A-265-00

2001 FCA 378

Sriskanthan Krishnapillai (*Appellant*)

v.

Her Majesty the Queen and **The Minister of Citizenship and Immigration** (*Respondents*)

Indexed as: Krishnapillai v. Canada (C.A.)

Court of Appeal, Richard C.J., Décary and Noël JJ.A.-- Montréal, November 20; Ottawa, December 6, 2001.

Citizenship and Immigration -- Exclusion and Removal -- Immigration Inquiry Process -- Appellant, permanent resident originally recognized as Convention refugee, ordered deported as danger to public--Application for leave to file judicial review application on ground administrative process under Immigration Act, s. 53(1) unconstitutional denied without reasons--Prothonotary striking out subsequent action raising same issue, plus issue of constitutionality of leave requirement in s. 82.1--In dismissing appeal, Motions Judge holding s. 82.1 could not be attacked on basis infringed Convention on Status of Refugees, Arts. 16, 32 because those provisions not incorporated into domestic law--Art. 16 granting refugees "free access to courts of law"--Art. 32 prohibiting expulsion of Convention refugee except on grounds of national security or public order, and then only in accordance with due process of law--While not incorporated into domestic law, Canadian legislation implicitly not at odds with those provisions --Art. 16 implicitly recognizing refugees subject to procedures available in country in which have habitual residence--Not imposing on state obligation to make available to refugees most favourable procedures that can be put in place--Leave requirement usual procedure in Canadian law and accepted form of access to courts of country--No suggestion in Canada refugees not having free access to leave requirement procedure within meaning of Convention.

Practice -- Res Judicata --Appeal from dismissal of appeal from Prothonotary's decision striking out action challenging constitutionality of Immigration Act, ss. 53(1), 82.1--Motions Judge holding F.C.A. already decided s. 82.1 consistent with Charter, ss. 7, 12, constitutionality of s. 53 res judicata--For doctrine of issue estoppel to apply, same question must have been actually decided in first proceeding; must be clear from facts same issue decided; issue out of which estoppel said to arise must have been fundamental to decision arrived at in earlier proceeding--Decision re: leave not decision on merit--Particularly with respect to constitutional issue, judgment denying leave to seek judicial review without reasons not deciding issues raised by applicant on merit with certainty required by doctrine of res judicata.

Practice -- Pleadings -- Motion to Strike --Appeal from dismissal of appeal from Prothonotary's decision striking out statement of claim--Application for leave to file judicial review application

on ground administrative process under Immigration Act, s. 53(1) unconstitutional denied--Action subsequently commenced raising same issue, and also challenging constitutionality of leave requirement in s. 82.1--S. 82.1 providing no appeal from judgment denying leave--Parliament clearly intending to put end to challenge of determination under Immigration Act at early stage--Where leave denied, commencement of action raising issue that could have been raised in leave application indirect attempt to circumvent intent of Parliament and collateral attack on judgment denying leave--Appeal dismissed on ground action abuse of process.

Constitutional Law -- Charter of Rights -- Life, Liberty and Security --Appeal from dismissal of appeal from Prothonotary's decision striking out action challenging constitutionality of Immigration Act, s. 82.1 on ground F.C.A. already holding consistent with Charter, ss. 7, 12--S. 82.1 imposing requirement to obtain leave before commencing application for judicial review--Not imposing obligation to give reasons for denying leave--Judicial decisions not subject to requirement of giving formal reasons--Nothing in Baker v. Canada (Minister of Citizenship and Immigration) importing such requirement with respect to judicial decisions denying leave to seek judicial review--Attack on constitutionality of leave requirement prescribed by s. 82.1 had no chance of success.

