayer J.A. went on to deal with questions 2 and 3 even though he stated, strictly speaking, he need not do so. However, what is important for the matters in question in this case is that he answered them in case he was incorrect with respect to his conclusion that section 7 is not engaged. He concluded there was no breach of the principles of fundamental justice.

In both subsection 70(5) and paragraph 53(1)(d) the question is whether in the Minister's opinion, a person is a danger to the public. The nature of the decision is the same under both and there is no breach of fundamental justice. The effect of the Minister's opinion under subsection 70(5) is to remove the right of appeal to the Appeal Division while the effect under paragraph 53(1)(d) is to allow the removal of a Convention refugee.

Although the applicant in the case before me is challenging the Minister's opinion and not a deportation order, I adopt the reasoning in the Federal Court of Appeal's decision in *Hoang v. Canada (Minister of Employment & Immigration)* (1990), 13 Imm. L.R. (2d) 35 where MacGuigan J.A. stated as follows at page 41:

> The distinction proposed by the appellant is that the result should be different where the deportee is a Convention refugee, in whose case one must presume persecution on return. No doubt the result is different, though not necessarily more calamitous for the deportee than extradition, as allowed by the Supreme Court in *R. v. Schmidt*, [1987] 1 S.C.R. 500, 61 O.R. (2d) 530 (note), 53 C.R. (3d) 1, 33 C.C.C. (3d) 193, 28 C.R.R. 280, 39 D.L.R. (4th) 18, 76 N.R. 12, 20 O.A.C. 161 and *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, 48 C.C.C. (3d) 193, 42 C.R.R. 101, 96 N.R. 321, 23 Q.A.C. 182. However, we find the appellant's distinction untenable in that, on the authority of *Hurd* and *Chiarelli*, deportation for serious offences affects neither s. 7 nor s. 12 rights, since it is not to be conceptualized as either a deprivation of liberty or a punishment ...

The Court found it was not contrary to the Charter to deport a person who has run afoul of Canada's criminal law. It was also confirmed by the Supreme Court of Canada in *Chiarelli v. M.E.I.* (1992), 135 N.R. 161 that Canada can deport persons who do not abide by the law. It does not violate the principles of fundamental justice nor does it violate the United Nations Convention relating to the status of refugees.

Further, in my view, by analogy, *Nguyen v. Canada (Minister of Employment & Immigration)* (1993), 18 Imm. L.R. (2d) 165 (F.C.A.) supports the position that the removal of appeal to the Immigration Appeal Board does not violate the rules of fundamental justice. As stated by Marceau J.A. at 173:

> ... Similarly in our case, while a determination of the ineligibility under subpara. 46.01(1)(e)(ii) of the Act is only indirectly linked to the deportation order, nevertheless it has the effect of taking away the only possible barrier to the issuance of an unconditional deportation order, and as such participate in the deprivation of liberty and, possibly, the security of the individual which results from deportation. More generally, the deprivation of liberty involved in any

> forced deportation is given a new dimension by the fact that the individual to be deported claims to be a refugee. It is appropriate, therefore, to assume that s. 7 of the *Charter* is brought into play with respect to the scheme as a whole, that is to say with respect not only to the issuance of the deportation order, but also to the ineligibility decision based on the public danger certificate. The question becomes whether the issuance of the public danger certificate, the central feature of the scheme as a whole, could be said to have violated a principle of fundamental justice.

Marceau J.A. then continues later stating:

> ... None of these submissions, however, convinces me that the legislation or its implementation in this case is constitutionally unacceptable.

In my view paragraph 53(1) is similar in effect to subparagraph 46.01(1)(e)(ii).

I also note with approval *Sinnappu* v. *The Minister of Citizenship and Immigration*, February 14, 1997, Court File IMM-3659-95 (F.C.T.D.) where McGillis J. stated at 19:

> In *Rodriguez v. B.C. (A.G.)*, [1993] 3 S.C.R. 519, Sopinka, J. outlined, at page 584, the following approach to be taken in assessing an alleged violation of the section 7 *Charter* rights of an individual to life, liberty and security of person:
>
> Section 7 involves two stages of analysis. The first is as to the values at stake with respect to the individual. The second is concerned with possible limitations of those values when considered in conformity with fundamental justice.
>
> In conducting the first stage of the two part analysis, the rights accorded under the provisions of the *Act* and the *Regulations* to the applicants as unsuccessful refugee claimants must be examined in order to determine the scope of protection available to them under section 7 of the *Charter*. Such rights represent the legislative embodiment of "... the values at stake with respect to the individual." [footnote omitted]

