[sv 1,214] [sv 75,1] [sv 19,1995]

sahin *v.* canada

IMM-3730-94

Bektas Sahin (*Applicant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

Indexed as: Sahin v. Canada ***(*Minister of Citizenship and Immigration*) (*T.D.*)***

Trial Division, Rothstein J.--Toronto, September 27, 28, October 7, 19, 1994.

Citizenship and Immigration -- Immigration practice -- Detention -- Judicial review of Adjudicator's decision ordering applicant's continued detention under Immigration Act, s. 103(1) -- Applicant detained upon arrival in Canada for lack of valid visa, passport, identification document -- Found to be Convention refugee -- Appeal process not exhausted so applicant might still have to leave -- Adjudicator fearing applicant would not report for removal if released -- Power of detention under s. 103 extraordinary -- Adjudicator wrong in not taking into account principles of fundamental justice under Charter, s. 7 -- Need to expedite proceedings before tribunals, Court when individuals detained.

Constitutional law -- Charter of Rights -- Life, liberty and security -- Applicant found to be Convention refugee -- Appeal process not complete -- Detention order by Adjudicator based on opinion applicant would not report for removal -- Applicant already detained 14 months -- Whether contrary to Charter, ss. 7, 12 -- Convention refugee entitled to Charter protection -- Continued detention must accord with principles of fundamental justice under Charter, s. 7 -- Public interest in continued detention must be weighed against liberty interest of individual -- Failure to take into account considerations required by s. 7 error of law.

This was an application for judicial review of an adjudicator's decision ordering that the applicant remain in detention on the basis that he would not report for removal if required to do so. The applicant, a citizen of Turkey, was detained upon his arrival in Canada in July 1993 and has remained in detention since then. A conditional departure order was issued against him as he was not in possession of a valid visa, and passport or identification or travel document as required by subsection 9(1) of the *Immigration Act* and subsection 14(1) of the *Immigration Regulations*. In the meantime, the applicant's refugee claim was heard by a panel of the Convention Refugee Determination Division which determined that he was a Convention refugee. His detention has been reviewed at least every 30 days as required by section 103 of the *Immigration Act*. The issue herein concerned the validity of the last detention order dated August 2, 1994.

Held, the case should be returned to an adjudicator for redetermination.

Applicant's first argument, that section 103 of the *Immigration Act* does not contemplate detention solely on the basis of an applicant refusing to return to a country in which he fears persecution, was unacceptable. The fact that an individual expresses a well-founded fear of persecution or that a tribunal has found someone to be a Convention refugee does not allow such person to ignore the provisions of the *Immigration Act*. Until all appeals have been disposed of, a person might still be found not to be a Convention refugee and it is that eventuality that justifies the continuance of conditional removal orders against such persons. It is consistent with the objective that persons be detained when the Minister is of the opinion that they would not appear for removal if a removal order is to be executed. There was a real possibility of the applicant being forced to return to Turkey as long as there were proceedings outstanding which might result in him being found not to be a Convention refugee. It would not be appropriate, in this judicial review of the detention order, to interfere with the Minister's application for judicial review of the CRDD decision which, in effect, is what the Court would be doing if it were to find that the likelihood of the applicant being removed is remote.

A person who is in Canada and has been found to be a Convention refugee is entitled to the protection of section 7 of the Charter. Since detention under section 103 of the *Immigration Act* is not for the purpose of punishment after conviction, but in anticipation of an individual's likely danger to the public or likely failure to appear for inquiry, examination or removal, such detention may not be indefinite. The applicant has been detained for over fourteen months because of the existence of a conditional removal order pending the judicial review of the decision finding him to be a Convention refugee. Not only is there an interest on the part of the individual to limit detention but also the cost of detaining persons for lengthy periods is such that the government itself has an interest in minimizing detention. Section 7 Charter considerations are relevant to the exercise of discretion by an adjudicator under section 103 of the *Immigration Act* which confers on him a necessary, but enormous power over individuals. The power of detention in respect of them is, while necessary, still extraordinary. Fundamental justice requires that a fair balance be struck between the interest of the person who claims his liberty has been limited and the protection of society. What amounts to an indefinite detention for a lengthy period of time may, in an appropriate case, constitute a deprivation of liberty that is not in accordance with the principles of fundamental justice. There are a number of considerations which should be taken into account by adjudicators when making a decision to release or detain an individual under subsection 103(7) of the *Immigration Act*. A consideration that deserves significant weight is the amount of time that it is anticipated will pass until a final decision determines whether the applicant may remain in Canada or must leave. Immigration proceedings should be expedited when persons are detained in custody under section 103. The public interest in detaining a person when there are grounds for believing that he would not appear for examination, inquiry or removal must be weighed against the liberty interest of the individual. In many cases, the most satisfactory course of action will be to detain the individual but expedite the immigration proceedings. Having regard to the liberty interest of the individual and the financial interest of the government in minimizing detentions, detention cases must be

given priority. While the Adjudicator properly complied with the statutory mandate of subsection 103(7) of the *Immigration Act*, he did not take into account the considerations required by section 7 of the Charter. The failure to do so constituted an error of law. The question of the applicant's continued detention must be returned to an adjudicator for redetermination which should take place as soon as possible.

