McAllister v. Canada (Minister of Citizenship and Immigration) (T.D.), 1996 CanLII 4030 (F.C.)

Date: 1996-02-08
Docket: IMM-3223-94 • IMM-4348-94
Parallel citations: [1996] 2 F.C. 190 • (1996), 108 F.T.R. 1
URL: http://www.canlii.org/en/ca/fct/doc/1996/1996canlii4030/1996canlii4030.html

IMM-3223-94

Malachy McAllister (*Applicant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

IMM-4348-94

Malachy McAllister (*Applicant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

Indexed as: McAllisterv. Canada (Minister of Citizenship and Immigration) (T.D.)

Trial Division, MacKay J."Toronto, March 2, 1995; Ottawa, February 8, 1996.

Citizenship and Immigration " Status in Canada " Convention refugees " Judicial review of Minister's decision, pursuant to Immigration Act, s. 46.01(1)(e)(ii), contrary to public interest to determine applicant's refugee claim under Act; senior immigration officer's decision applicant not eligible to have claim determined by CRDD " Applicant admitting membership in organization proscribed in Northern Ireland, engaged in terrorism " S. 19(1)(f)(iii)(B) precluding admission of persons reasonably believed to be members of organization reasonable ground to believe engaged in terrorism " Not making membership in organization unlawful in Canada, but precluding admission of persons described " Applies to foreign nationals having no right to enter, remain in Canada " Reasonable grounds to conclude applicant person described in s. 19(1)(f)(iii)(B).

Constitutional law " Charter of Rights " Life, liberty and security " Applicant notified Minister would be considering whether in public interest to have refugee claim determined under Immigration Act, given copies of information in Minister's possession " Minister reviewing applicant's written representations, other information, before deciding in public interest applicant's refugee claim not be determined under Act " No personal interview " (1) Principles of fundamental justice not requiring oral hearing in all circumstances " Ss. 46.01(1)(e), 27(2)(a), 19(1)(f)(iii)(B) provided valid process not violating principles of fundamental justice, providing requirements of fair hearing met " Applicant apprised of case to be met, adequate opportunity to respond " Fair hearing requirements met " No issue of credibility requiring oral hearing " No evidence before Minister of which applicant not aware " (2) Delay of 5 1/2 years between making Convention refugee claim and Minister's decision pursuant to s. 46.01 not in public interest to determine claim under Immigration Act " Claim in non-criminal case to Charter relief based on delay requiring evidence or inference of prejudice to applicant because of delay " Even if

Minister's decision struck down applicant still member of inadmissible class described in s. 19(1)(f) i.e. person reasonably believed to be member of organization reasonably believed to engage in terrorism " Not entitled to remain in Canada " Neither inference nor evidence prejudice to applicant caused by delay.

Bill of Rights " Applicant notified Minister would be considering whether in public interest to have refugee claim determined under Immigration Act, given copies of information in Minister's possession " Minister reviewing applicant's written representations, other information before deciding in public interest applicant's refugee claim not be determined under Act " No personal interview " Requirements of fair hearing under Canadian Bill of Rights, s. 2(e) met " Applicant apprised of case to be met, adequate opportunity to respond " No evidence before Minister of which applicant not aware.

Construction of statutes " (1) Immigration Act, s. 19(1)(f)(iii)(B) precluding admission to Canada of persons reasonably believed to be members of organization reasonable grounds to believe engaged in acts of terrorism " "Terrorism" not so vague as to be devoid of sufficient certainty of meaning, or that application of provision presenting uncertainty " (2) S. 46.01(1)(e)(ii) providing Convention refugee claimant ineligible to have claim determined by Refugee Division if adjudicator determining person described in s. 19(1)(f) and Minister of opinion contrary to public interest to have claim determined under Act " Use of "public interest" not rendering provision vague " Parliament declaring public interest in relation to class of individuals " Not so vague application by Minister not possibly subject to review " (3) Neither s. 19(1)(f)(iii)(B) nor s. 46.01(1)(e)(ii) applied retrospectively " Not retrospective legislation to adopt rule henceforth excluding persons from Canada on basis of past conduct " No vested right to have Convention refugee claim considered under rule prevailing when application made " As person with no right to enter Canada, claim subject to law prevailing when determined " By necessary implication, express provision, Parliament intending changes in Act applicable to cases arising for determination after amendments effective.

These were applications for judicial review of (1) the Minister's decision pursuant to subparagraph 46.01(1)(*e*)(ii) of the *Immigration Act* that it would be contrary to the public interest to have the applicant's refugee claim determined under the Act, and (2) the senior immigration officer's decision that the applicant was not eligible under subparagraph 46.01(1)(*e*)(ii) to have his Convention refugee claim referred to the Convention Refugee Determination Division. The latter decision followed from the former without any discretion on the officer's part under paragraph 45(1)(*a*). Subparagraph 46.01(1)(*e*)(ii) provides that a Convention refugee claimant is not entitled to have the claim determined by the Refugee Division if the person has been determined by an adjudicator to be a person described in paragraph 19(1)(*f*) and the Minister is of the opinion that it would be contrary to the public interest to have the claim determined under the Act.

The applicant was born in Northern Ireland. In 1981-1982, he was a member of the Irish National Liberation Army (INLA), an organization with a record of violence in Northern Ireland. He came to Canada in 1988 and applied for Convention refugee status on December 22, 1988. An inquiry was held and an adjudicator determined that the applicant was a person described in paragraph 27(2)(*a*) i.e. inadmissible person, and clause 19(1)(*f*)(iii)(B), i.e. a person who there were reasonable grounds to believe was a member of an organization that there were reasonable grounds to believe engaged in terrorism. He was advised that the Minister would be considering whether it would be in the public interest to have his refugee claim determined under the *Immigration Act*. He made written submissions and requested a personal interview. The applicant was subsequently informed by letter that the Minister, having reviewed those submissions and available information concerning the applicant, had reached the decision under attack. No mention was made of the request for an interview. The applicant was then advised of the senior immigration officer's decision.

On January 1, 1989, shortly after the applicant made his claim, "access criteria" which precluded refugee claimants from having their claims determined by the Refugee Division of the Immigration Refugee Board in circumstances specified by section 46.01, came into force.

The issues were (1) whether the failure to grant the applicant an interview amounted to denial of a fair hearing contrary to Charter, section 7 and *Canadian Bill of Rights*, paragraph 2(*e*); (2) whether the Minister's decision applying clause 19(1)(*f*)(iii)(B) was not based on a lawful foundation because it depended upon a finding of membership in an organization, a matter of belief, and not upon unlawful actions by the applicant; (3) whether the words "terrorism" in clause 19(1)(*f*)(iii)(B) and "public interest" in subparagraph 46.01(1)(*e*)(ii) were

unconstitutionally vague; (4) whether a delay of 5 1/2 years between the making and consideration of the applicant's refugee claim was unreasonable; and (5) whether the applicant had a right to have his claim to Convention refugee status determined in accordance with the law as it stood at the time he made his claim. Subparagraph 46.01(1)(*e*)(ii) and the current version of clause 19(1)(*f*)(iii)(B) came into force after he made his claim.

Held, the applications should be dismissed.