I note that McGillis J. was dealing with a non-successful refugee claimant but the reasoning is also applicable to a successful one and she makes this clear when she states at 20:

> In *Ahani v. Her Majesty the Queen*, [1995] 3 F.C. 669 (F.C.T.D.); aff'd [1996] 201 N.R. 233 (F.C.A.), I noted at page 687 that, in recognition of Canada's obligations in respect of refugees, Parliament had provided in the *Act* certain limited rights to Convention refugees, including a qualified right to remain in Canada and a qualified prohibition against removal to a country where life or freedom would be threatened. [footnote omitted]

It should be kept in mind that at this stage the applicant is not being removed to a specific country nor is the applicant challenging a removal order.

I must now examine whether the Minister followed the principles of fairness in the procedures used in the case at bar. The applicant suggested the Minister failed by not permitting an oral hearing. In *Nguyen v. The Minister of Employment and Immigration, supra* it was expressly held that an oral hearing was not required. The courts have held that what is required in these procedures is for the person involved to know the case against them and to have full opportunity to make submissions. This was done in this case and there is no breach by denying an oral hearing. The applicant also argued that the applicant could not have full opportunity to make submissions because the Minister's representative refused to grant an extension of time. However, to be specific, the Minister's representative allowed a one week extension rather than the two or three weeks requested. I am satisfied that the Minister's representative granted a reasonable extension of time in the circumstances. The Minister's representative took into consideration the limited English of the applicant and granted an extension albeit not as long as that requested by the applicant. It is clear that the Minister's delegate had the applicant's submissions before him in making the decision.

The applicant had concerns with two documents before the Minister which were not available to the applicant. The first was the danger to the public ministerial opinion report written by the local immigration officer and second, was the request for the Minister's opinion form prepared by the reviewing officer and senior analyst in the case management branch. I must look at the reported errors in light of the standards of judicial review set out in *Williams, supra*. At 26 Strayer J.A. states:

> ... 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.

Strayer J.A. also addresses the question as to what I should do if I am of a

different opinion than the Minister with respect to whether the applicant is a danger to the public. As Strayer J.A. states at 25 the test is as follows:

> ... 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. There is simply no evidence that any of these things occurred and I fail to see how the result can be regarded as perverse: that is I do not see how it can be said that it was not open to the Minister's delegate to form the opinion based on Williams' convictions, their nature and frequency, and the comments of the sentencing judge, that he represented a danger to the Canadian public ...

He reiterates this test earlier at 24 when he states:

> ... I have pointed out earlier the limited scope of judicial review of such decisions. The Court is not invited to sit on appeal and to redetermine findings of fact. It is not the opinion of the judge which is required as to whether the non-citizen presents a danger to the public ...

The first matter that the applicant states was mischaracterized was in the danger to the public ministerial opinion report at section 11 under DANGER RATIONALE where two of the statements are as follows:

> -He has supported himself in Canada almost exclusively through criminal activity

The applicant submits that there was evidence to show that he worked at two jobs for a period of a year from June 1994 until August 1995 in a fish processing plant and part-time delivering newspapers. In my view, the sentence is not misleading. The second subject matter is:

> -Prison sentences have deterred subject's criminal activity only for the period of time he actually is incarcerated (See "Excerpt of Proceedings" -- the sentencing portion of his last criminal trial)

It is clear that the sentencing judge did not state the matter in these terms. However, the sentencing judge did indicate that prison did not deter the applicant from further criminal activities. Again, this is a summary of the opinion of the local office and cannot be characterized as misleading.

The applicant is also concerned about the statement in the Request for the

Minister's Opinion - A70(5) and A53(1) wherein he states:

> Mr. Ngo's legal representative has forwarded a submission indicating that he does not want to return to Vietnam due to the overall situation in Vietnam and his fear that the Vietnamese Government will not live up to their international obligations regarding his treatment should he be returned. He fears execution due to his escape from an economic zone to which he was sent. There is no apparent rationale to suggest that Vietnamese authorities would have any political reason to detain or harass him. While drug trafficking is an offence punishable by death in Vietnam and his other convictions (if they occurred in Vietnam) would be viewed as 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. Ngo's removal to Vietnam cannot take place.

It is correct that Mr. Ngo's counsel did not state that Mr. Ngo did not want to return to Vietnam due to the overall situation in Vietnam. He was concerned about his prior political activity but he was also afraid of execution due to his escape from the economic zone to which he was sent. In my view, this is not a material error. Counsel did state in the Minister's record at page 33:

> It is submitted that if Mr. Ngo is deported to Vietnam, he will be at serious risk of persecution, and very likely, death.