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], ss. 7, 9, 12, 15, 24(1).

Criminal Code, R.S.C., 1985, c. C-46.

Federal Court Act, R.S.C., 1985, c. F-7, s. 18.2 (as enacted by S.C. 1990, c. 8, s. 5).

Federal Court Rules, C.R.C., c. 663, R. 327.1 (as enacted by SOR/94-41, s. 2).

Immigration Act, 1976, S.C. 1976-77, c. 52, s. 104.

Immigration Act, R.S.C., 1985, c. I-2, ss. 9(1) (as am. by S.C. 1992, c. 49, s. 4), 19(1), (2)(*d*), 28 (as am. *idem*, s. 17), 46.04(3.1)(*b*) (as enacted *idem*, s. 38), (7) (as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 14; S.C. 1992, c. 49, s. 38), 53(1)(*a*) (as am. *idem*, s. 43), (*b*) (as am. *idem*), 103(1) (as am. *idem*, s. 94), (3), (6) (as am. *idem*), (7) (as am. *idem*).

Immigration Regulations, 1978, SOR/78-172, s. 14(1) (as am. by SOR/83-339, s. 2; 84/809, s. 1).

cases judicially considered

applied:

Cunningham v. Canada, [1993] 2 S.C.R. 143; (1993), 11 Admin. L.R. (2d) 1; 80 C.C.C. (3d) 492; 20 C.R. (4th) 57; 14 C.R.R. (2d) 234; 151 N.R. 161; 62 O.A.C. 243; *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.

distinguished:

Canada (Department of Employment and Immigration) v. Cushnie, [1988] R.J.Q. 2046; (1988), 17 Q.A.C. 38; 54 D.L.R. (4th) 420; 35 Admin. L.R. 38; 6 Imm. L.R. (2d) 209 (C.A.).

considered:

R v Governor of Durham Prison, ex p Singh, [1984] 1 All ER 983 (Q.B.); *R. v. Farinacci* (1993), 109 D.L.R. (4th) 97; 86 C.C.C. (3d) 32; 25 C.R. (4th) 350; 67 O.A.C. 197 (Ont. C.A.).

referred to:

Dehghani v. Canada (Minister of Employment and Immigration), [1993] 1 S.C.R. 1053; (1993), 101 D.L.R. (4th) 654; 10 Admin. L.R. (2d) 1; 20 C.R. (4th) 34; 14 C.R.R. (2d) 1; 18 Imm. L.R. (2d) 245; 150 N.R. 241; *Singh et al. v. Minister of Employment and Immigration*, [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; *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385; [1990] 6 W.W.R. 673; (1990), 51 B.C.L.R. (2d) 1; 60 C.C.C. (3d) 1; 80 C.R. (3d) 257; 2 C.R.R. (2d) 304; 121 N.R. 198; *Armadale Communications Ltd. v. Adjudicator (Immigration Act)*, [1991] 3 F.C. 242; (1991), 83 D.L.R. (4th) 440; 14 Imm. L.R. (2d) 13; 127 N.R. 342 (C.A.).

APPLICATION for judicial review of an adjudicator's decision ordering that the applicant remain in detention under subsection 103(1) of the *Immigration Act*. Case returned to an adjudicator for redetermination.

counsel:

Avi J. Sirlin for applicant.

Harley R. Nott for respondent.

solicitors:

Avi J. Sirlin, Toronto, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for order of the Court delivered orally in English by

Rothstein J.:

The Issue

This is a judicial review of the decision of Adjudicator W. K. Willoughby, an adjudicator of the Adjudication Division of the Immigration and Refugee Board, made on August 2, 1994 in which he ordered that the applicant remain in detention. The detention order followed a hearing held on July 28, 1994. This detention order was made because the Adjudicator was of the opinion, based on the applicant's own statements, that if he was released, the applicant would not report for removal if required to do so.

The issue in this proceeding concerns the validity of the detention order.