(1) The principles of fundamental justice under Charter, section 7, and the right to a fair hearing in accordance with those principles under *Canadian Bill of Rights*, paragraph 2(*e*) do not require an oral hearing in all circumstances. The key factor is the adequacy of the opportunity for the person affected to state his case and to know the case that has to be met. Subparagraph 46.01(1)(*e*)(ii), paragraph 27(2)(*a*), and clause 19(1)(*f*)(iii)(B) provide for a valid process under the Act which does not violate the principles of fundamental justice in light of Charter, section 7, *Canadian Bill of Rights*, paragraph 2(*e*), or natural justice requirements at common law, provided the process followed met the requirements for a fair hearing. The applicant was apprised of the case to be met and was given adequate opportunity to respond to that case by written submissions. There was no issue of credibility, the determination of which would require an oral hearing, as the applicant acknowledged his membership in the INLA, a proscribed organization in Northern Ireland. The applicant had been provided with copies of all information considered by the Minister. The requirements of a fair hearing were met.

(2) Clause 19(1)(*f*)(iii)(B) does not make membership in an organization unlawful in Canada. It does preclude admission to Canada of those who are found to be members of an organization that on reasonable grounds is found to have been or is engaged in terrorism. It applies to foreign nationals, who have no right to enter or remain in Canada except as the Act permits. The applicant acknowledged his membership in an organization, proscribed in Northern Ireland, which was engaged in terrorism. There were reasonable grounds to conclude the applicant was a person described in clause 19(1)(*f*)(iii)(B) and the Minister's decision was not tainted with error.

(3) Use of the term "terrorism" did not render clause 19(1)(*f*)(iii)(B) vague in the sense that it violated Charter sections 7 or 1, or that the applicant did not understand the meaning of the term in the circumstances. "Terrorism" is not used in clause 19(1)(*f*)(iii)(B) with reference to crimes of individuals, but as describing activities of organizations, membership in which is prescribed by Parliament as a basis for exclusion from admission to Canada. The word "terrorism" is defined in dictionaries. It is not so vague as to be devoid of sufficient certainty of meaning, or that application of the provision would present uncertainty. It is recognizable to individuals and to those applying the Act.

Use of "public interest" does not render subparagraph 46.01(1)(*e*)(ii) vague for constitutional or other reasons. Under clause 19(1)(*f*)(iii)(B) Parliament has declared that the basic public interest in relation to persons who were members of organizations reasonably believed to have engaged in terrorism is that such persons are not admissible to Canada unless they are exempt from that principle by a positive determination of the Minister that their admission would not be detrimental to the national interest. Subparagraph 46.01(1)(*e*)(ii) then provides an opportunity for the refugee claimant to persuade the Minister that it is in the public interest that his refugee claim be considered. If no determination of that issue is made, the claimant remains inadmissible. "Public interest" as used in subparagraph 46.01(1)(*e*)(ii) does not render that provision so vague that its application by the Minister could not be subject to review in a proper case.

(4) There was no basis for judicial intervention because of delay in the process of considering the applicant's Convention refugee claim. In a non-criminal case, a claim to Charter relief based on delay requires evidence, or some inference from the surrounding circumstances, that prejudice or unfairness resulted from the delay. Moreover, intervention by the Court to strike down a decision that has been delayed may simply result in more delay without in any way establishing a basis for the claim to refugee status. Thus, even if the Minister's decision were struck down, the applicant would remain a member of an inadmissible class described in clause 19(1)(*f*)(iii)(B) by reason of the adjudicator's decision which was not questioned by the applicant. Under the Act such a person is not entitled to remain in Canada. There was neither evidence nor inference of prejudice caused to the applicant by delay in dealing with his claim.

(5) Neither clause 19(1)(*f*)(iii)(B) nor subparagraph 46.01(1)(*e*)(ii) has been applied retrospectively. It is not retrospective legislation to adopt a rule that henceforth excludes persons from Canada on the basis of their conduct

in the past. The applicant, having made a Convention refugee claim, had no vested or entrenched rights to have that claim considered under the rules prevailing at the time of his application. He was a person with no right to enter or remain in Canada, except as provided by the *Immigration Act*, and any claim he made to enter or to remain was subject to the law prevailing when that claim was determined, not when the claim was made. Parliament intended, by necessary implication and by express provision, that changes in the Act would be applicable to cases arising for determination after the amendment became effective.

statutes and regulations judicially considered

An Act to amend the Immigration Act and other Acts in consequence thereof, S.C. 1992, c. 49, ss. 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120.

An Act to amend the Immigration Act, 1976 and to amend other Acts in consequence thereof, S.C. 1988, c. 35, s. 41.

Canadian Bill of Rights, R.S.C., 1985, Appendix III, s. 2(*e*).

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], ss. 1, 2, 7, 11(*e*), 15.

Combines Investigation Act, R.S.C. 1970, c. C-23 , s. 32(1).

Criminal Code, R.S.C., 1985, c. C-46 , ss. 465(1)(*a*) (as am. by R.S.C., 1985 (1st Supp.), c. 27, s. 61), 515(10)(*b*).

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

Immigration Act, R.S.C., 1985, c. I-2 , ss. 19(1)(*c*.1)(i) (as enacted by S.C. 1992, c. 49, s. 11), (*f*)(iii)(B) (as am. *idem*), (*g*), 27 (as am. by R.S.C., 1985 (3rd Supp.), c. 30, s. 4; S.C. 1992, c. 47, s. 78; c. 49, s. 16), 32 (as am. by R.S.C., 1985 (3rd Supp.), c. 30, s. 5; (4th Supp.), c. 28, s. 11; S.C. 1992, c. 49, s. 21), 32.1 (as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 12), 45(1)(*a*) (as am. *idem*, s. 14; S.C. 1992, c. 49, s. 35), (4) (as am. by S.C. 1992, c. 49, s. 35), 46.01 (as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 14; S.C. 1992, c. 49, s. 36; 1995, c. 15, s. 9), 83(1) (as am. by S.C. 1992, c. 49, s. 73).

Immigration Act, 1976, S.C. 1976-77, c. 52.

cases judicially considered

followed:

Nguyen v. Canada (Minister of Employment and Immigration), 1993 CanLII 2926 (F.C.A.), [1993] 1 F.C. 696; (1993), 100 D.L.R. (4th) 151; 14 C.R.R. (2d) 146; 18 Imm. L.R. (2d) 165; 151 N.R. 69 (C.A.).

applied:

Akthar v. Canada (Minister of Employment and Immigration), reflex, [1991] 3 F.C. 32; (1991), 50 Admin. L.R. 153; 14 Imm. L.R. (2d) 39 (C.A.).

distinguished:

Singh et al. v. Minister of Employment and Immigration, 1985 CanLII 65 (S.C.C.), [1985] 1 S.C.R. 177; (1985), 17 D.L.R. (4th) 422; 12 Admin. L.R. 137; 14 C.R.R. 13; 58 N.R. 1; *Yamani v. Canada (Solicitor General)*, 1995 CanLII 3553 (F.C.), [1996] 1 F.C. 174; (1995), 129 D.L.R. (4th) 226 (T.D.); *R. v. Morales*, 1992 CanLII 53 (S.C.C.), [1992] 3 S.C.R. 711; (1992), 51 Q.A.C. 161; 77 C.C.C. (3d) 91; 17 C.R. (4th) 74; 12 C.R.R. (2d) 31; 144 N.R. 176.

