Federal Court Cour fédérale

Date: 20120327

Docket: IMM-1715-11

Citation: 2012 FC 362

Ottawa, Ontario, March 27, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

PANCHALINGAM NAGALINGAM

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). The Applicant seeks an order declaring a deportation order (2003 Order) issued by the Immigration Division of the Immigration and Refugee Board (ID) and dated 28 May 2003 null and void. The Applicant also seeks a writ of prohibition preventing the Respondent from removing him from Canada.

BACKGROUND

[2] The Applicant is a citizen of Sri Lanka currently living in Canada under house arrest. He first entered Canada on 31 August 1994. At that time, he claimed refugee status under the former *Immigration Act*. The Convention Refugee Determination Division (CRDD) recognized the Applicant as a Convention refugee without a hearing on 2 March 1995. The Applicant became a permanent resident of Canada on 13 March 1997.

[3] Between 1999 and 2001, the Applicant accumulated four criminal convictions in Canada. On 24 August 2001, the Respondent issued a report which alleged the Applicant was inadmissible for involvement in organized criminality, based on his membership in AK Kannan – a gang active in Toronto. The Applicant was arrested and detained on 18 October 2011 on the basis that he was a danger to the public and would not attend his admissibility hearing. The ID found on 28 May 2003 that the Applicant was inadmissible to Canada under paragraph 37(1)(*a*) of the Act because he was involved in organized criminal activity. On that date, the ID also issued the 2003 Order against him.

[4] After the 2003 Order was issued, the Applicant applied to this Court on 11 June 2003 for leave and judicial review of the ID's admissibility decision. Justice Elizabeth Heneghan dismissed the application for judicial review on 12 October 2004 (see *Nagalingam v Canada (Minister of Citizenship and Immigration)* 2004 FC 1397).

[5] In order to return the Applicant to Sri Lanka as a Convention refugee, the Minister of Citizenship and Immigration or his delegate had to issue a danger opinion against him under paragraph 115(2)(*b*) of the Act. The Minister of Citizenship and Immigration first issued a danger opinion on 4 October 2005 (2005 Danger Opinion). The Applicant applied for judicial review of

that danger opinion on 25 October 2005. After in the Respondent initiated removal proceedings in 2005, the Applicant made a motion for a stay of removal. This motion was denied by Justice Eleanor Dawson on 2 December 2005.

[6] The Applicant then asked the Ontario Court for an injunction to stop his deportation. During that proceeding, the Respondent undertook to return the Applicant to Canada if his application for judicial review of the danger opinion was successful. Justice Wilson of the Ontario Court of Justice dismissed the application for an injunction on 5 December 2005. The Canada Border Services Agency (CBSA) removed the Applicant from Canada on 7 December 2005.

[7] In his judgment, dated 28 February 2007, Justice Michael Kelen dismissed the application for judicial review of the 2005 Danger Opinion (*Nagalingam v Canada (Minister of Citizenship and Immigration*), 2007 FC 229). However, he also certified two questions. The Applicant pursued an appeal to the Federal Court of Appeal. On 24 April 2008, the Federal Court of Appeal quashed the 2005 Danger Opinion and remitted the matter to the Minister of Citizenship and Immigration for reconsideration (*Nagalingam v Canada (Minister of Citizenship and Immigration)* 2008 FCJ 153).

[8] Pursuant to his undertaking before the Ontario Court of Justice in 2005, the Respondent eventually issued the Applicant a Temporary Resident Visa (TRV) in February 2009. On 24 February 2009, the Applicant returned to Canada. The CBSA detained him on his arrival in Canada and placed him in immigration detention. He remained in immigration detention until April 2009 when he was released to house arrest.

[9] The Minister of Citizenship and Immigration issued a new danger opinion under paragraph 115(2)(*b*) of the Act on 23 February 2011 (2011 Danger Opinion). That opinion was subject to an

application for judicial review currently before this Court (IMM-1711-11, which I granted on 8 February 2012.

[10] On 10 March 2011 a CBSA officer personally served the Applicant with a Notice of Removal Arrangements (NORA) and told him he would be removed on the basis of the 2003 Order. The NORA informed the Applicant that he was scheduled for removal between 23 and 26 March 2011. On 15 March 2011 made the within application for leave and judicial review. The Applicant also applied for a stay of removal on 16 March 2011.

[11] The Respondent informed the Applicant on 17 March 2011 that his removal had been administratively deferred. On the strength of that information, the Applicant asked this court to adjourn his motion for stay of removal *sine die*. The Court granted that adjournment.

[12] On 9 September 2011, a CBSA officer served the Applicant with a report under subsection 44(1) of the Act, which said that the officer was of the opinion that he was inadmissible under paragraph 36(2)(*a*) of the Act. This opinion was based on the Applicant's convictions in 2000 and 2001. When he went to the Greater Toronto Enforcement Center (GTEC) for an interview on 16 September 2011, the CBSA served the Applicant with a deportation order (2011 Order). On 17 September 2011, the Applicant was given another NORA. That notice informed him that he was scheduled for removal on 29 or 30 September 2011. The Applicant has applied for leave and judicial review of the inadmissibility report (IMM-6450-11), which has not yet been granted or denied. He also applied for leave and judicial review of the 2011 Order, but discontinued that application on 7 December 2011 (IMM-6451-11).

[13] The Applicant asked this Court, on 21 September 2011, that his 16 March 2011 motion for stay of removal be set down for a hearing on 26 September 2011. On 26 September 2011, I stayed the Applicant's removal pending the outcome of his applications for judicial review of the 2003 Order and the 2011 Danger Opinion.

ISSUES

[14] The Applicant raises the following issues in this proceeding:

a. Whether the 2003 Order continues to empower the Respondent to remove him from Canada;

b. Whether prohibition is an appropriate remedy.