Facts

The applicant is a citizen of Turkey. He left that country on July 26, 1993, and arrived in Canada on July 28, 1993. He made a claim for Convention refugee status upon his arrival. Immediately following an initial interview with an immigration officer at Pearson International Airport at Toronto, the applicant was detained. On July 29, 1993, a conditional departure order was made against the applicant because a senior immigration officer was satisfied that the applicant was a person described in paragraph 19(2)(*d*) of the *Immigration Act*, R.S.C., 1985, c. I-2 in that he was not in possession of a valid visa, and passport or identification or travel document as required by subsection 9(1) [as am. by S.C. 1992, c. 49, s. 4] of the Act and subsection 14(1) of the *Immigration Regulations, 1978*, SOR/78-172 as amended [by SOR/83-339, s. 2; 84/809, s. 1].

The applicant has remained in detention since his arrival on July 28, 1993. His detention has been reviewed at least every 30 days as required by section 103 [as am. by S.C. 1992, c. 49, s. 94] of the *Immigration Act*. The last detention order is the one made by Adjudicator Willoughby on August 2, 1994 which is the subject of this judicial review.

The applicant made an application for leave and judicial review of the August 2, 1994 detention order on August 8, 1994. On August 16, 1994, the applicant also made a motion for an interim order pursuant to section 18.2 of the *Federal Court Act*, R.S.C., 1985, c. F-7 [as enacted by S.C. 1990, c. 8, s. 5] and subsection 24(1) 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]. This motion requested, *inter alia*, an order quashing the detention order, and an order prohibiting Adjudicator Willoughby or any other adjudicator from proceeding with further detention hearings, or in the alternative, that any such hearings be held in accordance with directions set out by this Court. On August 24, 1994, MacKay J. dismissed the applicant's request for interim relief but ordered that further detention review hearings involving the applicant be stayed pending final determination of the current application for judicial review.

The Minister consented to the application for leave to commence judicial review on August 30, 1994 and leave was granted by MacKay J. on September 2, 1994. The judicial review took place before me on September 27 and October 7, 1994.

In the meantime, the applicant's refugee claim was heard by a panel of the Convention Refugee Determination Division on December 14 and 16, 1993. By decision dated February 16, 1994, the CRDD determined that the applicant was a Convention refugee. The Minister filed an application for leave and for judicial review of the CRDD decision in this Court on March 3, 1994. Leave has been granted and the judicial review of the decision finding the applicant to be a Convention refugee will be heard by me today, October 19, 1994.

Scheme of the Legislation

The relevant provisions of the *Immigration Act* are contained in section 28 [as am. by S.C. 1992, c. 49, s. 17], paragraph 46.04(3.1)(*b*) [as enacted *idem*, s. 38], subsection 46.04(7) [as am. *idem*], subsection 53(1) [as am. *idem*, s. 43], and subsections 103(1), (3) and (7) of the *Immigration Act*:

28. (1) Where a senior immigration officer is of the opinion that a person who claims to be a Convention refugee is eligible to have the claim referred to the Refugee Division and is a person in respect of whom the senior immigration officer would, but for this section, have made an exclusion order under subsection 23(4) or a departure order under subsection 27(4), the senior immigration officer shall make a conditional departure order against the person.

(2) No conditional departure order made pursuant to subsection (1) against a person who claims to be a Convention refugee is effective unless and until

(*a*) the person withdraws the claim to be a Convention refugee;

(*b*) the person is declared by the Refugee Division to have abandoned the claim to be a Convention refugee and has been so notified;

(*c*) the person is determined by the Refugee Division not to be a Convention refugee and has been so notified; or

(*d*) the person is determined pursuant to subsection 46.07(1.1) or (2) not to have a right under subsection 4(2.1) to remain in Canada and has been so notified.

. . .[qc]

46.04 . . .

(3.1) An immigration officer may grant landing under subsection (3) only if

. . .[qc]

(*b*) where the Minister has filed an application for leave to commence an application for judicial review under the *Federal Court Act* within the time normally limited for doing so, a judgment is made in respect of the Refugee Division's determination by the Federal Court[CAD211]Trial Division, Federal Court of Appeal or Supreme Court of Canada that finally disposes of the matter.

. . .[qc]

(7) Where a person who is determined to be a Convention refugee is a person against whom a removal order or conditional removal order is made is granted landing under this section, the order shall be deemed never to have been made.

. . .[qc]

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

(*a*) the person is a member of an inadmissible class described in paragraph 19(1)(*c*) or subparagraph 19(1)(*c*.1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada; or

(*b*) the person is a member of an inadmissible class described in paragraph 19(1)(*e*),(*f*),(*g*),(*j*),(*k*) or (*l*) and the Minister is of the opinion that the person constitutes a danger to the security of Canada.