considered:

Allende v. Shultz, 845 F.2d 1111 (1st Cir. 1988); *R. v. Nova Scotia Pharmaceutical Society*,

1992 CanLII 72 (S.C.C.), [1992] 2 S.C.R. 606; (1992), 114 N.S.R. (2d) 91; 93 D.L.R. (4th) 36; 313 A.P.R. 91; 74 C.C.C. (3d) 289; 43 C.P.R. (3d) 1; 15 C.R. (4th) 1; 10 C.R.R. (2d) 34; 139 N.R. 241; affg reflex, (1991), 102 N.S.R. (2d) 22; 80 D.L.R. (4th) 206; 279 A.P.R. 222; 64 C.C.C. (3d) 129; 36 C.P.R. (3d) 173; 7 C.R.R. (2d) 352 (C.A.).

referred to:

Urbanek v. Canada (Minister of Employment & Immigration) (1992), 17 Imm. L.R. (2d) 153; 144 N.R. 77 (F.C.A.); *Angus v. Sun Alliance Insurance Co.*, 1988 CanLII 5 (S.C.C.), [1988] 2 S.C.R. 256; (1988), 65 O.R. (2d) 638; 52 D.L.R. (4th) 193; 34 C.C.L.I. 237; 47 C.C.L.T. 39; [1988] I.L.R. 1-2370; 9 M.V.R. (2d) 245; 87 N.R. 200; 30 O.A.C. 210; *Cortez v. Canada (Secretary of State)* (1994), 74 F.T.R. 9; 23 Imm. L.R. (2d) 270 (F.C.T.D.); *Rudolph v. Canada (Minister of Employment and Immigration)*, reflex, [1992] 2 F.C. 653; (1992), 91 D.L.R. (4th) 686; 73 C.C.C. (3d) 442; 14 C.R. (4th) 169; 142 N.R. 62 (C.A.).

APPLICATIONS for judicial review of (1) the Minister's decision pursuant to *Immigration Act*, subparagraph 46.01(1)(*e*)(ii) that it would be contrary to the public interest to have the applicant's refugee claim determined under the Act, and (2) the senior immigration officer's decision that the applicant was not eligible under subparagraph 46.01(1)(*e*)(ii) to have his claim to be a Convention refugee referred to the Convention Refugee Determination Division. Applications dismissed.

counsel:

Irvin H. Sherman, Q.C. for applicant.

Claire A. Le Riche for respondent.

solicitors:

Rekai & Johnson, Toronto, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for orders rendered in English by

MacKay J.: By two applications for judicial review, heard together, the applicant seeks to have set aside successive decisions made in relation to his claim to be a Convention refugee.

The first, in Court file IMM-3223-94, seeks review and an order setting aside the decision by the respondent Minister, communicated by letter dated May 26, 1994, pursuant to subparagraph 46.01(1) (*e*)(ii) of the *Immigration Act*, R.S.C., 1985, c. I-2 as amended [as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 14; S.C. 1992, c. 49, s. 36] (the Act), that it was the Minister's opinion that it would be contrary to the public interest to have the applicant's refugee claim determined under the Act.

The second application, in Court file IMM-4348-94, initiated on direction by the Court in response to the plaintiff's application to amend the original application, concerns the decision of a senior immigration officer, made under paragraph 45(1)(*a*) [as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 14; S.C. 1992, c. 49, s. 35], dated June 27, 1994, that the applicant is not eligible under subparagraph 46.01(1) (*e*)(ii) of the Act to have his claim to be a Convention refugee referred to the Convention Refugee Determination Division. That decision was said to be based on the determination of an adjudicator that he was a person described in paragraph 19(1)(*f*) [as am. by S.C. 1992, c. 49, s. 11] and the Minister was of the opinion it would be contrary to the public interest to have the applicant's claim determined under the Act.

I note that counsel for the parties were agreed that the senior immigration officer's decision, questioned in the second application for judicial review, follows, without any discretion on the officer's part, under paragraph 45(1)(*a*) from the decision of the Minister.

Background

The applicant, a citizen of the United Kingdom, was born in Northern Ireland in 1957 and he came to Canada in December, 1988 with his wife and four children. Soon after arrival in Canada he and his wife made separate claims to be Convention refugees.

As a young person growing up the applicant had a number of convictions for several minor offences between 1973 and 1980. From July 1981 until February 1982 he was a member of the Irish National Liberation Army (INLA), an organization with a record of violence in Northern Ireland. In July 1981 he was charged with a number of serious offences for which he was later convicted, including conspiracy to commit murder, wounding with intent, possession of a firearm, and belonging to a proscribed organization. Upon conviction he was sentenced for terms up to seven years to be served concurrently. In 1987 he was convicted on counts of assault on police and of resisting police and in 1988 he was convicted of driving with excess of alcohol. The later convictions, after his years of imprisonment, resulted in fines without further incarceration.

After his arrival in Canada the applicant was permitted to work; he and his family settled in southwestern Ontario where he found employment and they acquired a house.

In March 1993, Mr. McAllister was interviewed by immigration officials about his refugee claim. He was advised by letter of July 9, 1993 that there were insufficient humanitarian and compassionate grounds in his case to accept an application for permanent residence from within Canada and he would be advised of a hearing/inquiry on his refugee claim in due course.

On the same day, July 9, 1993, an immigration officer made a report pursuant to section 27 [as am. by R.S.C., 1985 (3rd Supp.), c. 30, s. 4; S.C. 1992, c. 47, s. 78; c. 49, s. 16] of the Act alleging that the applicant was a person in Canada other than a Canadian citizen or a permanent resident who there are reasonable grounds to believe has been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence punishable under an act of Parliament by a maximum term of imprisonment up to ten years or more. Persons falling in that class, defined by subparagraph 19(1)(*c*.1)(i) [as am. by S.C. 1992, c. 49, s. 11] of the Act are inadmissible to Canada. That report was said to be based on information that the applicant was convicted in Northern Ireland of the offence of conspiring to commit murder, an offence which if committed in Canada, would constitute an offence contrary to paragraph 465(1)(*a*) of the *Criminal Code* [R.S.C., 1985, c. C-46 (as am. by R.S.C., 1985 (1st Supp.), c. 27, s. 61)]. Also on July 9, 1993 a direction was issued pursuant to subsection 27(3) of the Act for an inquiry to determine if the applicant was a person described in the immigration officer's report of that same day, i.e., a person described in paragraph 27(2)(*a*) and subparagraph 19(1)(*c*.1)(i) of the Act.

Subsequently on November 23, 1993 a further direction was issued pursuant to subsection 27(3) of the Act for an inquiry to determine if the applicant is a person described in paragraph 27(2)(*a*) and clause 19(1)(*f*)(iii)(B). The latter provisions, so far as they are relevant, are as follows:

19. (1) No person shall be granted admission who is a member of any of the following classes:

. . .

(*f*) persons who there are reasonable grounds to believe

. . .

(iii) are or were members of an organization that there are reasonable grounds to believe is or was engaged in

. . .