STANDARD OF REVIEW

[15] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[16] Also in *Dunsmuir* (above), the Supreme Court of Canada held at paragraph 59 that true questions of *vires* are subject to the correctness standard. The Supreme Court of Canada has recently affirmed this holding in *Smith v Alliance Pipeline* 2011 SCC 7 at paragraph 26 and *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* 2011 SCC 61 at

paragraph 30. The Court in this case is called on to determine if the Minister has the authority to remove the Applicant from Canada. This is a true question of *vires,* so the correctness standard applies.

[17] At paragraph 50 in *Dunsmuir*, the Supreme Court of Canada held that

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[18] This Court's jurisdiction to grant a writ of prohibition is found at paragraph 18(1)(*a*) of the *Federal Courts Act* RSC 1985 c F-7. In *Canadian Red Cross Society v Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] FCJ No 17, the Federal Court of Appeal held at paragraph 25 that:

> One of the objectives of judicial review of the decisions of administrative bodies is to prevent those bodies from doing acts that they do not have the power to do, and one method of doing this that is recognized in the Federal Court Act is to obtain a writ of prohibition (see paragraphs 18(1)(a) and 18.2(3)(b) of the Act).

[19] Further, it is well established that prerogative writes like prohibition are discretionary. See *Canada (Citizenship and Immigration) v Khosa* 2009 SCC 12 at paragraph 40 and *Alberta (Information and Privacy Commissioner)*, above, at paragraph 22. If I conclude that the Respondent does not have the jurisdiction to remove the Applicant under the 2003 Order, then prohibition is an appropriate, but discretionary remedy.

STATUTORY PROVISIONS

[20] The following provisions of the IRPA are applicable in these proceedings:

36. (2) A foreign national is inadmissible on grounds of criminality for	36. (2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :
(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;	*a*) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;
37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for	37. (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants:
(*a*) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern;	*a*) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;
…	…
45. The Immigration Division, at the conclusion of an	45. Après avoir procédé à une enquête, la Section de

admissibility hearing, shall make one of the following decisions:	l'immigration rend telle des décisions suivantes:
…	…
(*d*) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.	*d*) prendre la mesure de renvoi applicable contre l'étranger non autorisé à entrer au Canada et dont il n'est pas prouvé qu'il n'est pas interdit de territoire, ou contre l'étranger autorisé à y entrer ou le résident permanent sur preuve qu'il est interdit de territoire.
…	…
48. (1) A removal order is enforceable if it has come into force and is not stayed.	48. (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.

ARGUMENTS

The Applicant

[21] The Applicant concedes that the 2003 Order was valid when it was issued. However, he argues that the Respondent does not have the jurisdiction to remove him from Canada under that order because its legal force was spent when the CBSA removed him on 7 December 2005.

The 2003 Order is Spent

[22] The Applicant says that, when the CBSA enforced the 2003 Order, its entire legal force was exhausted. That order gave a single direction to the CBSA to remove the Applicant, which was done, so its mandate has been fulfilled. To deport him again, the Respondent must obtain another deportation order from the ID.

[23] The Applicant also says that this interpretation ensures that there is no redundancy in the Act. To hold that the 2003 Order is not spent and remains in force would render subparagraph 228(1)(*c*)(ii) of the Regulations redundant. That subparagraph requires the ID to issue a deportation order where a foreign national has re-entered Canada without authorization. The Applicant says that, if a deportation order is not spent by its execution, there is no need for a new deportation order under 228(1)(*c*)(ii) when a previously deported foreign national re-enters Canada; that foreign national could simply be deported under the first deportation order.

[24] In *Communities Economic Development Fund v Canadian Pickles Corporation*, [1991] SCJ No 89, [1991] 3 SCR 388, the Supreme Court of Canada held at paragraph 36 that

> It is a principle of statutory interpretation that every word of a statute must be given meaning: "A construction which would leave without effect any part of the language of a statute will normally be rejected" (Maxwell on the Interpretation of Statutes (12th ed. 1969), at p. 36).

[25] The Applicant also says that the jurisprudence of this Court, the Federal Court of Appeal, and the Immigration Appeal Division of the IRB supports his position. See *Mercier v Canada (Minister of Employment and Immigration)*, [1986] FCJ No 739, *Mercier v Canada (Minister of Employment and Immigration)*, [1985] FCJ 535 (FCA), *Huang v Canada (Minister of Citizenship and Immigration)*, [2008] IADD No 1453, *Raza v Canada (Minister of Citizenship and*

Immigration), [1998] FCJ 1826 (TD), and *Saprai v Canada (Minister of Employment and Immigration)*, [1986] FCJ 273.

The Respondent

[26] The Respondent argues that the 2003 Order is still in effect, so he still has the authority to remove the Applicant. The Applicant has conceded in his memorandum that the 2003 Order is valid. There is no ground for the judicial review the Applicant seeks because he has conceded this point.

The Circumstances Surrounding the Applicant's Re-entry are Unusual

[27] The Applicant returned to Canada on a TRV after the Respondent gave an undertaking to the Ontario Court of Justice to assist the Applicant to return to Canada if the 2005 Danger Opinion was overturned on judicial review. Had it not been for this undertaking, the Respondent would not have allowed the Applicant to come back to Canada. The 2003 Order remains in force because these circumstances are unusual.

Nature of Prohibition

[28] The Respondent says that there is no basis for this application because the Applicant is not seeking review of the 2003 Order. Although this Court has the jurisdiction to grant prerogative writs, it cannot grant any relief that is not within the jurisdiction of the body being reviewed. In *Vickers v Canada (Attorney General)* 2002 FCT 408, Justice Luc Martineau said at paragraph 11 that

> In accordance with the ruling in *Thibaudeau v. M.N.R.*, [1994] 2 F.C. 189, at 224, a court hearing an application for judicial review cannot exercise more powers than the federal board, commission or other tribunal could have exercised.