. . .[qc]

103. (1) The Deputy Minister or a senior immigration officer may issue a warrant for the arrest and detention of any person with respect to whom an examination or inquiry is to be held or a removal order or conditional removal order has been made where, in the opinion of the Deputy Minister or that officer, there are reasonable grounds to believe that the person poses a danger to the public or would not appear for the examination or inquiry or for removal from Canada.

. . .[qc]

(6) Where any person is detained pursuant to this Act for an examination, inquiry or removal and the examination, inquiry or removal does not take place within forty-eight hours after that person is first placed in detention, that person shall be brought before an adjudicator forthwith and the reasons for the continued detention shall be reviewed, and thereafter that person shall be brought before an adjudicator at least once during the seven days immediately following the expiration of the forty-eight hour period and thereafter at least once during each thirty-day period following each previous review, at which times the reasons for continued detention shall be reviewed.

(7) Where an adjudicator who conducts a review pursuant to subsection (6) is satisfied that the person in detention is not likely to pose a danger to the public and is likely to appear for an examination, inquiry or removal, the adjudicator shall order that the person be released from detention subject to such terms and conditions as the adjudicator deems appropriate in the circumstances, including the payment of a security deposit or the posting of a performance bond.

Under subsection 28(1), when a person makes a claim to be a Convention refugee, if he or she would otherwise have been subject to exclusion or departure, a conditional departure order shall be made in respect of that person.

Under subsection 53(1), if a person is determined to be a Convention refugee, he shall not, except for specified exceptions, be removed to a country where his life or freedom would be threatened. Notwithstanding that a person may have been found to be a Convention refugee, under paragraph 46.04(3.1)(*b*) he will only be granted landing after all judicial reviews and appeals of that finding have been fully disposed of. The conditional departure order issued pursuant to subsection 28(1) may subsist against the person while he has been found to be a Convention refugee and until he has been granted landing.

Under subsection 103(1) a person subject to a conditional removal order may be detained where the Deputy Minister or a senior immigration officer are of the opinion that there are reasonable grounds to believe that the person poses a danger to the public or would not appear for examination or inquiry or removal from Canada.

Pursuant to subsection 103(6), where a person is detained, he shall be brought before an adjudicator at intervals not exceeding thirty (30) days for a review of the reasons for his detention. Pursuant to subsection 103(7), where an adjudicator is satisfied that a person in detention will not pose a danger to the public and is likely to appear for examination, inquiry or removal, the adjudicator shall order the person released from detention, subject to such terms and conditions as the adjudicator considers appropriate, including the posting of a bond.

Position of the Applicant

Counsel for the applicant makes the following arguments:

(1) Section 103 does not contemplate detention solely on the basis of an applicant refusing to return to a country in which he fears persecution.

(2) There was no possibility of the applicant being forced to return to Turkey in view of the finding that he was a Convention refugee and the provisions of subsection 53(1). The Adjudicator erred in believing that there was such a possibility.

(3) Even if there was a possibility of the applicant being forced to return to Turkey, it is so remote as to make a decision requiring him to be detained patently unreasonable.

(4) Continued detention is contrary to the *Canadian Charter of Rights and Freedoms*. The Adjudicator erred in refusing to consider Charter issues. The nature and length of the applicant's continued detention in this case is contrary to sections 7 and 12 of the Charter.

Analysis

(1) Section 103 does not contemplate detention solely on the basis of an applicant refusing to return to a country in which he fears persecution.

Applicant's counsel argues that section 103 of the *Immigration Act*, providing for detention, is not applicable when a person claiming Convention refugee status says that he will not appear for removal from Canada because he fears persecution in the country to which he would be returned. He says an even stronger case can be made out for the inapplicability of section 103 when the person who says he will not appear for removal, is a person who has been determined, under Canada's immigration laws, to be a Convention refugee. He says it is perverse and absurd to interpret section 103 so as to provide for detention when a person says, in substance, that he does not want to appear for removal to the country in which it has been determined that he has a well-founded fear of persecution.

I cannot accept counsel's argument. To do so would be to allow persons seeking Convention refugee status, or even those who have been found to be Convention refugees but who cannot be granted landing because of appeals, "to take the law into their own hands." Non-citizens do not have an unqualified right to enter and remain in Canada. Canada's immigration laws constitute a regulatory scheme whereby this country controls who may enter Canada. See *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053, at pages 1070-1071.

I acknowledge that, except for recognized exceptions, e.g. criminal activity by a Convention refugee, Canada will not send Convention refugees to countries in which it has been found that they have a well-founded fear of persecution. But simply because an individual expresses that fear, or a tribunal has found someone to be a Convention refugee, does not allow such person to ignore the provisions of the *Immigration Act*. Until all appeals have been disposed of, a person might still be found not to be a Convention refugee and it is that eventuality that justifies the continuance of conditional removal orders against such persons. As long as a conditional removal order may become an effective removal order, section 103 recognizes that the Minister must be in a position to enforce the order. It is consistent with that objective that persons be detained when the Minister is of the opinion that they would not appear for removal if a removal order is to be executed.