(B) terrorism,

except persons who have satisfied the Minister that their admission would not be detrimental to the national interest.

. . .

27. . . .

(2) An immigration officer or a peace officer shall . . . forward a written report to the Deputy Minister setting out the details of any information in the possession of the immigration officer or peace officer indicating that a person in Canada, other than a Canadian citizen or permanent resident, is a person who

(*a*) is a member of an inadmissible class, other than an inadmissible class described in paragraph 19(1)(*h*) or 19(2)(*c*).

As a result of the directions issued July 9 and November 23, 1993, Mr. McAllister was the subject of an inquiry before an adjudicator on January 17, 1994 when the adjudicator determined, on the basis of evidence before him, that the applicant was a person described in paragraph 27(2)(*a*), and subparagraph 19(1)(*c*.1)(i), and paragraph 27(2)(*a*) and clause 19(1)(*f*)(iii)(B). Having so found, the adjudicator issued a conditional deportation order pursuant to subsection 32.1(4) [as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 12] of the Act.

The applicant did not seek to review the determinations of the adjudicator made on January 17, 1994 that he was an inadmissible person for two reasons as described under the Act.

By letter dated February 22, 1994, delivered by hand and acknowledged by Mr. McAllister on March 9, 1994, the applicant was advised that the Minister is or "will be considering whether or not it is in the public interest to have your refugee claim determined under the Immigration Act . . . according to subparagraph 46.01(1)(*e*)(ii) of the Act, in that an immigration adjudicator has found you to be a person described in subparagraph 27(2)(*a*) for 19(1)(*f*)(iii)(B) of the Act".

The letter advised that the Minister's consideration was based on the finding by an adjudicator that he was a person who there are reasonable grounds to believe is or was "a member of an organization that there are reasonable grounds to believe is or was engaged in terrorism, pursuant to subparagraph 27(2)(*a*) for 19(1)(*f*)(iii)(B)". The applicant was invited to make written representations to the Minister within 15 days from March 9, 1994 if he wished to comment on the accuracy and correctness of the information on which an opinion of the Minister was to be made, or on any other information relevant to the issue. The letter stated that "Based on evidence submitted at the inquiry the Minister may be of the opinion that it is not in the public interest to have your refugee claim determined under the Act". If the Minister's opinion were negative, Mr. McAllister was advised he would not be eligible to have his claim to refugee status determined by the Refugee Division.

The applicant, through his counsel, made submissions to the Minister by letter dated March 23, 1994. By letter dated May 26, 1994 the Minister informed the applicant, through counsel, that, having reviewed the submissions made for the applicant and available information concerning Mr. McAllister, the Minister was of opinion it would be contrary to the public interest to have the applicant's refugee claim determined under the Act. Subsequently the applicant was advised by notice from a senior immigration officer dated June 27, 1994 that he had been found to be ineligible under paragraph 45(1)(*a*) to have his claim to be a Convention refugee referred to the Refugee Division of the Immigration and Refugee Board. The basis of that determination was said to be the determination (earlier) by an adjudicator that he was a person described in paragraph 19(1)(*f*) and that the Minister is of opinion it would be contrary to the public interest to have his claim determined under the Act.

The application for leave in file IMM-3223-94 was filed June 28, 1994. Subsequently, this Court ordered a stay of deportation of the applicant pending determination of the judicial review proceedings. The second application in Court file IMM-4348-94 was filed October 4, 1994, as earlier noted, pursuant to directions issued by a judge of the Court upon an application to amend the original application to include the decision of the senior immigration officer, dated June 27, 1994.

When the matters came on for hearing five issues were raised on behalf of the applicant. I deal in turn with each of these issues. They concern: fair hearing requirements in relation to the Minister's decision; the application of clause 19(1)(*f*)(iii)(B), a provision based on membership in an organization, not on actions by the applicant; the application of that provision made with reference to vague and ill-defined standards; the effect of the decision in light of what is said to be unreasonable delay in dealing with the applicant's claim; and the right of a claimant to determination of his claim under the law prevailing at the time the claim was made and the inapplicability of subsequent changes in the law adversely affecting that right.

A fair hearing

The first ground argued on behalf of the applicant is that the Minister, in forming his opinion concerning the public interest, denied the applicant a fair hearing, to which he is entitled under section 7 of the Charter[1] and under paragraph 2(*e*) of the *Canadian Bill of Rights*, R.S.C., 1985, Appendix III.[2] The refugee determination process under the Act is subject to both section 7 of the Charter and to section 2 of the *Canadian Bill of Rights*, and denial of a right to make a claim to refugee status without a hearing may violate both the Charter and the *Canadian Bill of Rights*.[3]

Here it is acknowledged that the applicant was given notice by the Minister in advance of the latter's decision of the public interest issue. Specifically he was advised that the Minister:

. . . is or will be considering whether or not it is in the public interest to have your refugee claim determined under the Immigration Act . . . according to subparagraph 46.01(1)(e)(ii) of the Act, in that an immigration adjudicator has found you to be a person described in subparagraph 27(2)(a) for 19(1)(f)(iii)(B) of the Act.

Specifically, this consideration is based on the adjudicator's finding that you are a person who there are reasonable grounds to believe are or was a member of an organization that there are reasonable grounds to believe is or was engaged in terrorism, pursuant to subparagraph 27(2)(a) for 19(1)(f)(iii)(B).

Based on evidence submitted at the inquiry the Minister may be of the opinion that it is not in the public interest to have your refugee claim determined under the Act.

The applicant was further advised that he, or counsel on his behalf, had 15 days to make written representations to the Minister "on the accuracy and correctness of the aforementioned information . . . or any other information relevant to the issue".

On behalf of the applicant, counsel did respond and make written submissions and he included a number of supporting documents. In the letter of submissions counsel did expressly request "the right to a personal interview with you and your officials prior to the formation of your opinion . . . . To deny our client this right would be to deprive him of fairness". The letter concludes, "We reserve our right to an interview and to make further submissions".

In his letter of May 26, 1994 advising of his decision the Minister makes no reference to the applicant's request for an interview, though the decision does state that the Minister reviewed the applicant's submission and the available information concerning Mr. McAllister.

Together the failure to accede to the applicant's request for an interview before the decision was made, or to refer explicitly to that request in the letter of decision, and a perception that the applicant had no basis to know and challenge the reasons of the Minister, give rise to the claim that the applicant was here denied a fair hearing.

