IMM-2483-96

BETWEEN:

MAU VAN NGUYEN

Applicant,

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent.

REASONS FOR ORDER

GIBSON J.:

These reasons arise out of an application for judicial review of a decision reached on behalf of the Respondent, pursuant to subsection 70(5) of the *Immigration Act*,[1] that the Respondent is of the opinion that the Applicant constitutes a danger to the public in Canada. The decision is dated the 6th of May, 1996.

The Applicant is a stateless person from Vietnam where he was born on the 23rd of December 1963. At the age of 15, on the 19th of July, 1979, he was landed in Canada. Since his arrival in Canada, he

[1] R.S.C. 1985 c. I-2.

has had a steady employment record although apparently at times he has supplemented his employment income with welfare. He is single and has no relatives in Canada. He has a mother, a brother and a sister in Vietnam.

The Applicant's criminal record reveals three convictions as follows: first, in November of 1981 he was convicted of mischief and given a suspended sentence and probation for eighteen months; second, he was convicted in September of 1982 of possession of a weapon and was sentenced to one day incarceration and a fine of $200.00. In October of 1994, he was convicted of trafficking in a narcotic, namely approximately one ounce of cocaine. Although he handled the cocaine in the transaction, he was jointly accused with another who was described in material on the tribunal record as the "coordinator". On this conviction, he was sentenced to imprisonment for two years less a day, thereby ensuring that he would serve his sentence in a provincial institution rather than a federal prison.

In a memorandum recommending that the Applicant be referred to inquiry, the following comment appears:

> Edmonton Integrated Intelligence Unit has no record of the subject being involved in organized criminal activity.

A removal order was made against the Applicant. The Respondent undertook an investigation to determine whether or not an opinion should be formed that the Applicant constitutes a danger to the public in Canada.

In submissions made on the issue of danger to the public, counsel for the Applicant wrote:

> It is submitted that when assessing Mr. Nguyen as a danger to the public, that significant weight must be placed upon the efforts that Mr. Nguyen has made towards his rehabilitation while in custody. Enclosed is a copy

> of Mr. Nguyen's certificate and letter confirming his completion of a drug awareness program. In addition, enclosed is a letter from Captain Richard Weber from The Church Army in Canada evidencing Mr. Nguyen's demeanour and efforts at rehabilitation.
>
> In the Immigration report dated January 4, 1995, Mr. Lomas indicates that Mr. Nguyen has close relatives in Vietnam. In fact, Mr. Nguyen has had very little contact, if any, with Vietnam and has spent over half of his life in Canada. In fact, Mr. Nguyen came to Canada when he was 15 years old. He would suffer a severe hardship if he was returned to a country which is completely unknown to him.

In the Criminal Backlog Review Ministerial Opinion Report - Danger to the Public, prepared for submission to the Respondent's delegate, an officer in the Respondent's Ministry reasonably summarized the material on file for consideration by the Respondent's delegate. The Officer wrote the following under the heading "Additional comments":

> Subject's three convictions span over a period of thirteen/fourteen years - 1981, 1982 and 1994. The lengthiest sentence he received was two years less one day for the trafficking offence. During incarceration, he completed a Drug Awareness Program. At this time, I do not believe that the subject is a danger to the public at this time; however, I recommend that the circumstances of the case be reviewed again should other convictions occur.

The officer's manager did not concur in the officer's recommendation. The officer commented:

> I find this a difficult assessment as subject has just completed a two year (less a day) sentence for drug-trafficking in cocaine. As this is not subject's first criminal conviction, although his previous convictions were relatively minor and occurred sometime ago, I am not convinced he will not reoffend. For these reasons, I believe subject should be declared a danger to the public. [underlining added by me for emphasis]

Without further documentation on the Tribunal record, and without reasons to explain the choice between the conflicting recommendations, the danger opinion issued.

The sole issue argued before me was whether or not, on the material before the Respondent's delegate, the opinion that the Applicant constitutes a danger to the public was perverse.

In the *Minister of Citizenship and Immigration v. Williams*,[2] Mr. Justice Strayer, in the context of commentary on the lack of reasons provided in matters such as this, wrote:

> What has been recognized is that where a discretionary tribunal decision is either, on its face, perverse, or where there is evidence of facts being before the tribunal which manifestly required a different result or which were irrelevant yet apparently determinative of the result, then a court may be obliged to conclude that, in the absence of reasons which might have explained how the result is indeed rational or how certain factors were taken into account but rejected, a court may have to set aside the decision for one of the established grounds for judicial review such as error of law, bad faith, consideration of irrelevant factors, failure to consider relevant factors etc. In such cases the tribunal decision is set aside not because of a lack of reasons *per se* but because in the absence of reasons it is not possible to overcome the inference of perversity or error derived from the result or the surrounding circumstances of the decision.

Earlier in the *Williams* reasons for decision, Mr.Justice Strayer wrote:

> Further, when confronted with the record that was, according to undisputed evidence, before the decision-maker, and there is no evidence to the contrary, the Court must assume that the decision-maker acted in good faith in having regard to that material.

I am of the view that the reference to "...in having regard to that material" must be read as "...in having regard to the totality of that material." Thus, I must assume, because there is no evidence to the contrary in this matter, that the Respondent's delegate had regard to all of the material that was before him or her, not simply to the memorandum prepared for his or her use by an officer in the Respondent's ministry and differed from in its conclusion by that officer's manager.