(2) There was no possibility of the applicant being forced to return to Turkey in view of the finding that he was a Convention refugee and the provisions of subsection 53(1). The Adjudicator erred in believing that there was such a possibility.

The Adjudicator stated in his reasons:

There is a legal possibility of removal to Turkey.

The short answer to applicant's counsel's argument is that there is a real possibility of removal to Turkey as long as there are proceedings outstanding which might result in him being found not to be a Convention refugee.

(3) Even if there was a possibility of the applicant being forced to return to Turkey, it is so remote as to make a decision requiring him to be detained patently unreasonable.

Counsel for the applicant says that the Adjudicator himself thought it unlikely that the applicant would be ordered removed. The Adjudicator stated:

If I were gambling rather than adjudicating, I would bet that Mr. Sahin will eventually be allowed to remain, but I might losse [*sic*] that bet and in that case he would not report when ordered to leave.

However, likelihood of removal is not determined by "*obiter*" remarks of an adjudicator. The scheme of the *Immigration Act* permits the Minister to seek leave to apply for judicial review of the decision which found the applicant to be a Convention refugee. Indeed, leave has now been granted. It would not be appropriate in this judicial review of the detention order, to interfere with the Minister's application for judicial review of the CRDD decision which, in effect, is what I would be doing if I were to find in these proceedings, that the likelihood of the applicant being removed is remote.

(4) Continued detention is contrary to the *Canadian Charter of Rights and Freedoms*. The Adjudicator erred in refusing to consider Charter issues. The nature and length of the applicant's continued detention in this case is contrary to sections 7 and 12 of the Charter.

Counsel for the applicant initially submitted that the Adjudicator's decision contravened sections 7, 9, 12 and 15 of the Charter. In oral argument, however, he restricted his Charter challenge to alleged breaches of sections 7 and 12. Sections 7 and 12 state:

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.

. . .[qc]

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Counsel for the respondent concedes that a person who is in Canada and has been found to be a Convention refugee is entitled to the protection of section 7 of the Charter and indeed, this is well established in law. (See *Singh et al. v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at page 212).

Counsel for the applicant relies upon *Canada (Department of Employment and Immigration) v. Cushnie*, [1988] R.J.Q. 2046; (1988), 54 D.L.R. (4th) 420, a decision of the Quebec Court of Appeal. An American had been convicted and jailed for a period of time. After completion of his sentence, he continued to be detained in custody by virtue of detention orders made under section 104 [now section 103] of the *Immigration Act, 1976*, [S.C. 1976-77, c. 52] on the ground that he posed a danger to the public and was a

person who, in all probability, would not appear when his deportation order was to be executed.

Counsel for the applicant relies on the following statement of Chevalier J.A. at pages 429 and 430 [of D.L.R.]:

At the time of the hearing of the appeal, the appellant was questioned repeatedly in an attempt to establish a date when detention of the respondent would terminate. Counsel for the appellant declared that, despite certain last-minute developments, he could not give any definite date. His position is that everyone must be patient, allow the investigation to continue and hope that the problem will soon be resolved.

With all due respect, I find this position unacceptable. For several months now, an individual who is not wanted in Canada and who would like to go elsewhere is being deprived of his freedom by a combination of circumstances for which he is not at all responsible. However undesirable he may be, he must not be made to pay the price for a legal and administrative tangle for which there seems to be no solution.

However, counsel for the respondent points out that, unlike the situation in the case at bar, there was no evidence in *Cushnie* that the applicant would seek to avoid removal from Canada. Indeed, the rationale of Chevalier J.A. appears to be, at least in part, that continuing detention is unacceptable when a person who would like to go elsewhere is detained by virtue of circumstances for which he is not responsible. Here the applicant's avowed intention is to remain in Canada. For this reason, I do not think *Cushnie* addresses the facts in the case at bar.[1]*ftnote[1] In *Cushnie*, the Quebec Court of Appeal also expressed some doubt as to whether detention constitutes cruel and unusual treatment or punishment under s. 12 of the Charter, (see p. 427, of D.L.R.). However, in *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, Cory J. stated that indeterminate detention could constitute cruel and unusual punishment if it was not tailored to the circumstances of the offender. For purposes of this decision I need not deal with s. 12 of the Charter.