This was an appeal from the Motions Judge's dismissal of an appeal from the Prothonotary's decision striking out the statement of claim. The appellant, who had been recognized as a Convention refugee, but subsequently became a permanent resident, was ordered deported on the basis that he was a danger to the public. He sought leave under *Immigration Act*, section 82.1 to file a judicial review application with respect to the Minister's finding that he was a danger to the public. The principal issue raised therein was whether the administrative process under subsection 53(1) was unconstitutional. Leave was denied without reasons. The appellant then commenced an action again challenging the constitutionality of subsection 53(1) and adding a challenge to the constitutionality of the leave requirement in section 82.1. The Prothonotary allowed a motion to strike the statement of claim. The Motions Judge dismissed the appeal therefrom on the grounds that the Federal Court of Appeal had already decided that section 82.1 was consistent with Charter, sections 7 and 12; section 82.1 could not be attacked on the basis that it infringed Convention on the Status of Refugees, Articles 16 and 32 because those sections had not been incorporated into domestic law; and the constitutionality of section 53 is *res judicata*. Article 16 grants refugees "free access to courts of law" in the sense of granting refugees the right to sue and to be sued in the courts of law of a Contracting state and to enjoy, when suing or being sued in the Contracting state in which he has his habitual residence, the same treatment as a national including legal assistance when available to nationals. Article 32 prohibits the expulsion of a Convention refugee except on grounds of national security or public order, and then only in accordance with due process of law.

Held, the appeal should be dismissed on the ground that the statement of claim was properly struck out as an abuse of the process of the Court and did not raise any reasonable cause of action.

For the doctrine of issue estoppel to apply, the same question must have been actually decided in the first proceeding. It must be clear from the facts that the question has indeed been decided, and the issue out of which the estoppel is said to arise must have been fundamental to the

decision arrived at in the earlier proceeding. There must be no doubt that the decision could not have been made without that issue being addressed and actually decided. The issue in a leave application is whether a fairly arguable case has been made. Once leave has been granted, the issue is whether the case has been made. It could not be said, for the purpose of the doctrine of *res judicata*, that the two issues were unequivocally similar. A decision granting or denying leave is not a decision on the merit of any given issue. Particularly with respect to a constitutional issue, a judgment denying leave to seek judicial review without reasons does not decide the issues raised by the applicant on their merit with such certainty, as required by the doctrine of *res judicata*, as to preclude the examination of the merit of these issues in a different sort of legitimate proceeding.

The constitutional issue was raised through the application for leave to seek judicial review along with other issues. Section 82.1 provides that there is no appeal from a judgment denying leave. Parliament clearly intended to put an end to the challenge of a determination made under the *Immigration Act* at an early stage. Where leave is denied, the commencement of an action raising an issue that was or could have been raised in the leave application is an indirect attempt to circumvent the intent of Parliament and a collateral attack on the judgment denying leave. This was an abuse of the process of the Court.

The Motions Judge correctly found that Articles 16 and 32 of the Convention Relating to the Status of Refugees had not been incorporated into domestic law. Those provisions, however, are still relevant. International norms were examined by the Court in *Bains v. Canada (Minister of Employment and Immigration)* and Canadian legislation was found, at least implicitly, not to be at odds with these norms. Article 16 implicitly recognizes that refugees are subject to the procedures available in the country in which they have their habitual residence. It does not impose on the state the obligation to make available to refugees because they are refugees the most favourable procedures that can be put in place. The right to apply for leave is a right of access to the courts. Leave requirement is a usual procedure in Canadian law and it is, in Canadian terms, an accepted form of access to the courts of the country. No suggestion was made that in Canada refugees do not have free access to the leave requirement procedure within the meaning of the Convention.

It was not clear that Article 32 relates to the judicial review process available once a decision is made to expel a refugee. If it does, there is no doubt that the leave requirement accords with due process of the law. The only novel issue raised in this appeal with respect to the constitutionality of the leave requirement is the failure to impose an obligation to give reasons when denying leave. Judicial decisions are not subject to the requirements of giving formal reasons, and nothing which was said in *Baker* with respect to the requirement that in certain circumstances reasons be provided for administrative decisions, led to the import of such a requirement with respect to judicial decisions denying leave to seek judicial review. The attack on the constitutionality of the leave requirement prescribed by section 82.1 had no chance of success.

statutes and regulations judicially

considered

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44].

Federal Court Act, R.S.C., 1985, c. F-7 , s. 57 (as am. by S.C. 1990, c. 8, s. 19).

Federal Court Rules, 1998, SOR/98-106, r. 221(1)(*a*),(*b*), (*f*).

Immigration Act, R.S.C., 1985, c. I-2 , ss. 27(1) (as am. by S.C. 1992, c. 49, s. 16), 53(1) (as am. by S.C. 1992, c. 49, s. 43; 1995, c. 15, s. 12), 82.1 (as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 19; S.C. 1992, c. 49, s. 73).

Immigration Regulations, 1978, SOR/78-172.

