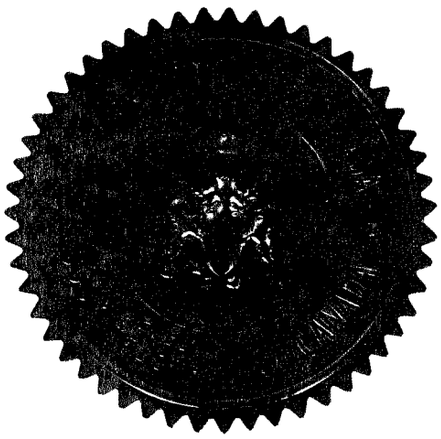
Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

IMM-1054-96

B E T W E E N:



LEROY ANTHONY SMITH

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER & ORDER

GILES, A.S.P.:

The applicant herein for an extension of time within which to file his record was in the process of appealing a Deportation Order based on ss. 27(a)(d)(ii) of the *Immigration Act* to the Immigration Appeal Division. His hearing in that division was postponed because the Minister who had the applicant in custody claimed to be unable to bring the applicant to his hearing. During the delay thus necessitated the Minister formed the opinion that the applicant was a danger to the public within the meaning of s. 70(5).

The Appeal Division then found itself without jurisdiction. The applicant's legal recourse is limited now to judicial reviews. All of which it appears, because of the time limits in the F*ederal Court Immigration Rules, 1993*, must be carried on at the same time, although not in the same application. Only one decision can be challenged in each application.

The challengeable decisions appear to be:

1) The decision under s. 27(1)(d)(ii), the judicial review right being substituted for of right of appeal by s. 70(5).

2) The decision of the Minister in forming the opinion that the applicant is a danger to the public.

3) The decision of the Appeal Division that it did not have jurisdiction.

Counsel for the Minister in her submissions with respect to the motion before me, indicates, that an application for leave and judicial review of the decision of the Minister in under way in Court File. IMM-2727-96. Should the applicant be successful in challenging the Minister's decision, it would appear that his next move would be to proceed with the appeal interrupted by the Minister' decision.

The grounds for the challenge of the Minister 's decision as such are not, I believe before me intentionally and in fact should not be. It appears that one of the grounds for challenging the decision of the Appeal Division, which is the subject of this file is that s. 70(5) is unconstitutional. Such an allegation might be deployed in challenging the Minister's decision, or in challenging the Appeal Division's decision, because the Appeal Division would indeed have jurisdiction if s. 70(5) of the Immigration Act, or the section implementing it this case (S.C. 1995 c. 15 s. 13(4)) was ruled unconstitutional.

Counsel for the Minister has correctly indicated that most of the submissions filed to show evidence of the existence of an arguable case for leave in this file, which is the challenging of the decision of the Appeal Division that

it had no jurisdiction, are relevant only to the decision of the Minister that the applicant is a danger to the public. I am not prepared to conclude, that those allegations with respect to conduct of the Department are relevant to the challenge of the Minister's decision. I am, however, quite prepared to find that those allegations are irrelevant to this file.

The decision as to the jurisdiction of the Appeal Division will depend on the validity of the Minister's decision. The only part of that decision which could be challenged on this motion, and that indirectly, would be the constitutionality of s. 70(5). However, the attack here does not appear to be on the constitutionality of s. 70(5) itself, but on the constitutionality of the formation of an opinion by the Minister in this case. That is, the way in which the decision was taken to form the opinion that the applicant was a danger to the public. That question is more properly raised in Court File IMM-2727-96. The applicant, therefore has not shown an arguable case for leave to have judicial review of the Appeal Division's decision that it no longer had jurisdiction. This application for an extension of time to file a record must be dismissed.

It remains to be decided, whether I should grant leave to reapply. Counsel for the Minister has represented that the applicant has had three opportunities to apply, and should not be granted another. In view of the antics of the Department alleged in this case (at this stage, I must accept them to be factual), I would have no hesitation at all in granting a further attempt were there any possibility of success.

As previously stated, it is my opinion that the only attack that could be made on the decision of the Appeal Division that it had lost jurisdiction because of the Minister's opinion, would be because s. 70(5) was unconstitutional.

In his recent reasons in *Esperidion Sanidad Casino v. M.C.I.*, IMM-746-96 rendered in Calgary on 20th September, 1996, Mr. Justice Dubé indicates that retro-active removal of the applicant's right of appeal to the Immigration Appeal Division does not violate the applicant's rights under the *Charter*. In his reasons Mr. Justice Dubé cited *Seyhoon v. M.C.I.*, now reported at 28 Imm. L.R. (2d) 87, and *Tsang et al. v. M.C.I.*, now reported at 107 F.T.R. 214, recent decisions of this Court in the area of s. 70(5) or the Minister's opinion. He also cites *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53 at p. 70 as authority for the proposition that a right to appeal is of purely statutory origin and not a *Charter* right.

As there is no possibility of success for a constitutional attack on s. 70(5), I will reluctantly not be granting leave for a further application.

<u>O R D E R</u>

Motion for an extension of time to file the applicant's record is dismissed.

"Peter A.K. Giles"

A.S.P.

Toronto, Ontario
October 11, 1996

FEDERAL COURT OF CANADA

Names of Counsel and Solicitors of Record

COURT NO:	IMM-1054-96
STYLE OF CAUSE:	LEROY ANTHONY SMITH - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION

CONSIDERED AT TORONTO, ONTARIO UNDER THE PROVISION OF RULE 324.

REASONS FOR ORDER AND ORDER BY:	GILES, A.S.P.
DATED:	OCTOBER 11, 1996

APPEARANCES:

Yossi Schwartz

Solicitor for the Applicant

Ms. Urszula Kaczmarczyk

Solicitor for the Respondent

SOLICITORS OF RECORD:

Yossi Schwartz
ROACH, SCHWARTZ & ASSOCIATES
Barristers & Solicitors
688 St. Clair Avenue West
Toronto, Ontario
M6C 1B1

Solicitor for the Applicant

Ms. Urszula Kaczmarczyk
Department of Justice

George Thomson
Deputy Attorney General of Canada

Solicitor for the Respondent