[29] Though the ID has the authority to grant deportation orders, it does not have the ability to grant the relief that the Applicant seeks, so this Court also does not have that authority. The Respondent refers to *Psychologist "Y" v Nova Scotia Board of Examiners in Psychology* 2005 NSCA 116 [*Psychologist Y*] at paragraph 21 where the Nova Scotia Court of Appeal held that

> Prohibition is a drastic remedy. It is to be used only when a tribunal has no authority to undertake (or to continue with) the matter before it. Unless a lack of jurisdiction or a denial of natural justice is clear on the record, prohibition is also a discretionary remedy. As Sara Blake says in her text, Administrative Law in Canada, 3rd ed. (Butterworths, 2001) at 200, it may be refused if the existence of jurisdiction is debatable or turns on findings of fact that have yet to be made. "It must be clear and beyond doubt," she writes, "that the tribunal lacks authority to proceed." Or as 11 Halsbury's Laws of England (3rd ed., 1955) p. 115 puts it, prohibition cannot be claimed as of right unless the defect of jurisdiction is clear.

[30] Following *Sadique v Canada (Minister of Manpower and Immigration)*, [1974] FCJ No 89; 46 DLR (3d) 131, the Respondent says that prohibition cannot be substituted for a stay or an injunction.

Deportation and Enforcement are Separate

[31] The Respondent also says that the enforcement of a deportation order cannot affect the validity of that order. He relies on *Kalombo v Canada (Minister of Citizenship and Immigration)* 2003 FCT 460, where Justice Martineau said at paragraph 27 that

> […] the issuance and validity of removal orders do not depend upon the intention to execute those orders. The issuance of a removal order and its enforceability or execution are two distinct concepts that are

> not interchangeable. Removal orders arise from the operation of law and are not premised on intent.

[32] The Respondent also relies on *Argueles v Canada (Minister of Citizenship and Immigration)* 2004 FC 1477 where Justice Martineau provided the following guidance at paragraph 23:

> In the case at bar, it is worth noting here that the Act does not make the validity of the removal order subject to its enforcement or enforceability. The Act clearly separates the two proceedings (*Kalombo v. Canada (Minister of Citizenship and Immigration*), [2003] F.C.J. No. 615 (F.C.T.D.) (QL); *Nguyen v. Canada (Minister of Employment and Immigration*), [1993] 1 F.C. 696 (C.A.), at pages 708-9). When the panel has made a removal order, the question of when and where the person concerned will be removed is entirely a matter for the Minister (*Chieu v. Canada (Minister of Citizenship and Immigration*), [2002] 1 S.C.R. 84, at paragraph 74). At this stage, therefore, it cannot be assumed that the deportation order will be carried out by the Minister.

[33] The Respondent also points to *Wajaras v Canada (Minister of Citizenship and Immigration)* 2009 FC 200, and says that the 2003 Order remains in force even though it was enforced in 2005 because the enforcement and issue of deportation orders are separate processes.

2011 Danger Opinion was Issued Because of the 2003 Order

[34] The Respondent notes that the delegate issued the February 2011 danger opinion because of the Order; the Order is only enforceable against the Applicant – as a convention refugee – once there has been a danger opinion issued under paragraph 115(2)(*b*) of the IRPA as an exception to the principle of non-refoulement. The Respondent says that the Applicant understands that he remains subject to removal based on the Order.

Delay

[35] The Respondent further argues that the Applicant cannot object to the 2003 Order in these proceedings because he has had several opportunities to object but has not availed himself of any of them. The Applicant could have raised the validity of the 2003 Order when he was detained on his return to Canada in February 2009, or at his detention review hearings in February and April 2009. The Respondent says that the ID specifically raised the enforceability of the 2003 Order at the Applicant's detention review hearing in April 2009 when the member said

> He is detained pending his removal, he is subject still of the removal order that was issued in 2003. It was understood that in essence his legal situation would be essentially the same as it was of the 4th of December, 2005, the day before he was removed from Canada the 1st time except that at that time the 115(2)(*b*) was in existence and was used to support his removal.

[36] The Applicant cannot now object to the 2003 Order because he did not take this earlier opportunity to do so and has not objected to it during the two years since he returned to Canada.

Seeking a Fresh Order Would be an Abuse of Process

[37] The Respondent further says that the Applicant has no status in Canada while he says at the same time that the Respondent must seek a fresh deportation order. The Respondent argues that seeking a new deportation order would be an abuse of process because, the Applicant having conceded the validity of the 2003 Order in his memorandum, the issuance of a deportation order is now *res judicata*. There is no legal reason to remit the matter to the ID to conduct a new admissibility hearing in order to issue a new removal order where an enforceable order is in place. As Justice Jean-Eudes Dubé said in *Kaloti v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1281 at paragraph 12

> Consequently, I must find that, generally, *res judicata* has an application in public law. Otherwise, applicants could re-apply ad infinitum and ad nauseam with the same application, an abuse of the process of administrative tribunals.

[38] The Respondent says that there are public policy reasons which support the application of the principle of *res judicata* in the context of immigration law and that seeking a fresh deportation order is inappropriate in this case.

The Applicant's Reply

[39] The Applicant replies that the Respondent's has mischaracterized his position on the validity of the 2003 Order. The Applicant says that he has not conceded that the 2003 Order is valid, only that it was valid when it was issued. He maintains his argument that the 2003 Order no longer has any force because it was spent when he was removed on 7 December 2005. He also says that the Respondent mischaracterises the *lis* in these proceedings as a review of the 2003 Order; the Applicant seeks a declaration that the 2003 Order is spent, not a review of its original issuance.

[40] The Applicant also points out that there is no authority for the Respondent's argument that the unusual circumstances of his return to Canada overcome the lack of statutory jurisdiction. The Respondent has not rebutted his argument that the correct interpretation of the Act leads to a finding that the 2003 Order is spent. The Respondent also has not distinguished the jurisprudence upon which the Applicant relies.