United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6, Arts. 16, 32.

cases judicially considered

applied:

Bains v. Canada (Minister of Employment & Immigration) (1990), 47 Admin. L.R. 317; 109 N.R. 239 (F.C.A.); *Singh v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 596 (C.A.) (QL); *RJR--MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; (1994), 111 D.L.R. (4th) 385; 164 N.R. 1; *Paul v. The Queen*, [1960] S.C.R. 452; (1960), 127 C.C.C. 129; 34 C.R. 110.

considered:

Metodieva v. Canada (Minister of Employment and Immigration) (1991), 132 N.R. 38 (F.C.A.); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 F.C. 592; (2000), 18 Admin. L.R. (3d) 159; 5 Imm. L.R. (3d) 1; 252 N.R. 1 (C.A.).

referred to:

Angle v. M.N.R., [1975] 2 S.C.R. 248; (1974), 47 D.L.R. (3d) 544; 74 DTC 6278; 2 N.R. 397; *Ernewein v. Minister of Employment and Immigration*, [1980] 1 S.C.R. 639; (1979), 103 D.L.R. (3d) 1; 14 C.P.C. 264; 30 N.R. 316; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; (1989), 59 D.L.R. (4th) 416; 26 C.C.E.L. 85; 89 CLLC 14,031; 93 N.R. 183; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 243 N.R. 22; *Supermarchés Jean Labrecque Inc. v. Flamand*, [1987] 2 S.C.R. 219; (1987), 43 D.L.R. (4th) 1; 28 Admin. L.R. 239; 87 CLLC 14,045; 78 N.R. 201; 9 Q.A.C. 161.

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APPEAL from a Motions Judge's dismissal of an appeal from a Prothonotary's decision striking out the statement of claim challenging the constitutionality of *Immigration Act*, subsection 53(1) and section 82.1 after leave had been denied to file a judicial review application of the Minister's finding that the appellant was a danger to the public. Appeal dismissed on the ground that the statement of claim was properly struck out as an abuse of process of the Court, and did not raise any reasonable cause of action.

appearances:

Pia Zambelli for appellant.

Michel Pépin for respondent.

solicitors of record:

Joseph W. Allen, Montréal, for appellant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English by

[1]Décary J.A.: The appellant was recognized as a Convention refugee in 1994. He became a permanent resident of Canada in 1996.

[2]He was ordered deported from Canada in 1999 pursuant to paragraph 53(1)(*d*) [as am. by S.C. 1992, c. 49, s. 43; 1995, c. 15, s. 12] of the *Immigration Act* [R.S.C., 1985, c. I-2] (the Act) on the basis that he was a danger to the public in Canada.

[3]He sought leave, under section 82.1 [as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 19; S.C. 1992, c. 49, s. 73] of the Act, to file a judicial review application with respect to the Minister's finding under subsection 27(1) [as am. *idem*, s. 16] of the Act that he was a danger to the public. The principal issue raised in the application for leave was whether the administrative process under subsection 53(1) of the Act was unconstitutional. Issues relating to the reasonableness of the Minister's finding were also raised. Leave was denied on September 30, 1999, without reasons.

[4]On November 26, 1999, the appellant commenced an action, once again challenging the constitutionality of subsection 53(1) and adding a challenge to the constitutionality of the leave requirement in section 82.1 of the Act. The respondent filed a motion to strike the statement of claim in its entirety on the basis that it disclosed no reasonable cause of action, that it was

immaterial or redundant and that it was an abuse of the process of the Court (paragraphs 221(1)(*a*), (*b*) and (*f*) of the *Federal Court Rules, 1998* [SOR/98-106]).

[5]On February 7, 2000, the Prothonotary struck out the statement of claim.

[6]On April 17, 2000, the Motions Judge dismissed the appeal from the order of the Prothonotary in the following terms:

CONSIDERING that the Federal Court of Appeal has already decided that Section 82.1 of the *Act* is consistent with Sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*, and

CONSIDERING that Section 82.1 cannot be attacked on the basis that it infringes Sections 16 and 32 of the 1951 Convention on the Status of Refugees, these sections have not been incorporated into domestic law and finally,

CONSIDERING that the issue of the constitutionality of Section 53 is *res judicata*, the plaintiff has failed to demonstrate that the decision rendered by Prothonotary Morneau is clearly wrong.

[7]I shall deal with the reasons of the Motions Judge in their reverse order.