The principles of fundamental justice, under section 7 of the Charter, and the right to a fair hearing in accordance with those principles, under paragraph 2(*e*) of the *Canadian Bill of Rights*, do not require an oral hearing in all circumstances; rather the requirements vary with the circumstances, but the key factor is the adequacy of the opportunity for the person affected to state his or her case and to know the case that has to be met.[4] In *Singh*, referring to requirements under paragraph 2(*e*) of the *Canadian Bill of Rights*, Beetz J. commented that "most important factors in determining the procedural content of fundamental justice in a given case are the nature of the legal rights at issue and the severity of the consequences to the individuals concerned". In that case he found the rights at issue, i.e., the rights of refugee claimants to seek refuge in Canada, subject to the provisions of the *Immigration Act, 1976* [S.C. 1976-77, c. 52], as it then was, were of such vital importance for those concerned, who claimed threats to their lives or liberty, i.e., persecution, in their home country, that assessing their claims to be refugees required at least one oral hearing before a final negative determination.[5] In the same case, Wilson J. noted another factor of significance, that is that hearings based on written submissions would not be satisfactory where a serious issue of credibility is involved, for fundamental justice requires that credibility be determined on the basis of an oral hearing.[6]

The Act has been changed significantly since the decision in *Singh*. One major change was the introduction of "access criteria", precluding claimants for refugee status from having their claims determined by the Refugee Division of the Immigration Refugee Board in circumstances specified by section 46.01[7] which came into force January 1, 1989, shortly after Mr. McAllister made his claim to be a refugee. That provision and subsection 27(2) and paragraph 19(1)(*f*) were relied upon by the Minister in this case.[8]

Provisions of the Act, analogous to those applied in this case, that is, "access criteria" of another sort, were upheld in *Nguyen v. Canada (Minister of Employment and Immigration)* .[9] There the Court of Appeal dismissed an application for judicial review of a decision of an adjudicator that a refugee claimant was not eligible to have his claim considered by the Refugee Division where he was found to be a person defined by then clause 46.01(1)(*e*)(ii)(B), as one convicted in Canada of an offence under any Act of Parliament for which a term of imprisonment of ten years or more may be imposed, who the Minister has certified constitutes a danger to the public in Canada. In that case Mr. Justice Marceau, for the Court, commented:[10]

A foreigner has no absolute right to be recognized as a political refugee under either the common law or any international convention to which Canada has adhered. It follows that legislation which purports to define conditions for eligibility to claim refugee status may violate the Charter only if those conditions have the effect of subjecting a group of claimants to discriminatory treatment within the meaning of section 15. To deny dangerous criminals the right, generally conceded to immigrants who flee persecution, to seek refuge in Canada certainly cannot be seen as a form of illegitimate discrimination. Only section 15 of the Charter is engaged since, contrary to the first decision which entailed forced deportation and therefore deprivation of liberty, a declaration of ineligibility does not imply or lead, in itself, to any positive act which may affect life, liberty or security of the person . . . .

Mr. Justice Marceau also distinguished the circumstances in *Nguyen* from those in *Singh* on the ground that the former dealt with eligibility to have a refugee claim considered, while the latter concerned circumstances where the right to claim refugee status was "previously granted", presumably under the Act, and had not been withdrawn by statute.

In *Nguyen*, Marceau J.A. noted that procedural challenges to the decision-making process, followed in that case, did not need to be addressed, but he did briefly indicate why, in his opinion, there was no merit in objections that there had been no oral hearing. He said, in part:

The procedure set up and actually followed affords the individual 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.[11]

Counsel for Mr. McAllister sought to distinguish the circumstances of *Nguyen* from those in this case. Clearly there are differences in the facts, but in my view the Court of Appeal's decision in that case is persuasive in this and its principles and approach should here be followed. Thus, the provisions of the Act here followed by the Minister in his decision of May 26, 1994, i.e., subparagraph 46.01(1)(*e*)(ii), paragraph 27(2)(*a*), and clause 19(1)(*f*)(iii)(B), provide for a valid process under the Act, which does not violate principles of fundamental justice, in light of section 7 of the Charter, paragraph 2(*e*) of the *Canadian Bill of Rights*, or natural justice requirements at common law, provided the process here followed meets requirements for a fair hearing. While it is argued otherwise for the applicant, the facts here clearly indicate, in my view, that the applicant was apprised of the case he had to meet by the letter dated February 22, 1994 and was given adequate opportunity to respond to that case by written submissions.

The case to be met was whether the Minister should form the opinion that it was not in the public interest to have Mr. McAllister's refugee claim determined under the Act. The issue was raised, as the letter makes clear, on the adjudicator's finding that he is a person who there are reasonable grounds to believe is or was a member of an organization that there are reasonable grounds to believe is or was engaged in terrorism, pursuant to paragraph 27(2)(*a*) and clause 19(1)(*f*)(iii)(B). There was here no issue of credibility about the basis for that belief for Mr. McAllister acknowledged his membership at an earlier date in the INLA, a proscribed organization in Northern Ireland under emergency legislation there. Moreover, the letter of February 22, 1994, providing opportunity for his

written submissions also indicated that the Minister's opinion would be based upon evidence submitted at the inquiry held earlier, in January 1994, and representations the applicant might make. Subsequently, in the letter of May 26, 1994 conveying his decision the Minister refers to counsel's submission on behalf of Mr. McAllister and specifically states that the submission and the available information concerning the applicant had been reviewed. There is no evidence that any information available to the Minister was other than that provided on behalf of the Minister at the January inquiry, which Mr. McAllister was aware of and a copy of which appears, from the record and from comments of his counsel at the hearing, to have been provided to him with the letter inviting submissions from him.

Clearly there was no oral hearing and no interview provided in response to his request made with his submissions to the Minister. Nevertheless, in my opinion, the process here followed ensured that the applicant was apprised of the case he had to meet and was given adequate opportunity to make written submissions in relation to the issue the Minister had served notice he would consider and decide. In my view, the requirements of a fair hearing, under the Charter, the *Canadian Bill of Rights* and the common law duty of fairness, were here met.

Before turning to the next two issues argued on behalf of the applicant I note that although they concern the validity of certain legislative provisions, counsel did not argue directly they were unconstitutional. No notice of a constitutional question was here given in accord with section 57 of the *Federal Court Act*, R.S.C., 1985, c. F-7 as amended [by S.C. 1990, c. 8, s. 19]. In the circumstances I do not propose to deal with the issues as constitutional questions raising the validity of the provision in question since no adequate base for determination of constitutional issues was laid in this case.

The application of clause 19(1)(*f*)(iii)(B), a provision based on membership in an organization, not on actions by the applicant

For the applicant it is urged that the Minister's decision applying clause 19(1)(*f*)(iii)(B), is not based on a lawful foundation for it depends upon a finding of membership in an organization, a matter of belief or at least reflective of belief, and not upon unlawful actions by the applicant. Reference was made to the distinction referred to in *Allende v. Shultz*,[12] under American constitutional law, between belief and activity and to the fact that mere membership in an organization is not an offence known to the law in Canada.

In *Yamani v. Canada (Solicitor General)*[13] I recently held that a portion of paragraph 19(1)(*g*) of the Act contravened paragraph 2(*d*) of the Charter, in so far as it relates to "persons who there are reasonable grounds to believe . . . are members of . . . an organization that is likely to engage in . . . acts" of violence that would or might endanger the lives or safety of persons in Canada. The case involved the process of terminating the status of a permanent resident. That decision is on appeal. It was rendered after notice under section 57 of the *Federal Court Act* and after thorough argument on the constitutional issues there raised. Those conditions do not here apply, section 2 of the Charter was here raised only in brief reference in the written submissions of counsel and not discussed directly at the hearing. In these circumstances this Court may not render a determination that the provision here in question is invalid for constitutional reasons.