[41] The Applicant further says that the Respondent's argument based on the nature of the relief sought is a further mischaracterization of the matter in dispute. Though it may be that the ID is not empowered to review its own orders, this application is not against the ID but against the

Respondent and the CBSA. What is at issue is not the power to review the order but the continuing force of the order to authorize the Respondent to remove the Applicant. *Psychologist Y*, above, does not assist the Respondent. That case stands for the proposition that prohibition is an appropriate remedy where there is a lack of jurisdiction, which is what the Applicant says is the case with respect to the 2003 Order. The Respondent lacks jurisdiction to remove the Applicant because the 2003 Order is spent, so prohibition is appropriate.

[42] The Applicant agrees with the Respondent that the enforcement and issuance of deportation orders are separate processes. However, the Respondent's submissions on this point are irrelevant because the Applicant is not arguing that the 2003 Order was invalid when it was issued. Enforcement does not alter the original validity of the order, but it does expend the order's force such that the Respondent no longer has the jurisdiction to remove the Applicant.

[43] The Respondent's statement that the 2011 Danger Opinion was issued pursuant to the 2003 Order is simply irrelevant. Also, the Respondent's statement that the Applicant is without status is incorrect; he is still a Convention refugee.

[44] Further, the Respondent's submissions on delay are not supported by the evidence. The Applicant put the Respondent on notice of his position regarding the continuing force of the Order as early as 30 May 2008. On that day, the Applicant wrote a letter to Bridget O'Leary, a lawyer in the Immigration Section of the Department of Justice, in which he said

> Be advised that I dispute your contention that the Deportation Order remains in effect. The Deportation Order if May 2003 was executed when Mr. Nagalingam was deported in 2005. There is therefore no Deportation Order in effect at this time.

[45] The Respondent has not taken any steps to resolve this issue, so he cannot say that delay bars the Applicant from seeking relief in this Court.

[46] Though there may be difficulty in getting the ID to hear a new application for a deportation order, this is not relevant to whether the 2003 Order still gives the Respondent jurisdiction to remove him. If there are public policy arguments which support the application of *res judicata* in the immigration context, the Respondent can presumably marshal similar public policy arguments in support of a new order.

[47] Finally, the Applicant notes that, while there has been no excess of jurisdiction to date, the whole point of his application is to seek a declaration regarding jurisdiction and an order of prohibition to prevent an excess of jurisdiction.

The Respondent's Further Memorandum

The Deportation Order Remains Enforceable

[48] The Respondent further says he would be without a means to remove the Applicant if his argument that he cannot be deported without a fresh deportation order is correct, even though he remains inadmissible and is not challenging the issuance of the 2003 Order. The admissibility process has been completed in this case and was upheld on judicial review. To force the Minister to repeat this process would be a waste of time and money. The Respondent also says that the issue of admissibility is *res judicata* and that there is no legislative authority for the Applicant's assertion that the Order is no longer enforceable.

The Applicant Accepted the Respondent's Authority to Remove Him

[49] The Respondent points out that the Applicant was detained on his return from Sri Lanka on the understanding that he remains inadmissible and is subject to removal. Though the Applicant raised objections to enforceability in correspondence with the Minister as early as 30 May 2008, in the letter to Counsel at the Department of Justice and in letters dated 25 June 2008 and 2 February 2009, these objections were prior to the Applicant's return to Canada. The Respondent says that the Applicant did not raise any objections to enforceability of the 2003 Order at his immigration detention reviews, which suggests that he accepted the enforceability of the 2003 Order. Had the 2003 Order not been enforceable, the immigration detention proceedings would have been without basis, so the Applicant should have objected at that time.

[50] The Respondent points out that the ID repeated the understanding of all parties that the Applicant remained subject to the 2003 Order at the Applicant's third detention review. All parties, including the Applicant, understood that his legal situation would be the same as it was on 6 December 2005, the day before he was removed to Sri Lanka. The Applicant did not object to this statement. Further, the Applicant did not raise the enforceability of the 2003 Order in his submissions to the Minister's Delegate assigned to formulate the 2011 Danger Opinion. That danger opinion was premised on the Respondent's ability to remove him under the 2003 Order, so the Respondent asks why the Applicant did not challenge the Order at that time.

[51] The Applicant has acquiesced in the terms and conditions attached to his release that he negotiated with the Minister. In the two years that he has been out of immigration detention, the Applicant has not raised the issue of the Order, though he has had several opportunities to do so. This means that he has given up his right to object under the common-law doctrine of waiver. The

Respondent relies on *Benitez v Canada (Minister of Citizenship and Immigration)* 2006 FC 461 where Justice Richard Mosley wrote ay paragraph 213 that

> The principle of common law waiver is described by Justice MacGuigan in *In re Human Rights Tribunal and Atomic Energy of Canada Limited,* [1986] 1 F.C. 103, (1985) 24 D.L.R. (4th) 675 (F.C.A.), […] Justice MacGuigan stated that at common law, even an implied waiver of objection to an adjudicator at the initial stages is sufficient to invalidate a later objection. Justice MacGuigan noted:
>
> > The only reasonable course of conduct for a party reasonably apprehensive of bias would be to allege a violation of natural justice at the earliest practicable opportunity. Here, AECL called witnesses, cross-examined the witnesses called by the Commission, made many submissions to the Tribunal, and took proceedings before both the Trial Division and this Court, all without challenge to the independence of the Commission. In short, it ... impliedly ... waived its right to object.
> > [emphasis in original]

[52] It is reasonable to believe that the Applicant would have objected to the basis for his detention when he was brought back to Canada. He was aware of the issue, as shown by his correspondence with the Minister in 2008 and early 2009, so he cannot now raise the issue. The Applicant's silence is equivalent to acquiescence.

ANALYSIS

General

[53] Neither side has been able to identify a specific statutory provision or legal authority that decides the issue before me.