The constitutionality of subsection 53(1) and *res judicata*

[8]Contrary to the Motions Judge, I would be reluctant to decide this question on the basis that the denial without reasons of an application for leave to seek judicial review gives rise to *estoppel* with respect to a constitutional issue raised in the application.

[9]For the doctrine of issue *estoppel* (as opposed to the doctrine of cause of action *estoppel*, which is not argued here) to apply, the same question must have been actually decided in the first proceeding. For the same question to have been actually decided in the first proceeding, it must be clear from the facts that the question has indeed been decided and the issue out of which the *estoppel* is said to arise must have been fundamental to the decision arrived at in the earlier proceeding. For the issue to have been fundamental to the earlier proceeding, there must be no doubt that the decision could not have been made without that issue being addressed and actually decided. There is no equivocal finding which can found issue *estoppel*. (See *Angle v. M.N.R.*, [1975] 2 S.C.R. 248; *The Doctrine of Res Judicata in Canada*, Donald J. Lange, Butterworths, 2000, at page 38 ff.)

[10]It is true, as noted by Mahoney J.A. in *Bains v. Canada (Minister of Employment and Immigration)* (1990), 47 Admin. L.R. 317 (F.C.A.), at page 318, that in leave applications under section 82.1 of the *Immigration Act* "the only consideration is whether a fairly arguable case has been disclosed". Yet, where there is a denial without reasons of a leave application, there could be so many grounds, apart from those raised by the applicant, on which the judge may have relied for *estoppel* to be said to arise with respect to any given issue. Even, for example, where only one legal issue is raised, the judge might have been of the view that the facts did not support the issue raised or that the issue raised was not determinative of the case.

[11]The issue, in a leave application under the *Immigration Act*, is whether a fairly arguable case has been made. Once leave has been granted, the issue is whether the case has been made. One cannot say, for the purpose of the doctrine of *res judicata*, that the two issues are unequivocally similar. Neither a decision granting leave nor a decision denying leave may be said to be a decision on the merit of any given issue. I have yet to see either type of decision successfully invoked as authority for the proposition that the issues raised in a leave application have been actually decided one way or the other.

[12]The case of *Metodieva v. Canada (Minister of Employment and Immigration)* (1991), 132 N.R. 38 (F.C.A.) on which the respondent relies is authority for the proposition that the Court has no jurisdiction, once it has denied a leave application, to hear a leave application pertaining to the same matter. The decision in *Metodieva* was not based on *res judicata*.

[13]More to the point, perhaps, is a decision I made as a single judge in *Singh v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 596 (C.A.) (QL). The respondent had suggested that where an application for leave to appeal raises an issue concerning the constitutional operability of a paragraph of the *Immigration Regulations, 1978* [SOR/78-172], the applicant ought to give notice of the constitutional question under section 57 of the *Federal Court Act* [R.S.C., 1985, c. F-7 (as am. by S.C. 1990, c. 8, s. 19)]. I had dismissed the suggestion in the following words [at paragraph 2]:

That suggestion is without merit. Section 57 requires a notice "where the constitutional validity, applicability or operability of . . . regulations . . . is in question before the Court. . .". In the application for leave to appeal, the Court is not being asked to adjudge the constitutional validity, applicability or operability of a law, but rather the Court is being asked to decide whether or not there is an arguable case to be heard by the Court. A notice of a constitutional question would be premature, if not presumptuous at this preliminary stage.

[14]I note that in *RJR--MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, Sopinka and Cory JJ., while dealing with interlocutory motions to stay proceedings, expressed the view, at page 337, that:

. . . a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

[15]In *Paul v. The Queen*, [1960] S.C.R. 452, a decision referred to with approval by Chief Justice Laskin in *Ernewein v. Minister of Employment and Immigration*, [1980] 1 S.C.R. 639, Taschereau J. made the following observation at page 457:

It is furthermore my strong view, that a refusal by a Court of Appeal to grant leave to appeal is not tantamount to a dismissal of the appeal. It simply means that the right of appeal which does not exist as of right, but only by leave, never came into being. A judgment on an application for leave to appeal *is one judgment*, and the disposal of the case on its merits when leave has been granted *is another judgment*. The refusal by the Court of Appeal to grant leave is not a disposal of the case on its merits.

Taschereau J. was speaking on behalf of Abbott J. and his view on this matter was adopted at page 466 by Fauteux and Judson JJ.