There are other differences in this case. Here the basis for decision is membership in an organization that there are reasonable grounds to believe is or was engaged in "terrorism", a ground here not challenged by the applicant, except to urge that membership in an organization, any organization, is not unlawful in Canada. However that may be, it is to be noted that the *Immigration Act* by clause 19(1)(*f*)(iii)(B) does not make membership in an organization unlawful in Canada. It does preclude admission to Canada of those who are found to be members of an organization that on reasonable grounds is found to have been or is engaged in terrorism. It applies in the case of foreign nationals, who have no right to enter or remain in Canada except as the Act permits. It is unlike *Yamani* where the provision in question applies to one who has been admitted as a permanent resident who has a right to remain in the country, subject to termination in accord with the law.

In this case the organization is defined in the Act with more particularity than was the case with the words I found unsatisfactory in *Yamani*. In the circumstances here the applicant has acknowledged his membership in an organization, proscribed in Northern Ireland, which it is understood he acknowledges, and which news articles provided at his inquiry indicate, was engaged in terrorism. In this case it seems clear there are reasonable grounds to conclude the applicant is a person described in clause 19(1)(*f*)(iii)(B) and that the Minister's decision, applying

the Act as Parliament provided, was not tainted with error, in law or in fact.

The application of provisions with vague and imprecise terms

This third ground argued on behalf of the applicant is that the provisions here applied by the Minister include terms that are not defined in the Act or otherwise, including "terrorism" in clause 19(1)(*f*) (iii)(B) and "public interest" in subparagraph 46.01(1)(*e*)(ii).

It is suggested the word "terrorism" is so imprecise, vague and ill-defined that the applicant is incapable of knowing in advance with a high degree of certainty what conduct constitutes "terrorism". In my opinion that is not an issue raised in the circumstances of this case. The applicant acknowledges his membership in the INLA, an organization about which there is evidence in news articles of its activities, at least in recent years, evidence that was before the inquiry and subsequently before the Minister and which was not apparently disputed as evidence of terrorist activity of the organization. Moreover, the word "terrorism" is not used in clause 19(1)(*f*)(iii)(B) with reference to criminal activity, that is, with reference to commission of a crime, even if most acts of terrorism might also constitute crimes. The word is not used with reference to crimes of individuals. Rather the word is used in the *Immigration Act*, in describing activities of organizations, membership in which is prescribed by Parliament as a basis for exclusion from admissible classes of persons for immigration or for entry to Canada. "Terrorism" is defined by dictionaries, and a definition from Webster's dictionary is included in written submissions in support of Mr. McAllister's application for judicial review. It is there defined as "using terror and violence to intimidate, subjugate etc. especially as a political weapon or policy".

In an era when much attention on the international level, and within many countries, has been and continues to be given to containing, restricting and punishing acts of terrorism, I am not persuaded that the word can be considered so vague as to be devoid of sufficient certainty of meaning, or that application of the provision would present uncertainty. The word is recognizable to individuals, as it apparently was to Mr. McAllister in this case, and to those concerned with applying the Act. In my opinion "terrorism" as used in clause 19(1)(*f*)(iii)(B) does not render that provision vague in the sense that it violates section 7, or in the sense that it would be contrary to section 1, of the Charter, or in the sense that the applicant did not understand the meaning of the term in the circumstances of this case.

With reference to the term "public interest", it is urged that the Court should note and follow the comments of Chief Justice Lamer in *R. v. Morales* .[14]

As currently defined by the courts, the term "public interest" is incapable of framing the legal debate in any meaningful manner or structuring discretion in any way.

Nor would it be possible in my view to give the term "public interest" a constant or settled meaning. The term gives the courts unrestricted latitude to define any circumstances as sufficient to justify pre-trial detention. The term creates no criteria to define these circumstances. No amount of judicial interpretation of the term "public interest" would be capable of rendering it a provision which gives any guidance for legal debate.

In *Morales* the Supreme Court was not concerned with the *Immigration Act*, rather the case concerned paragraph 515(10)(*b*) of the *Criminal Code* which authorized pre-trial detention of an accused by court order where that was "necessary in the public interest or for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence or interfere with the administration of justice". The majority of the Court found that provision, in so far as it authorized detention in "the public interest", violated paragraph 11(*e*) of the Charter which guarantees that any person charged with an offence has the right not to be denied reasonable bail without just cause.

The concept of "vagueness" as a flaw in criminal legislation violating section 7 of the Charter was earlier dealt with by the Court in *R. v. Nova Scotia Pharmaceutical Society*[15] where the issue concerned validity of then subsection 32(1) of the *Combines Investigation Act* [R.S.C. 1970, c. C-23] creating an offence to prevent or lessen competition "unduly". Mr. Justice Gonthier, speaking for the Court, stated that the doctrine of vagueness applies to all types of enactments:

La notion d'"imprécision", en tant que faille dans les lois pénales qui contrevient à l'article 7 de la Charte, a déjà été traitée par la Cour dans l'arrêt *R. c. Nova Scotia Pharmaceutical Society*[15] . Cet arrêt portait sur la question de validité du paragraphe 32(1) de la *Loi relative aux enquêtes sur les coalitions* [S.R.C. 1970, ch. C-23] qui créait une infraction sur le fait d'empêcher ou de diminuer "indûment" la concurrence. Le juge Gonthier, dans le prononcé des motifs au nom de la Cour, a déclaré que la théorie de l'imprécision s'appliquait à tous les types de textes de loi:

Finally, I also wish to point out that the standard I have outlined applies to all enactments, irrespective of whether they are civil, criminal, administrative or other. The citizen is entitled to have the State abide by constitutional standards of precision whenever it enacts legal dispositions . . . .

The doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This statement of the doctrine best conforms to the dictates of the rule of law in the modern State, and it reflects the prevailing argumentative, adversarial framework for the administration of justice.

The standard to which Gonthier J. refers as applicable to all enactments, whether civil, criminal, administrative or other, is one that ensures sufficient precision to provide guidance for legal debate, i.e. whether the circumstances are or are not within the intended application of the enactment in question. In passing, I note that in the application of this standard in the later *Morales* case, Gonthier J. dissented from the majority view expressed by Lamer C.J., finding the term "public interest" as used in the *Criminal Code* provision concerning detention prior to trial was not so vague as to contravene constitutional requirements. In the *Nova Scotia Pharmaceutical* case, where the Supreme Court upheld the Nova Scotia Court of Appeal [1991 CanLII 2553 (NS C.A.), (1991), 102 N.S.R. (2d) 222] that the word "unduly" as used in subsection 32(1) of the *Combines Investigation Act* was not unconstitutionally vague, Gonthier J. for the Court noted that courts are reluctant to find statutory provisions are not enforceable because of vagueness: "the threshold for finding a law vague is relatively high".[16]

In my opinion, that note of judicial caution is appropriately adopted here. The basis of constitutional issues is not here laid, procedurally or in terms of the issues arising on the facts as established. There are, moreover, differences between the circumstances here and those in *Morales* where the term "public interest" was found unconstitutionally vague as used in paragraph 515(10)(*b*) of the *Criminal Code*. There discretion under the Code was exercisable by the criminal courts with regard to persons charged generally with indictable offences in certain circumstances, giving rise to a likelihood of a range of decisions, and those decisions if positive, would result in imposition of a serious penalty, a limitation on liberty before any trial for the offence charged, quite separate from considerations of public safety or maintenance of the judicial process which has been separately provided by Parliament as grounds for discretional action. In this case, under the *Immigration Act*, discretionary authority exercisable in the public interest is vested in one Minister (and in practice, in those responsible to her or him), it relates to persons who have no right to remain in Canada and a positive determination results in opening an opportunity for such persons to remain in the country. As I read this legislative scheme, under clause 19(1)(*f*)(iii)(B) Parliament has determined that persons who are or were members of organizations that there are reasonable grounds to believe are or were engaged in terrorism are not admissible to Canada unless they have "satisfied the Minister that their admission would not be detrimental to the national interest". Parliament has declared the basic public interest in relation to such persons, that they are not admissible to Canada, as immigrants, refugees or visitors, unless they are exempt from that principle by a positive determination of the Minister that their admission would not be detrimental to the national interest.