[54] There is no dispute between the parties that the 2003 Order was valid when it was issued, and that the Applicant was legitimately removed from Canada pursuant to that order. The disagreement is over the current status of the 2003 Order and its impact for any future removal of the Applicant. The Applicant takes the position that because he was removed to Sri Lanka in 2005 pursuant to the 2003 Order, the force of that Order is now spent so that any further removal requires the Minister to obtain a new deportation order. On the other hand, the Respondent says that, even though the Applicant was removed in 2005, the force of the 2003 Order is not spent. On this reading of the situation, once the issue for which the Applicant has returned to Canada has been resolved, he can be removed again under the 2003 Order.

[55] It seems to me that the issue of whether or not the Minister has a continuing jurisdiction to remove the Applicant pursuant to the 2003 Order depends upon the nature and purpose of this kind of deportation order and the role it is intended to play in our immigration system. To simplify the issue somewhat, does the 2003 Order authorize only a single removal, or does it define the Applicant's status and render him subject to removal at any time until that order is either lifted or modified? If it is the former, then it seems to me that there is some force to the Applicant's argument that the authority of the 2003 Order is now spent, because what it authorized has taken place. If, however, the 2003 Order defines the Applicant's status and renders him subject to removal at any time when no other impediment to removal exists, then it seems to me that the authority of the 2003 Order is not spent and the Respondent still has the jurisdiction to remove the Applicant under that order.

[56] If the Respondent is correct and a removal order continues to empower and require him to remove subjects of removal orders from Canada, then it follows that, if a person previously subject

to a removal order returns, the Respondent is also obligated to remove that person on their return. At the same time, the Minister of Citizenship and Immigration is permitted to authorize subjects of removal orders to return to Canada. Although they have authorization to return, people formerly subject to removal orders would be in danger of removal. It simply does not make sense to me that one Minister can authorize a person to return while another is concurrently obligated to remove that person from Canada.

[57] One could interpret an authorization to return to Canada as including an implicit stay of deportation. However, this approach does not deal with the potential redundancy the Applicant has identified in his submissions. Under subparagraph 228(1)(*c*)(ii) of the Regulations, the Immigration Division (ID) is required to issue a deportation order where a person has returned to Canada without authorization. If the Respondent is correct and a removal permits a second removal and subsequent removals, it is redundant to require the issuance of a second deportation order under subparagraph 228(1)(*c*)(ii). As the Supreme Court of Canada noted, at paragraph 36, in *Communities Economic Development Fund v Canadian Pickles Corp.*, [1991] 3 SCR 388,

> It is a principle of statutory interpretation that every word of a statute must be given meaning. “A construction which would leave without effect any part of the language of a statute will normally be rejected”…

[58] The authority to remove flows from subsection 48(2). This section does not speak about the duration of the authorization to remove, so it would seem that, unless there is a limitation somewhere else in the Act or the Regulations, the duration of the order would be indefinite. I do not think that this fits with the scheme of the Act.

[59] Looking at the scheme of the Act and Regulations as a whole, I think “enforceable” in section 48 must mean “executable only once.” Interpreting removal orders in this way solves the duration issue and resolves the potential tension between the obligation to remove and the discretion to authorize return. If the force of the order to authorize removal is spent by a single removal, the Minister is free to authorize return without having to stay removal prior to return. Further, a single-removal order eliminates the administrative hurdle for subjects of departure and exclusion orders.

Jurisprudence

The Applicant

[60] The Applicant has argued that the deportation order which was used to remove him from Canada in 2005 is no longer in force, so it cannot empower the Minister to remove him from Canada. He says that the cases he has cited at paragraph 9 of his Memorandum show that, once a deportation order is executed, it ceases to have any force or effect. He relies on *Rawle Ramkissoon v Canada (Minister of Manpower and Immigration)*, [1978] 2 FC 290 (FCA); *Mercier v Canada (Minister of Employment and Immigration)*, [1985] FCJ 535 (FCA); *Saprai*, above; *Bhawan v Canada (Minister of Employment and Immigration)*, [1987] FCJ 573; *Raza*, above; and *Huang*, above.

[61] In *Ramkissoon v Canada (Minister of Manpower and Immigration)*, [1978] 2 FC 290 (FCA) (QL), the appellant was ordered deported on 14 February 1974, to Trinidad, because he had been convicted of a criminal act. He left Canada and returned on 13 March 1976 without notifying the Minister. The appellant appealed this first deportation order to the Immigration Appeal Board (IAB); the appeal was heard on 17 November 1975, before he returned to Canada. The appellant

was ordered deported a second time because he returned to Canada without either the Minister's consent or a successful appeal after a deportation order had been made against him.

[62] The issue before the Federal Court of Appeal was whether the appellant's departure from Canada had executed his deportation order such that the IAB no longer had jurisdiction to consider an appeal of that deportation order. The Federal Court of Appeal held that the definition of "removal" in the 1952 *Immigration Act*, RSC 1952 c 325 (1952 Act) was broad enough to include a voluntary departure. More importantly for the present case, the Federal Court of Appeal held that the execution of the deportation order deprived the appellant of any status to appeal that order.

[63] It seems to me that the Applicant is attempting to use this case to show that, because the IAB no longer had jurisdiction to entertain an appeal of the order in *Ramkissoon*, the deportation order must have been spent of all its legal force by its execution. Ramkissoon argued that he had not executed the order against him, so the IAB had jurisdiction to hear his appeal; having not been executed, he argued that the order was not spent and his right of appeal still flowed from the order. The Federal Court of Appeal held that

> The legal effect of the applicant's voluntary departure was that he was thereby deprived of the any status entitling him to appeal against the first deportation order under the equitable section 15 jurisdiction of the Board.

[64] The Federal Court of Appeal held that, under section 15 of the *Immigration Appeal Board Act* RSC 1970, c I-3, the IAB had jurisdiction to quash or stay a deportation order which continued to be in force and had not yet been executed. The Federal Court of Appeal said

> Nowhere in section 15 is the Board clothed with the jurisdiction to take any action in cases where the deportation order has been executed. All the powers conferred on the Board under section 15 relate to possible action before the execution of the deportation order.