[16]I appreciate that these views were expressed in a different legislative context and that they were not made in discussions pertaining to *res judicata*, but they reinforce my reluctance, particularly with respect to a constitutional issue, to rule that a judgment denying leave to seek judicial review without reasons is a judgment which can be said to decide the issues raised by the applicant on their merit with such certainty, as required by the doctrine of *res judicata*, as to preclude the examination of the merit of these issues in a different sort of legitimate proceeding.

[17]In the end, I prefer not to base my conclusion on the doctrine of *res judicata* and to rely, for the following reasons, on the abuse of the process of the Court.

[18]The constitutional issue was raised, as is mandated by section 82.1 of the Act, through the only process contemplated by Parliament to challenge the Minister's decision: an application for leave to seek judicial review. The issue was raised, one must assume, with the other issues that could be raised in order to challenge the decision of the Minister. Section 82.1 of the Act provides that there is no appeal from a judgment denying leave. The intent of Parliament was clearly to put an end to the challenge of a decision made under the *Immigration Act* at an early stage, i.e. as soon as leave was denied. Where leave is denied, the commencement of an action raising an issue that was or could have been raised in the leave application is an indirect attempt to circumvent the intent of Parliament and a collateral attack on the judgment denying leave. This is an abuse of the process of the Court.

[19]This conclusion disposes of the issue raised with respect to the constitutional validity of subsection 53(1). It could dispose, also, of the better part of the issues raised with respect to the constitutional validity of the leave requirement because, apart from the issue relating to the absence of reasons in denying leave which obviously could not have been raised prior to the decision denying leave, these issues could and should have been raised at the first opportunity, i.e. in the leave application. However, the argument was not made on that basis, and I shall treat the whole issue of the validity of the leave requirement under the following heading, as was done by the parties.

<u>The constitutionality of the leave requirement under section 82.1 and articles 16 and 32 of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6 (the Convention)</u>

[20]The first two grounds relied upon by the Motions Judge may be examined together.

[21]Articles 16 and 32 of the Convention read as follows:

Article 16

Access to courts

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*.

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

. . .

Article 32

Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

[22]Counsel for the appellant concedes that these provisions have not been incorporated into Canadian domestic law. (I note that in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 F.C. 592 (C.A.), this Court expressed the view, in *obiter*, at paragraph 116, that Article 32, paragraph 2 of the Convention "has become part of our domestic law with the promulgation of the *Immigration Act*". The Court, as it appears clearly in the context, was in reality referring to paragraph 3.) Counsel argues, rather, that even though the provisions have not been so incorporated, they are nevertheless relevant to the extent that it is now settled law that international norms should inform the interpretation of the Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] (see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at page 1057, Lamer J.; *Suresh*, *supra*, at paragraph 22) and "may help inform the contextual approach to statutory interpretation and judicial review" *(Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 70, L'Heureux-Dubé J.).

[23]The Motions Judge was correct in finding that the provisions had not been incorporated into domestic law. If that finding meant that they were irrelevant, she was wrong. I shall examine the impact of these provisions in a few moments.

[24]In dealing with the constitutionality of section 82.1 of the *Immigration Act*, it is useful, first, to quote from the reasons of Mahoney J.A. in *Bains*, *supra*, at page 318:

The requirement of leave does not deny refugee claimants access to the court. The right to apply for leave is itself a right of access to the Court and, in our opinion, the requirement that leave be obtained before an appeal or application for judicial review may proceed does not impair rights guaranteed refugee claimants under either s. 7 or 15 of the *Canadian Charter of Rights and Freedoms*.

[25]Counsel for the appellant correctly points out that *Bains* was rendered in a case involving a Convention refugee claimant and not, as in this case, a Convention refugee. The Convention, therefore, did not apply. Yet, in the extensive written representations then submitted to the Court by Mrs. Jackman, counsel for Mr. Bains, it was argued under the heading "International Norms", in paragraph 20, that:

Where fundamental rights are concerned, the importance of an effective remedy before the courts and free access to the courts have been recognized internationally.

and reference was made, *inter alia*, to the Convention and, more particularly, to articles 16 and 32. Counsel concluded, at paragraph 22:

In particular, it is submitted that the international community has recognized that where refugee protection is in issue, there must be an effective appellate or review remedy on the merits.