The place of subparagraph 46.01(1)(*e*)(ii), in relation to paragraph 19(1)(*f*), is then to provide opportunity for the refugee claimant who is found to fall within paragraph 19(1)(*f*) to persuade the Minister that it is in the public interest that his or her claim to be a refugee be considered. In effect, if the claimant persuades the Minister at this stage, that an exception should be made to the basic public interest declared by Parliament and that it is in the public interest that the claim be considered by the Refugee Division, he or she will meet the requirements for exemption under paragraph 19(1)(*f*). The onus is upon the claimant.[17] As I understand the process, if no determination of that issue is made before there is a hearing by the Refugee Division of the refugee claim, the claimant remains inadmissible to Canada under clause 19(1)(*f*)(iii)(B) unless he or she can persuade the Minister that an exemption be made in his or her case on the ground that it would not be detrimental to the national interest.

In my opinion, the term "public interest" as used in subparagraph 46.01(1)(*e*)(ii) does not render that provision so vague that its application by the Minister could not be subject to review, in a proper case, on an application for judicial review. The exercise of discretion under that provision is, after all, left to one whose function it is generally to exercise his authority in the public interest. The discretion may be broad, but where it is clearly exercised for a purpose not in the public interest, or without reference to evidence before the Minister, the Court would set the decision aside. The use of the phrase "public interest" does not render subparagraph 46.01(1)(*e*)(ii) of the Act vague for constitutional or other reasons.

Unreasonable delay

The fourth ground argued by the applicant is that there was unreasonable delay in considering his refugee claim, some 5" years after his arrival and making of his claim. It is argued this delay warrants a finding that the Minister's opinion was made in bad faith, because of the delay. It is said that only after more than five years have elapsed from the time the applicant arrived did the Minister become concerned with protecting the public interest by excluding Mr. McAllister, and that to do so after such a length of time is unreasonable and done in bad faith.

I am not persuaded to so find. In *Akthar v. Canada (Minister of Employment and Immigration)*[18] Mr. Justice Hugessen for the Court of Appeal found that in the circumstances of the case a delay of two and one-half to three years between the making of a refugee claim and the holding of a credible basis hearing, then the first stage in processing of the claim, did not give rise to a Charter remedy. In that case it was stated that a claim in a non-criminal case to Charter relief based on delay requires evidence, or at the very least some inference from the surrounding circumstances, that the claimant has in fact suffered prejudice or unfairness because of the delay. As Hugessen J.A. pointed out in that case, no time limits are specified under the Act, even though Parliament has sought to devise a process for considering refugee claims that is expeditious. Moreover, intervention by the Court to strike down a decision that has been delayed may simply result in more delay without in any way establishing a basis for the claim to refugee status. Thus, in this case even if the Minister's decision here questioned were to be struck down, Mr. McAllister remains a member of an inadmissible class described in clause 19(1)(*f*)(iii)(B) by reason of the decision of an adjudicator in January 1994, a decision not questioned by the applicant. Under the Act such a person is not entitled to remain in Canada and is subject to deportation on order of an adjudicator under section 32 [as am. by R.S.C., 1985 (3rd Supp.), c. 30, s. 5; (4th Supp.), c. 28, s. 11; S.C. 1992, c. 49, s. 21] of the Act.

Thus there can be no inference of prejudice caused to the applicant in the circumstances of this case, as a result of delay in dealing with his claim. There is, moreover, no evidence of prejudice caused to the applicant by reason of the delay in considering his claim. As Hugessen J.A. commented in *Akthar*, a refugee claimant is asserting a claim which he or she bears the burden of establishing, and evidence of any prejudice suffered is for him or her to produce. Finally, in *Akthar* his lordship referred to the basis of the law relating to refugees, in the following terms.

The purpose of the refugee system both in international and domestic law is not to provide an easy means for immigrants to find a new and more desirable country of residence; it is to furnish a safe haven to those who rightly fear they will be persecuted in their country of origin.[19]

As the Court of Appeal found in *Akthar*, so I here find that in the circumstances of this case where there is no evidence or inference of prejudice to the applicant as a result of delay, delay does not give rise to remedies under the Charter. There is no basis for intervention by the Court because of delay in the process of considering Mr. McAllister's claim to be a refugee.

The application of amendments to the Act made after the applicant's claim

In both applications for judicial review it is urged that the applicant has a right to have his claim to be a Convention refugee determined in accord with the law prevailing at the time the applicant made his claim, i.e. December 22, 1988. After that date, on January 1, 1989,[20] subparagraph 46.01(1)(*e*)(ii) came into force. The current version of clause 19(1)(*f*) (iii)(B) came into force even later, on February 1, 1993.[21]

In the first application for judicial review (IMM-3223-94) it is urged that the applicant's rights in relation to his claim vested under section 7 of the Charter before the eligibility criteria under section 46.01 were enacted and it is

wrong in law to deprive him of a remedy, the right to make his claim, on the basis of law not existing when the claim was made. It is said subparagraph 46.01(1)(*e*)(ii) and clause 19(1)(*f*)(iii)(B) should not be given retroactive application. In the second application (IMM-4348-94) it is said the applicant's right to a fair hearing were entrenched on the date he made his refugee claim. It would be wrong in law, it is urged, to give retroactive effect to current provisions of ineligibility under the Act. In written submissions it is urged that to give the current legislation effect would violate the applicant's equality rights under section 15 of the Charter, but that was not argued at the hearing of this matter.

When this matter was heard this aspect was argued principally in relation to common law principles concerning the temporal application of statutes, not in relation to Charter arguments. The well known principles, set out by Mr. Justice La Forest in *Angus v. Sun Alliance Insurance Co*.[22] are stressed by the applicant, in particular the reluctance of courts to apply legislation retrospectively so as to substantively affect vested rights in an adverse manner.

I am not persuaded these principles are here applicable. I do not accept that either clause 19(1)(*f*)(iii)(B) or subparagraph 46.01(1)(*e*)(ii) is in any means applied retrospectively in the circumstances of this case. Rather, the legislation in force at the time the decisions were made was given effect.[23] It is not retrospective legislation to adopt a rule that henceforth excludes persons from Canada on the basis of their conduct in the past.[24]

In my opinion, Mr. McAllister, having made a claim to be a Convention refugee had no vested or entrenched rights to have that claim considered under the rules prevailing at the time of his application; rather, he only had a right to have his claim considered under the rules prevailing when it is considered. He was a person with no right to enter or remain in Canada, except as provided by the *Immigration Act*, and in my opinion any claim he made to enter or to remain is subject to the law prevailing when that claim is determined, not when the claim is made.