Accordingly, the essence of what counsel said is included in the submissions. The applicant did raise political concerns because of his anti-government activity while he was in Vietnam but the Minister's representatives are entitled to select the documents they wish to rely on in the summary. The applicant was also concerned about certain comments under the heading REVIEWING OFFICER'S COMMENTS AND RECOMMENDATION at page 4 of the Minister's record. The applicant takes exception to the following:

> ... I find that there are insufficient humanitarian and compassionate considerations present which would outweigh the danger to the public aspect of this case. Mr. Ngo has been convicted of the serious offence of Trafficking in a Narcotic. This is his third narcotics related conviction. There is no indication that he would not return to this same occupation if he was allowed to remain in Canada. There is also a statement from Calgary Police that Mr. Ngo is an "associate" to the Asian organized crime element.

The applicant points out that in the applicant's submission it showed that in the period June 1994 until August 1995 that the applicant did work at two jobs as stated above and supported his family. There is no evidence that he engaged in any drug related activity during that period of time. He also objects to the statement from the

Calgary police stating that the applicant was an associate in crime when the applicant had not lived in Calgary since June of 1994. Again the Minister's officials are allowed to interpret the evidence as long as it is substantially correct in their summary in the request for the Minister's opinion. I do not agree that there is any obligation in law for the two reports prepared by the local office and then the national office to be shown to the applicant before the Minister issues the opinion as long as the two opinions do not introduce new evidence or materially mischaracterize the evidence. The summaries cannot be challenged. This case is not like *Kim v. The Minister of Citizenship and Immigration*, March 5, 1997, Court files Nos IMM-154-96, IMM-155-96 (F.C.T.D.) where the Minister introduced evidence of a phone call from a parole officer wherein a parole officer stated certain things which were in contrast to what was stated in the written report. The applicant had no opportunity in the *Kim* case to respond to these new suggestions which were contrary to the written material that had been supplied to the applicant. There is no similar new material here. Likewise in *Ibraham v. The Minister of Citizenship and Immigration*, November 29, 1996, Court File No. IMM-766-96, there was a new document entered into the material of criminal backlog review report which the applicant had not seen. The Minister's officials are allowed to summarize the evidence before them and they are not obligated to repeat every point made by the applicant. It is a summary report and there is no extrinsic material in these two reports. In my view in the first report from the local office there was material on file which supported all of the submissions in the letter from counsel. In my view the statements of Strayer J.A. at page 25 of *Williams, supra* are appropriate in the case at bar. He stated:

> 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 ...

The summary by its nature cannot include every single submission of the applicant. The applicant is concerned that the Minister's officials have chosen different aspects to highlight than the applicant's counsel would have but this is the nature of a

summary.

The applicant also raised one other point and that was the use of the Country Reports in the request for the Minister's opinion was use of an extrinsic document, however, the applicant was told that the Minister might be looking at the Country Reports prior to the time he was to make submissions in this matter. There is no breach of justice in using the Country Reports as was done in the case at bar. The applicant also said there was no evidence here with respect to the future danger to the public. I do not agree and again I am in agreement with the remarks of Strayer J.A. in *Williams, supra* when he states at page 16:

> ... I agree with Gibson J. in the *Thompson* case that "danger" must be taken to refer to a "present or future danger to the public". But I am reluctant to assert that some particular kind of material must be available to the Minister to draw a conclusion of present or future danger. I find it hard to understand why it is not open to a minister to forecast future misconduct on the basis of past misconduct, particularly having regard to the circumstances of the offences and, as in this case, comments made by one of the sentencing judges. A reviewing court may disagree with the Minister's forecast, or consider that more weight should have been given to certain material, but that does not mean that the statutory criterion is impermissibly vague just because it allows the Minister to reach a conclusion different from that of the Court. [footnote omitted]

In my view, the Minister's opinion is not patently unreasonable. The Minister had the relevant evidence before her and the weight to be accorded to that evidence is a matter for the Minister to decide and not for the Court. In my view, the analysis and advice contained in the two reports prepared by the local and national office for the Minister are not so flawed as to require me to refuse to support such a decision. There is no breach of natural justice. Accordingly, the application for judicial review is dismissed.

For the reasons submitted by counsel for the respondent, the four questions submitted by the applicant are not serious questions of general importance. There is no breach of fundamental justice in the applications herein.

William P. McKeown
Judge

OTTAWA, ONTARIO
June 17, 1997