[65] I agree with the Applicant that *Ramkissoon* suggests that, when the act contemplated by the removal order is done, the force of the order is spent. If this were not so and the order were still in force, the IAB would have had jurisdiction to hear Ramkissoon's appeal. By executing the removal order against him, Ramkissoon expended the force of the order and deprived himself of the right to an appeal which flowed from an unexecuted order.

[66] In *Mercier v Canada (Minister of Employment and Immigration)*, [1985] FCJ No 535 (FCA), Mercier applied for a writ of *mandamus* to compel the Respondent to hold an inquiry under the 1976 *Immigration Act* RSC 1985 c I-2 in which Mercier could claim refugee status. He also applied for an injunction preventing the Respondent from deporting him, but withdrew this request at the trial level. Under the 1976 *Immigration Act*, a person against whom a removal order was executed, but who returned to Canada, could only raise a claim for refugee status during an inquiry. Mercier argued that, by voluntarily removing himself, he had carried out the deportation order and so was entitled to an inquiry where he could raise a refugee claim.

[67] Mercier argued that, having executed the deportation order, its force was spent. The Federal Court of Appeal refused to address this issue because it was raised for the first time on appeal and depended on an allegation of fact that was not before the Trial Division. Hence, I cannot say that this case supports the Applicant's position before me.

[68] In *Mercier v Canada (Minister of Employment and Immigration)*, [1986] FCJ No 739, the applicant (the same Mercier as above) had been ordered deported on 17 November 1982 because of his criminal activities. While this deportation order was in force, the applicant went to his native Haiti and then returned to Canada. He made a similar argument in this case to the one he had made before the Federal Court of Appeal (see *Mercier*, above), to the effect that he had executed the order

against him voluntarily so he was entitled to a new hearing under subsection 44(1) of the 1976 *Immigration Act*.

[69] Justice Joyal held that Mercier had not sought or received leave before he left for Haiti under section 54 of the 1976 *Immigration Act*, so his departure had not executed the order against him. The order remained in effect. Because the order had not been executed, it remained in force and precluded him from seeking refugee status again.

[70] Justice Joyal also said, however, that counsel's argument that, having been executed, the order was no longer valid, "has a certain logic to it." While the order in *Mercier* was in force, the applicant had been able to pursue appeals before the IAB. Ultimately, Justice Joyal held that Mercier had not executed the order, so it remained in effect.

[71] In *Saprai*, above, the applicant was ordered deported in 1977, under the 1952 *Immigration Act*. Though the deportation order was issued under the 1952 Act, the transitional provisions in the 1976 *Immigration Act* converted the order into a deportation order under that statute, so the enforcement provisions of the 1976 *Immigration Act* applied to the order. Saprai had been advised that he would be removed to New Delhi on 24 February 1986. He argued that he had executed the deportation order himself when he left Canada on 6 March 1986.

[72] Saprai sought an injunction restraining the Respondent from removing him, on the grounds that he had voluntarily executed the order against himself and expended its force. The Court held that, without permission to depart, he could not have executed the order against himself. In that context, an unexecuted removal order empowered the Respondent to remove Saprai from Canada, so the Respondent could not be enjoined from detaining and removing Saprai.

[73] This case clearly establishes that an unexecuted removal order remains in force; by implication, it also seems to suggest that the force of a deportation is spent once it has been executed.

[74] *Bhawan*, above, presents a similar fact situation to the cases already reviewed: an applicant subject to a deportation order voluntarily departed Canada, then returned and claimed that his departure had executed the deportation order. Here, though, the applicant argued that, because he had executed the deportation order, the Minister could not deport him without issuing a fresh order. The Court did not comment on the necessity of a second deportation order to remove the applicant. Rather, it followed *Mercier*, which held that a voluntary departure, to execute a deportation order, required the permission of the Minister. As in *Mercier*, Bhawan had not sought the Minister's permission before leaving so he had not executed the deportation order. Since it had not been executed, the order remained in force.

[75] In *Raza*, above, the applicant challenged the determination of an immigration officer who had found that, because he had not received the permission of the Minister before leaving Canada, he had not executed the deportation order against himself. The Court in *Raza* relied on *Mercier* and *Ramkissoon* and found that Raza had not executed the deportation order because he did not have the Minister's permission to leave. Hence, the deportation order remained in force and Raza was precluded from claiming refugee status.

[76] In *Huang*, above, the appellants appealed an exclusion order made by a member of the Immigration Division (ID) against them on the basis that they were inadmissible under section 40(1) of the Act for misrepresentation. The appellants relied primarily on H&C grounds for their appeal, but the issue of execution of the exclusion order came up. It came to light at the hearing that the

appellants had gone to China for a month, then returned to Canada. Prior to their departure, they had appealed the exclusion order against them. The IAB found that the appellants had not intended to give up their rights to appeal. It also found that, because the appeal had not been finally determined, the exclusion orders were not in force when they had left Canada. Therefore, they could not have executed the exclusion orders and lost their right of appeal to the IAD.

[77] The applicability of *Huang* to the instant case is not entirely clear. At all relevant times in *Huang*, the exclusion order was not in force by virtue of the appeal to the IAD. Since the appellants were ultimately successful, the exclusion order never came into force against them, so the effect of execution on the orders' validity did not arise.

[78] From the cases above it seems that where an unexecuted removal order is in force the Respondent remains empowered to remove subjects and, to the extent that rights of appeal flow from an enforceable removal order, those rights remain only so long as the order remains in force. Further, *Ramkissoon* establishes that, where rights of appeal depend on an enforceable removal order, those rights are lost once the removal order is executed. The Applicant says that these cases demonstrate that an executed removal order is no longer valid. In my opinion, although the cases do not directly establish the Applicant's point, the reasoning behind them suggests that the force of a removal order is not perpetual. By implication at least it would seem that once a removal order has been executed then its force is spent.

The Respondent

[79] The Respondent relies on *Kalombo*, above, for the proposition that the issuance and enforcement of deportation orders are separate process. He says that, since they are separate

processes, the execution of the 2003 Order did not affect the continuing force of that order to allow him to remove the Applicant.