Moreover, in my view, the circumstances here are such that I have no hesitation in drawing a clear inference that Parliament intended, as in the normal course, that changes in the Act, would be applicable to cases arising for determination after the amendment in question became effective. In S.C. 1988, c. 35, under which section 46.01 was originally enacted to provide "access criteria", limiting refugee claimants entitled to have their claims considered by the Refugee Division, section 41 of that amending statute designates certain classes of persons, who as refugee claimants were to be entitled to have their claims determined by the Refugee Division notwithstanding any provision of the Act as amended. Clearly anyone not exempt under section 41 was subject to the access criteria established by section 46.01, by necessary implication. As for the later amendment, amending subparagraph 46.01(1)(*e*)(ii) and enacting clause 19(1)(*f*)(iii)(B), by S.C. 1992, c. 49, that amending Act specifically provides intransitional provisions as follows:

109. Subject to sections 110 to 120, every provision of the *Immigration Act*, as enacted by this Act shall, on the coming into force of that provision, apply in respect of every application, proceeding or matter under that Act or the regulations made thereunder that is pending or in progress immediately before the coming into force of that provision.

Sections 110 to 120 which provide for exceptions to that general rule of application, relate to inquiries or hearings commenced before the coming into force of the amendment but not then determined, or outstanding departure notices, or applications for leave or appeals. In my opinion, section 109 expressly enunciates Parliament's intent that amendments enacted in 1992, including clause 19(1)(*f*)(iii)(B), are to be applied in any inquiry initiated thereafter, as was the inquiry by the adjudicator in January 1994, the Minister's review of Mr. McAllister's case from February to May 1994 (raised in IMM-3223-94) and the senior immigration officer's finding in June 1994 (raised in IMM-4348-94).

In summary, I find no retrospective application of the legislation in this case. Further, it is clear, in my view, that by necessary inference, and by express provision, Parliament intended to have the amending statutes applied just as they were in considering Mr. McAllister's case.

Conclusion

It is my opinion that none of the grounds put forth for the applicant warrant intervention by this Court in regard to

the decision of the Minister pursuant to subsection 46.01(1), or in regard to the decision of the senior immigration officer based on the decision of the Minister and the earlier decision of an adjudicator pursuant to paragraph 27(2)(*a*) and clause 19(1)(*f*)(iii)(B).

Orders go in regard to each file, IMM-3223-94 and IMM-4348-94, dismissing each application for judicial review. I direct that a copy of these reasons be filed in relation to each of these proceedings.

At the conclusion of the hearing counsel were invited to propose questions for consideration for certification under subsection 83(1) [as am. by S.C. 1992, c. 49, s. 73] as serious questions of general importance. For the applicant it was urged that there were several serious issues raised by this case, but no specific question was submitted for consideration. Counsel for the respondent indicated that since constitutional issues were not directly raised, the only serious issue related to the application of the amending statutes, i.e., whether in the circumstances the legislation as applied was given retrospective effect and if this was warranted. In my opinion, the facts of the case do not directly raise issues that would be determinative of an appeal, and there is not, in my view, a serious question concerning retrospective application of the amending acts. Thus, I decline to certify a question under subsection 83(1).

[1] S. 7 of the *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]] provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[2] S. 2(*e*) of the *Canadian Bill of Rights* [R.S.C., 1985, Appendix III provides:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

. . .

(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

[3] ;*Singh et al. v. Minister of Employment and Immigration*, 1985 CanLII 65 (S.C.C.), [1985] 1 S.C.R. 177.

[4] *Singh, supra*, note 3, *per* Beetz J., at p. 229; *per* Wilson J., at p. 214.

[5] *Singh, supra*, note 3, *per* Beetz J., at pp. 229-231.

[6] *Singh, supra*, note 3, *per* Wilson J., at pp. 213-214.

[7] S. 46.01 of the Act was enacted by S.C. 1988, c. 35, s. 14 (R.S.C., 1985 (4th Supp.), c. 28, s. 14); subsequently am. by S.C. 1992, c. 49, s. 36 and S.C. 1995, c. 15, s. 9.

[8] These provisions of the Act, relied upon in this case, so far as here relevant, are ss. 27(2)(*a*), 19(1)(*f*)(iii)(B) as set out in the text of these reasons at pp. 200-201 and s. 46.01 which is:

46.01. (1) A person who claims to be a Convention refugee is not eligible to have the claim determined by the Refugee Division if the person

. . .

(*e*) has been determined by an adjudicator to be

. . .

(ii) a person described in paragraph 19(1) . . . (*f*) . . . and the Minister is of the opinion that it would be contrary to the public interest to have the claim determined under this Act.

[9] 1993 CanLII 2926 (F.C.A.), [1993] 1 F.C. 696 (C.A.).

[10] *Idem*, at p. 704.

[11] *Supra*, note 9 at pp. 707-708.

[12] 845 F.2d 1111 (1st Cir. 1988), at p. 1117.

[13] 1995 CanLII 3553 (F.C.), [1996] 1 F.C. 174 (T.D.).

[14] 1992 CanLII 53 (S.C.C.), [1992] 3 S.C.R. 711, at p. 732.

[15] 1992 CanLII 72 (S.C.C.), [1992] 2 S.C.R. 606, at pp. 642-643.

[16] *Per* Gonthier J., *idem*, at p. 632.

[17] S. 45(4) [as am. by S.C. 1992, c. 49, s. 35] of the Act provides that the burden of proving that a person is eligible to have a claim to be a Convention refugee determined by the Refugee Division rests on the person.

[18] reflex, [1991] 3 F.C. 32 (C.A.).

[19] *Idem*, at p. 40. See also *Urbanek v. Canada (Minister of Employment & Immigration)* (1992), 17 Imm. L.R. (2d) 153 (F.C.A.), at p. 154.

[20] S. 46.01 was enacted by S.C. 1988, c. 35, s. 14 (in error numbered as s. 48.01), which became R.S.C., 1985 (4th Supp.), c. 28, s. 14, assented to July 21, 1988 and proclaimed in force effective 1/1/89 by SI/88-231 dated 7 December 1988.

[21] S. 19(1) of the current Act was amended by R.S.C., 1985 (3rd Supp.), c. 30, s. 3, came into force 30/10/87 by SI/87-250 and paragraph (*f*) was amended S.C. 1992, c. 49, s. 11(2) assented to Dec. 17, 1992, which came into force 1/2/93 by SI/93-16 dated January 28, 1993.

[22] 1988 CanLII 5 (S.C.C.), [1988] 2 S.C.R. 256, at pp. 265-266.

[23] *Per* Rouleau J. in *Cortez v. Canada (Secretary of State)* (1994), 74 F.T.R. 9 (F.C.T.D.).

[24] *Per* Hugessen J.A. in *Rudolph v. Canada (Minister of Employment and Immigration)*, reflex, [1992] 2 F.C. 653 (C.A.), at p. 657.