Applicant's counsel also relies upon *R v Governor of Durham Prison, ex p Singh*, [1984] 1 All ER 983 (Q.B.), in which a convict, who had been ordered deported from the United Kingdom, was detained for removal after the date of his release on parole. He had been scheduled for parole on July 20, 1983, but had been detained after that date until arrangements could be made for his deportation. An application for *habeas corpus* was brought in the Queen's Bench Division for his release sometime in the fall of 1983. It was dealt with by the Court in a decision dated December 13, 1983, approximately five months after he would have been paroled. While the decision in that case allowed continued detention during a short adjournment to enable the Home Office to arrange for the applicant's deportation, Woolf J. made it clear that if the applicant was not removed "within a very short time", he would be released. Of significance in that case is the *dicta* of Woolf J. at page 985 dealing with implicit limitations on the power of detention (it is to be remembered that there is no Charter of Rights and Freedoms in the United Kingdom):

Since 20 July 1983 the applicant has been detained under the power contained in para 2(3) of Sch 3 to the *Immigration Act 1971*. Although the power which is given to the Secretary of State in para 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorize detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Second, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend on the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention. [Emphasis mine.]

In the case at bar, counsel for the respondent conceded that the power to detain under section 103 of the *Immigration Act* was not unlimited. He said that reasonableness, having regard to all the circumstances, was the standard by which the appropriateness of continuing detention is to be considered. Counsel for the applicant agreed. While section 103 provides for continuing reviews at least once during each thirty (30) day period following a prior review, nothing in that section provides for a maximum period of time for detention or for any consideration of the total length of time an individual may have been in detention.

Having regard to the fact that detention under section 103 of the *Immigration Act* is not for the purpose of punishment after conviction, but rather, in anticipation of an individual's likely danger to the public or likely failure to appear for inquiry, examination or removal, I do not think such detention may be indefinite. In the case at bar, the applicant has been detained now for over fourteen months. He has been found by the CRDD to be a Convention refugee. He is detained because of the existence of a conditional removal order pending the judicial review of the decision finding him to be a Convention refugee.

The very slow processing of refugee claims is notorious. While there may be valid reasons for some delay and while delay may give non-detained applicants the privilege of remaining in Canada pending the processing of their refugee claims without restriction, the matter of delay is much more serious when persons are kept in detention during this period. From the point of view of individuals, it is trite to say that the right to liberty is so fundamental that, even in the absence of the Charter, courts of inherent jurisdiction have, when necessary, exercised their power of *habeas corpus* for hundreds of years. The right to liberty is now, of course, enshrined in section 7 of the Charter and a person may not be deprived thereof except in accordance with the principles of fundamental justice. Not only is there an interest on the part of the individual to limit detention, but also from the point of view of the government, it is costly to detain persons for lengthy periods and therefore the government itself has an interest in minimizing detention.

With this background in mind, I think it is obvious that section 7 Charter considerations are relevant to the exercise of discretion by an adjudicator under section 103 of the *Immigration Act*. While trivial limitations of rights do not engage section 7 of the Charter, section 103 of the *Immigration Act* clearly confers on an adjudicator a necessary, but enormous power over individuals. The power of detention is normally within the realm of the criminal courts. The *Criminal Code* [R.S.C., 1985, c. C-46] and other statutes prescribe fixed periods of incarceration for various offences. Under section 103 of the *Immigration Act* an adjudicator, without finding that an individual is guilty of any offence, has the power to detain him or her if the adjudicator is of the opinion that the person may pose a danger to the public or will not appear for removal. Without intending to minimize these valid considerations, the power of detention in respect of them is, while necessary, still, extraordinary. This power of detention cannot be said to be trivial.

Further, questions of fundamental justice envisaged by section 7 of the Charter are also at stake. Under section 103 of the *Immigration Act*, Parliament has dealt with the right of society to be protected from those who pose a danger to society and the right of Canada to control who enters and remains in this country. Against these interests must be weighed the liberty interest of the individual. As stated by McLachlin J. in *Cunningham v. Canada*, [1993] 2 S.C.R. 143, at pages 151-152:

The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally. . . .

I am satisfied that what amounts to an indefinite detention for a lengthy period of time may, in an appropriate case, constitute a deprivation of liberty that is not in accordance with the principles of fundamental justice. I have used the term "indefinite detention." It is arguable that detention under section 103 is not indefinite because it must be reviewed at least every 30 days and may be maintained only while a conditional removal order is pending, which, itself, implies the taking of recognized and prescribed steps under the *Immigration Act*. On the other hand, when any number of possible steps may be taken by either side and the times to take each step are unknown, I think it is fair to say that a lengthy detention, at least for practical purposes, approaches what might be reasonably termed "indefinite."