[80] The applicant in *Kalombo* was a Convention refugee from the Democratic Republic of the Congo (DRC) who was convicted of a number of criminal offences and directed to an inquiry under paragraph 27(1)(*d*) of the 1976 *Immigration Act*, as amended by SC 1992 c 47, section 78. After that inquiry, the ID issued a removal order against him and he appealed to the IAD. Before the IAD, Kalombo argued that the order was invalid and should be stayed because the Respondent had a moratorium in place on removals to the DRC.

[81] Following the appeal, the IAD found that the deportation order against Kalombo was valid and held that the decision on whether or not to execute a removal order was within the Respondent's discretion. Although the Respondent did not wish to execute the removal order, this did not change the fact that the deportation order was valid at law. On judicial review, Kalombo again challenged the validity of the deportation order against him. He argued again that the Minister did not intend to remove him, so the removal order was invalid.

[82] Justice Martineau disagreed with the Applicant's position and found that the order arose out of the operation of law. He found that "the Act does not make the removal order contingent upon its execution or enforceability." Justice Martineau also noted that the issue of where an individual will be removed is a matter for the Respondent to decide. See *Chieu v Canada (Minister of Citizenship and Immigration)*, [2002] SCJ No 1.

[83] As I read this case, it does not say that the execution of a removal order has no effect on the continuing legal force of that order. In *Kalombo*, the applicant had not yet been removed from

Canada, so the question of whether a completed removal impacts the continuing authority to remove was not decided by the Court.

[84] I also think that *Kalombo* deals with the impact of administrative arrangements to remove, including the Respondent's intent to remove the subject on the validity of the order. That is, *Kalombo* stands for the proposition that a removal order is valid even though the Respondent does not intend to enforce it. What this case does not deal with, in my view, is whether performing the removal, the act mandated by the order, expends the Respondent's authority to remove the subject from Canada under that order.

[85] *Argueles*, above, is another case which considered the impact of administrative arrangements on the validity of removal orders. Argueles applied for judicial review of a deportation order issued against him by the ID because he was inadmissible under paragraph 36(1)(*a*) of the IRPA. Under that order, Argueles was to be removed to his native Cuba, where he feared persecution for political activities. On judicial review, Argueles argued that the deportation order was issued against him contrary to his *Charter* rights and that section 36 of the IRPA was unconstitutional because it violated the *Charter*. In his reasons, Justice Martineau refers to *Kalombo*, above, for the proposition that

> When the panel has made a removal order, the question of when and where the person concerned will be removed is entirely a matter for the Minister.

[86] Justice Martineau then went on to discuss the procedures in place for evaluating the risk faced by subjects of a removal order prior to their removal and the availability of H&C relief from the order. He concluded that the judicial review application should be dismissed because the order did not violate the applicant's *Charter* rights.

[87] As with *Kalombo*, I read *Argueles* as dealing with the impact of pre-removal administrative procedures on the enforceability of removal orders. As Justice Martineau said in *Argueles*, "I consider that the application for judicial review [of the order] is premature." The applicant's challenge was premature because the proper place to assert his *Charter* rights was in an application for review of the choice of the place to which he was to be deported, not in a challenge to the validity of the order itself. Although a deportation to risk might violate the applicant's *Charter* rights, the decision to deport him did not. Also, as in *Kalombo*, the removal order had not yet been executed against the applicant, so the Court did not have to deal with whether the act of removal expends the legal force of an order to empower the Respondent to remove the subject.

[88] In *Wajaras*, above, Wajaras was a citizen of Sudan and a Convention refugee in Canada. After living in Canada, he committed several crimes which resulted in both an admissibility hearing and a danger opinion. While the admissibility process was underway, a Minister's delegate determined that Wajaras was not a danger to the Canadian public. The ID then found that he was inadmissible to Canada on the grounds of serious criminality and issued a deportation order against him. Wajaras asked for judicial review of the deportation order, arguing that it was an abuse of process for the Respondent to seek a deportation order through the admissibility process even though he was precluded from removing the applicant under the principle of non-refoulement. Wajaras noted that, because of the deportation order, he had lost his permanent resident status in Canada.

[89] Justice Barnes found that it was not an abuse of process for the Respondent to seek a deportation order against Wajaras, even though that order could not be enforced. Most importantly

for the instant case, Justice Barnes relied on *Argueles* and *Kalombo*, above and found that, at paragraph 13 of *Wajaras*, above,

> The decision in *Kalombo* was applied in *Argueles* for the point that the validity of a removal order is not subject to its enforceability (see para. 23). Similarly, the validity of the removal order obtained against Mr. Wajaras is not dependant upon whether it can now or ever be executed. The Applicant effectively seeks to connect the two issues by suggesting that the inadmissibility process ought to have been halted by the Minister as soon as it was found that Mr. Wajaras was not a danger to the Canadian public. There is no legal basis for such an argument and the Board was right to reject it.

[90] As with *Kalombo* and *Argueles*, it is my view that *Wajaras* deals with the connection between the validity of a removal order and another, separate, administrative process. In *Wajaras*, this was clearly a distinct step which had to be completed before the applicant could be removed. The danger opinion the delegate was required to make was a separate process with its own set of procedural entitlements. *Wajaras* shows that the Court has been concerned to prevent processes which are ancillary to the purpose of a removal order from affecting the validity of the order.

[91] In *Wajaras*, the act the applicant attempted to use to challenge validity was not required by the removal order. What made the danger finding necessary was the principle of non-refoulement. In a similar way, the Respondent's moratorium on removals to the DRC in *Kalombo* also arose out of the principle of non-refoulement. In *Argueles*, the protection granted by the *Charter* stood in the way of removal. The common thread of these cases, it seems to me, is that the requirements separate from the act contemplated by the order do not affect the underlying validity of the order.