By reference to the first quote from *Williams* above, I am satisfied that, in this matter, there is no evidence of facts being before the

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[2](1997), 147 DLR (416) 93 (F.C.A.) ((application for leave to appeal to the Supreme Court of Canada filed June 10, 1997).

Minister's delegate "...which manifestly required a different result or which were irrelevant yet apparently determinative of the result...". But I reach a different conclusion on the issue of whether or not the decision to form the opinion that the Applicant is a danger to the public in Canada is, on its face, perverse.

I conclude that the principal factors disclosed by the material before the Respondent's delegate in this matter bearing on the formation of an opinion as to whether the Applicant can be said to be a present or future danger to the public in Canada are the following: first, the Applicant's criminal record which, as the officer in the Respondent's ministry pointed out, consists of three convictions over a period of thirteen or fourteen years and with two of those offences long removed from the most current offence and apparently being of a relatively minor nature if one considers the sentences imposed; second, while counsel for the Applicant acknowledged that the trafficking conviction, particularly involving cocaine in a significant quantity, is a serious one, the sentence imposed is remarkably light for such a conviction; third, the Edmonton Police Integrated Intelligence Unit had no record of the Applicant being involved in organized criminal activity which is, unfortunately, the hallmark of drug trafficking; fourth, apparently the Applicant spent substantial time in the community following the trafficking charge and before his conviction, and has spent further time in the community following his release from incarceration without any evidence of further criminal activity; and fifth and finally, the Applicant made effective use of his period of incarceration, brief as it was, in rehabilitative activity marked by a pro-social attitude.

The most negative factor on the record that was before the Respondent's delegate, leaving aside the drug trafficking convictions itself, was the comment contained in the manager's recommendation quoted

above that "...I am not convinced he will not reoffend." With great respect, that is not a relevant comment. In forming an opinion as to whether an individual such as the Applicant constitutes a present or future danger to the public in Canada, the possibility or likelihood of reoffending is only relevant to the extent that the reoffending may, or is likely to represent, a danger to the public in Canada. This Applicant's first offence was "mischief". Such an offence by the Applicant in the future is unlikely to represent a danger to the public in Canada. The Applicant's second offence was possession of a weapon for which the Applicant received a sentence of one day and a fine of $200.00. There was no evidence before the decision-maker as to the circumstances surrounding this offence or the weapon involved. Once again, while possession of a weapon might well be an indicia of danger, such an offence producing an equivalent sentence to that earlier imposed on the Applicant is unlikely to be of such a nature. If, however, what the manager was concerned about was the Applicant returning to drug trafficking in cocaine, or some other serious offence involving violence, directly or indirectly, that would certainly be a relevant consideration in forming an opinion that the Applicant constitutes a present or future danger to the public in Canada. But it is simply not evident that that is what the manager focussed on.

On the basis of the foregoing considerations, I return again to the words of Mr. Justice Strayer in *Williams*, first quoted above, and I extract the following from those words:

> ...where a discretionary tribunal decision is ... on its face, perverse, ... then a court may be obliged to conclude that, in the absence of reasons which might have explained how the result is indeed rational or how certain factors were taken into account but rejected, a court may have to set aside the decision for one of the established grounds for judicial review such as error of law, bad faith, consideration of irrelevant factors, failure to consider relevant factors, etc.

I am satisfied that the discretionary tribunal decision here under review is, on

its face, and in the absence of reasons that might explain how the result is indeed rational, perverse. In the result, in the absence of reasons, I conclude that I must set aside the decision of the Respondent's delegate for one of the established grounds for judicial review, in this case, error of law. In the absence of reasons, I can find no rational explanation for the opinion formed by the Respondent's delegate.

In so deciding, I realize that I may be seen to be differing from decisions of at least two of my colleagues on relatively similar fact situations.

In *Phong Tran v. The Minister of Citizenship and Immigration*,[3] Mr. Justice Heald dealt with the case of another stateless person from Vietnam who was found to be a danger to the public in Canada, apparently on the basis of one conviction only, that being for conspiracy to traffic in heroin. I am satisfied that case can be distinguished. A sentencing report on file in that matter indicated the applicant had sold heroin to undercover police officers on "numerous" occasions. Further, the sentencing judge found that although the applicant was not in the top echelon of the conspiracy, he had a "significantly closer connection than that as was indicated by the facts." Finally, in that matter, the applicant was sentenced to a term of five years imprisonment.

In *Smith v. the Minister of Citizenship and Immigration*,[4] Mr. Justice Muldoon dealt with the case of an individual who was found to be a danger to the public or the basis of a conviction for drug trafficking, for which he received a thirty month sentence, a conviction for

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[3] June 26, 1997, Court file: IMM-2382-96 (unreported)(F.C.T.D.)

[4] July 15, 1997, Court file: IMM-1153-96 (unreported) (F.C.T.D.)

drug possession for which he received a six month sentence concurrent to the thirty months, and an earlier conviction for theft that occurred in close proximity in time before his two later convictions. Once again, I am satisfied that this matter can be distinguished on the basis of the proximity of the three convictions and the evident escalation in the Mr. Smith's criminality.

In the result, this application will be allowed, the decision of the Respondent's delegate that, in his or her opinion, the Applicant constitutes a danger to the public in Canada will be set aside, and the matter will be. referred back to the Respondent for redetermination, if considered necessary, taking into account these reasons.

Neither counsel recommended certification of a question in this matter. No question will be certified.

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Judge

Ottawa,Ontario
August 20, 1997