Of course, section 103 does not make express reference to the Charter. But like all other statutes, its provisions and its discretionary administration are subject to Charter scrutiny. Applicant's counsel does not challenge the validity of the provisions of section 103. Rather it is the discretion of the adjudicator exercised under it that he says contravenes the Charter in this case. As the Supreme Court of Canada made clear in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, both the text of a legislative provision and the way in which that instrument has been used are subject to Charter review. Review of the legislative provision itself will be appropriate when that provision authorizes action which infringes a Charter right. On the other hand, where "the disputed order confers an imprecise discretion and does not confer, either expressly or by

necessary implication, the power to limit the rights guaranteed by the Charter" a review of the way in which the legislative provision has been applied will be appropriate. (See page 1080). The current case falls into the latter category.

The law is clear that adjudicators under the *Immigration Act* have the jurisdiction to exercise extensive powers to decide important questions of law and fact, including detentions under section 103. In making such decisions, adjudicators are vested with the power to decide questions touching the application and supremacy of the Charter. See *Armadale Communications Ltd. v. Adjudicator (Immigration Act)*, [1991] 3 F.C. 242 (C.A.), at page 247, *per* Hugessen J.A. In my opinion, when making a decision as to whether to release or detain an individual under subsection 103(7) of the *Immigration Act*, an adjudicator must have regard to whether continued detention accords with the principles of fundamental justice under section 7 of the Charter. As I have earlier observed, it is not the words of section 103 that vest adjudicators with such jurisdiction, but rather, the application of Charter principles to the exercise of discretion under section 103.

I acknowledge that the necessity to apply Charter principles in deciding whether or not to continue detention, increases and complicates the considerations to which adjudicators must have regard, and I am not unmindful of the burden of their duties and the limited time they have to make decisions. But once it is accepted that individuals to whom section 103 applies are entitled to Charter protection, it must follow that detention decisions must be made with section 7 Charter considerations in mind.

I expect that as precedents develop, guidelines will emerge which will assist adjudicators in these difficult decisions. To assist adjudicators I offer some observations on what should be taken into account by them. Both counsel for the applicant and respondent were helpful in suggesting a number of considerations. The following list, which, of course, is not exhaustive of all considerations, seems to me to at least address the more obvious ones. Needless to say, the considerations relevant to a specific case, and the weight to be placed upon them, will depend upon the circumstances of the case.

(1) Reasons for the detention, i.e. is the applicant considered a danger to the public or is there a concern that he would not appear for removal. I would think that there is a stronger case for continuing a long detention when an individual is considered a danger to the public.

(2) Length of time in detention and length of time detention will likely continue. If an individual has been held in detention for some time as in the case at bar, and a further lengthy detention is anticipated, or if future detention time cannot be ascertained, I would think that these facts would tend to favour release.

(3) Has the applicant or the respondent caused any delay or has either not been as diligent as reasonably possible. Unexplained delay and even unexplained lack of diligence should count against the offending party.

(4) The availability, effectiveness and appropriateness of alternatives to detention such as outright release, bail bond, periodic reporting, confinement to a particular location or geographic area, the requirement to report changes of address or telephone numbers, detention in a form that could be less restrictive to the individual, etc.

A consideration that I think deserves significant weight is the amount of time that is anticipated until a final decision, determining, one way or the other, whether the applicant may remain in Canada or must leave. This raises squarely the question of whether immigration proceedings should be expedited when persons are detained in custody under section 103. In *R. v. Farinacci* (1993), 109 D.L.R. (4th) 97 (Ont. C.A.), Arbour J.A. discusses a similar problem in the context of the denial of bail pending the appeal of a conviction. At pages 114-115 she states:

There may have been a time when appellate delays were so short that bail pending appeal could safely be denied, save in exceptional circumstances, without rendering the appeal illusory. Such is no longer the case. In both civil and criminal cases, appellate court judges are often required to balance two competing principles of justice: reviewability and enforceability. Ideally, judgments should be reviewed before they have been enforced. When this is not possible, an interim regime may need to be put in place which must be sensitive to a multitude of factors including the anticipated time required for the appeal to be decided and the possibility of irreparable and unjustifiable harm being done in the interval.

. . .[qc]

Even if an applicant otherwise meets the statutory criteria enunciated in s. 679(3) of the *Code*, the public interest may be better served by denying bail but ordering that the hearing of the appeal be expedited.

It seems self-evident that both an applicant and the respondent have an interest in expediting the immigration process when a person is held in detention. There is an obvious public interest in detaining a person who would pose a danger to the public. There is also public interest, although perhaps somewhat less than in the case of public danger, in detaining a person when there are grounds for believing he or she would not appear for examination, inquiry or removal. This public interest must be weighed against the liberty interest of the individual. In many cases, the most satisfactory course of action will be to detain the individual but expedite the immigration proceedings.