[26]It follows that international norms were examined by the Court in *Bains* and that the Canadian legislation was found at least implicitly not to be at odds with these norms. For greater certainty, however, I have examined closely the provisions of Article 16 and of Article 32, paragraphs 1 and 2 of the Convention on which counsel relies. I have been careful, in doing so, not to import in our statute the very words of the Convention, for these words are only to be used as guides helping us in the interpretation of the provisions of our own statute. It is the spirit, rather than the words, of the Convention that should guide us.

[27]Article 16 is found in Chapter II of the Convention. Chapter II deals with the "Juridical Status" of refugees in their country of refuge once their refugee status has been determined. I note in passing that, according to paragraph 12(ii) of the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* published by the Office of the United Nations High Commissioner for Refugees, the provisions of Chapter II "have no influence on the process of determination of refugee status". That process has been completed here.

[28]Article 16 is entitled "Access to Courts" (*Droit d'Ester en Justice*). It is a general provision granting refugees "free access to the courts of law" (*libre et facile accès devant les tribunaux*) in the sense of granting refugees the right to sue and to be sued in the courts of law of a Contracting State and to enjoy, when suing or being sued in the Contracting State in which he has his habitual residence, the same treatment as a national including legal assistance when available to nationals.

[29]According to the Travaux Préparatoires of the Convention, as analysed in 1995 by Dr. Paul Weis (Weis (ed.), *The Refugee Convention, 1951*, Cambridge International Documents Series, Volume 7, Cambridge University Press), the purpose of Article 16 is essentially the following (at page 131):

Although in principle the right of a refugee to sue and to be sued is not challenged, in practice there are insurmountable difficulties to the exercise of this right by needy refugees: the obligation to furnish *cautio judicatum solvi* and the refusal to grant refugees the benefit of legal assistance make the right illusory.

[30]"Free access to the courts of law" (*libre et facile accès devant les tribunaux*) are therefore words that are addressed, not to the type of procedure prescribed by the national law, but to the effective access to courts of law by refugees. Legal aid and exemption from security for costs were expressly provided for in paragraph 2 of Article 16. Items such as free assistance of an interpreter are contemplated by the use of the word "including" in that paragraph.

[31]Article 16 does not define a special procedure nor does it provide for special procedures for refugees. Quite to the contrary: in granting refugees the right to equal treatment before the courts, it implicitly recognizes that refugees are subject to the procedures available in the country in which they have their habitual residence. Article 16 does not impose on the state the obligation to make available to refugees because they are refugees the most favourable procedures that can be put in place.

[32]There is no doubt that the right to apply for leave is a right of access to courts. Leave requirement is a usual procedure in Canadian law and it is, in Canadian terms, an accepted form of access to the courts of the country. No suggestions were made that in Canada refugees do not have free access to the leave requirement procedure within the meaning of the Convention: counsel did not argue that legal aid and interpretation services were not available or that security for costs need be given and counsel has not referred the Court to any sort of obstacle contemplated by the Convention that would prevent a refugee from requesting leave to seek judicial review.

[33]Article 32 (Expulsion) is found in Chapter V, "Administrative Measures". It is not clear to me that it relates to the judicial review process available once a decision is made to expel a refugee. If it does, there is no doubt, in my view, that the leave requirement accords with due process of law.

[34]The only novel issue raised in this appeal with respect to the constitutionality of the leave requirement is the failure to impose an obligation to give reasons when denying leave. I say it is a novel issue because it was not formally raised in *Bains*, although counsel and the Court were certainly well aware of the general practice of the Court to deny leave without giving reasons.

[35]That neither the Court nor counsel seemed to be concerned with that practice is hardly surprising. It was then settled law that judicial decisions are not subject to the requirement of giving formal reasons (see *Supermarchés Jean Labrecque Inc. v. Flamand*, [1987] 2 S.C.R. 219, at page 233) and in my view nothing which was said in *Baker* at paragraph 35 ff. with respect to

the requirement that in certain circumstances reasons be provided for administrative decisions, leads to the import of such a requirement with respect to judicial decisions denying leave to seek judicial review.

[36]The attack on the constitutionality of the leave requirement prescribed by section 82.1 of the *Immigration Act* has no chance of success.

[37]The statement of claim was properly struck out in its entirety as it was on the one hand an abuse of the process of the Court and as it did not, on the other hand, raise any reasonable cause of action.

[38]The appeal will therefore be dismissed with costs.

Richard C.J.: I agree.

Noël J.A.: I agree.