In recognizing the need to expedite proceedings when individuals are held in detention, I not only have in mind proceedings before immigration officials and tribunals. The Court must also be prepared to accommodate and expedite proceedings in this forum as well. Rule 327.1 of the *Federal Court Rules* [C.R.C., c. 663 (as enacted by SOR/94-41, s. 2)] dealing with motions to expedite proceedings was promulgated this year and I think that Rule may be put to good use in detention cases. It goes without saying that the parties and counsel must also cooperate. In making these observations, I am not unmindful of the volume of immigrants and the demands on the various participants in the immigration

process. However, having regard to the liberty interest of the individual and the financial interest of the government in minimizing detentions, detention cases must be given priority.

Conclusion

In the case at bar, the Adjudicator decided to detain the applicant for the reasons he stated in the following manner:

Conditional release is not possible as Mr. Sahin will not voluntarily report for removal and is unwilling to offer any guarantee that would ensure compliance. He has been in detention for one full year and neither he nor his counsel, despite efforts, have been able to find any individual or organization that is willing to offer any guarantee that he will comply with conditions of release. He does not have a third country to go to and the only third country he has mentioned at previous reviews, Switzerland, is one where he feels authorities will return him to the police in Turkey.

As to the Charter considerations submitted by counsel for the applicant before him, the Adjudicator stated:

This reason for detention makes it unnecessary, and I believe it is undesirable, to address every point made by counsel, Mr. Sherlin, in his submisions.

While I am of the view that the Adjudicator properly complied with the statutory mandate of subsection 103(7) of the *Immigration Act*, he did not take into account the considerations required by section 7 of the Charter. The Adjudicator, in my view, is obliged to take such considerations as are relevant into account. Perhaps without some direction from the Court an adjudicator could not have been expected to do so, and there is no blame to be attributed to him. Nonetheless, the failure to do so constitutes an error of law.

I should make one further comment respecting the Adjudicator's comments in his decision as to whether the applicant would pose a danger to the public if he was not detained. I make this observation not because I think the Adjudicator erred in his assessment of the applicant's likely danger to the public, but rather, because it appears that in some early detention decisions regarding the applicant, there had been reference to public danger, while in later decisions, including the August 2, 1994 decision of Adjudicator Willoughby, public danger is not a consideration. The Adjudicator stated in his August 2 decision:

I also decided that the evidence did not support a finding that he likely would pose a danger to the public if released.

On the issue of danger to the public, I found that, that ground had been supported before by his own statements that he had been involved in bombings. He later recanted and this was accepted by the CRDD at a full hearing. No further evidence had been obtained or

presented by the Commission and the CRDD believed that he had not been personally involved in the bombings so I have no good evidence to believe he would pose a danger to the public.

It is the adjudicator himself or herself who must determine whether he or she is satisfied that the applicant would not pose a danger to the public. The fact that the CRDD made findings on this point may be relevant to the adjudicator's consideration of the matter, but it is not conclusive. The issue is an open one on each detention review and must be decided by the adjudicator each time. The applicant and the respondent are free to bring forward whatever evidence or information is relevant to assist the adjudicator in reviewing a detention.

The question of the applicant's continued detention shall be returned to an adjudicator for redetermination. The redetermination shall take place as soon as possible but, in any event, not later than fourteen (14) days after the date of this decision. The adjudicator shall have regard to the provisions of subsection 103(7) of the *Immigration Act* and section 7 Charter considerations in the nature of those outlined above and any others that he may consider relevant to fundamental justice. Should the fourteen (14) day period have to be extended for any reason, respondent's counsel shall arrange for a conference call with the Court and counsel for the applicant to explain the delay.

The parties shall provide the adjudicator with as much information as possible in respect of relevant considerations to enable him to make an informed and considered decision. This should include such information as to whether the applicant would pose a danger to the public if released, as well as whether he would appear for removal, and the future steps to be taken with respect to the applicant and when it is anticipated they will be completed.

I have been asked by counsel for the respondent to certify the following question:

Do the principles of fundamental justice prescribed by section 7 of the *Canadian Charter of Rights and Freedoms* place a limitation upon the length of a person's detention pursuant to section 103 of the *Immigration Act*, and if so, what is the extent thereof and by what means is such limitation to be determined?

I have also been asked by counsel for the applicant to certify the following question:

Pursuant to section 103 of the *Immigration Act*, can an adjudicator lawfully detain a Convention refugee or Convention refugee claimant as being unlikely to report for removal solely upon such person's expressed unwillingness to return to the country where he or she fears persecution?

While I entertain some doubts as to the appropriateness of either of these questions in the way in which they are framed, because Charter considerations are at issue, I think it is appropriate that the Federal Court of Appeal have an opportunity to review this matter. I shall certify the questions requested.