[92] Taken together, I think that *Argueles*, *Kalombo,* and *Wajaras* show that there is an important distinction between pre-removal administrative processes and removal itself. Although the processes leading up to removal are necessary and important and may impact a subject's rights, they

are ancillary to the validity of the removal order. Removal is the act authorized and mandated by the order, while pre-removal administrative processes are only necessary by implication; they are required to carry out the act, but they are not the act authorized and mandated by a removal order.

[93] Looking to the case at hand, I do not find the Respondent's argument based upon *Kalombo*, *Argueles*, and *Wajaras*, to be persuasive. As noted, these cases all deal with pre-removal administrative arrangements.

[94] The Respondent's position is that, even though he has removed the Applicant once under the 2003 Order, he can still use the same order to remove the Applicant in the future. As I read *Kalombo*, *Argueles*, and *Wajaras*, however, they do not show that executing the specific act contemplated by a removal order (i.e. removal) cannot affect its validity.

Remedy

[95] Assuming that my above comments are correct and the 2003 Order no longer empowers the Respondent to remove the Applicant from Canada, this raises the question of the appropriate remedy in this case. In his Application for Leave and Judicial Review, the Applicant asks for

> An order declaring the removal order of May 28, 2003, to be null and void and prohibiting the [Respondent] from removing the Applicant from Canada.

[96] The Respondent has argued, following *Vickers*, above, that prohibition is an inappropriate remedy because the ID cannot grant prohibition. In *Vickers*, at paragraph 11, Justice Martineau held that

> In accordance with the ruling in *Thibaudeau v. M.N.R.*, [1994] 2 F.C. 189, at 224, a court hearing an application for judicial review cannot

> exercise more powers than the federal board, commission or other tribunal could have exercised. In the case at bar, the vice-chairman of the Board could have granted or denied leave to appeal under subsection 83(2) of the Plan. Accordingly, the Court here cannot grant the plaintiff a disability pension and can only reverse the Board's decision and refer the matter back for re-determination.

[97] While it may be that the ID cannot grant prohibition against its own orders, this does not mean in my view that prohibition is not available in the appropriate case. As the Respondent has noted

> Prohibition is a drastic remedy. It is to be used only when a tribunal has no authority to undertake (or to continue with) the matter before it. Unless a lack of jurisdiction or a denial of natural justice is clear on the record, prohibition is also a discretionary remedy.

[98] If the Court were to accept the Respondent's argument, this would leave the Applicant without any means of challenging an improper exercise of the authority granted to the Respondent concerning removal orders. In my view, this cannot be the case.

[99] With that said, however, I think the relief the Applicant has requested is too broad. What the Applicant challenges here is not the validity of the removal order but its present authority to effect his removal a second time. To declare the 2003 Order wholly void would be to grant the Applicant more than is necessary to vindicate his rights as established in this case.

[100] The validity of the 2003 Order is not contested; the Applicant has admitted its validity in his arguments. The relief the Court grants should accord with facts before it, including the validity of the 2003 Order.

[101] The Applicant also asks the Court for an order "prohibiting the [Respondent] from removing him from Canada." This too, I think, is too broad.

[102] What I think is the most appropriate remedy here is a declaration from this Court that the Respondent is not empowered to remove the Applicant from Canada under the 2003 Order and an order of prohibition preventing the Respondent from using that order to remove the Applicant. In *Canada (Prime Minister) v Khadr* 2010 SCC 3, the Supreme Court of Canada held at paragraph 46 that

> A court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it. Such is the case here.

[103] In this Application, the Court's jurisdiction over the issue is found in subsection 18(1) of *Federal Courts Act* RSC 1985 c F-7, which says that

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	**18.** (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour:
(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and	*a*) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;
(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.	*b*) connaître de toute demande de réparation de la nature visée par l'alinéa *a*), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

Waiver and Consent

[104] The Respondent has argued in his submissions that the circumstances surrounding the Applicant's return to Canada in 2009 were unusual in a way that impacts the continuing validity of the 2003 Order. He also says that the parties were all operating under the understanding that the Applicant would be in the same position after his return as he was immediately prior to his removal in 2005. The Respondent says that the parties agreed that the 2005 removal would have no effect on the continuing enforceability of the 2003 Order. Further, the Respondent argues that, because the Applicant has not objected to the validity of the 2003 Order before (at his detention reviews, for example), he is precluded from raising the 2003 Order's validity now.

[105] The common thread that runs through all of these arguments is the notion that the Respondent's authority to remove the Applicant can somehow be extended by consent of the parties or a waiver of the right to object. The Respondent's authority to remove anyone from Canada is delegated to him by the Act and Regulations. It does not seem to me that the Respondent's authority to remove someone in accordance with the Act and the Regulations can be enlarged by the consent of the parties.

[106] Further, it does not make sense to me that the subject of a deportation order can somehow empower a second removal simply by not raising the issue at the earliest opportunity. This would mean that, although the IRPA authorizes only a single removal, the lack of a timely objection somehow enlarges the Respondent's powers beyond what are granted under the Act. In my view, whether or not an applicant objects to the Respondent's authority cannot change the scope of that authority.

[107] Also, I am not convinced that, when he was returned to Canada in 2009, the Applicant believed that the 2003 Order could still be used to deport him. The Applicant filed the within application on 14 March 2011, only four days after he was notified on 10 March 2011 that the CBSA intended to remove him on the strength of the 2003 Order.

[108] The Respondent has also said that the Applicant should have objected to the validity of the 2003 Order in the context of the 2011 Danger Opinion. However, as discussed below, the danger opinion and admissibility processes are separate; the validity of the 2003 Order had no bearing on the propriety of the section 115 process, so it was not reasonable to expect the Applicant to raise the 2003 Order's validity in that context. In my view, there cannot have been waiver of the right to object to the 2003 Order in those proceedings.

The Danger Opinion

[109] The Respondent has also argued that the 2011 Danger Opinion was sought on the basis of the 2003 Order and that, without an inadmissibility finding, there is no requirement to seek a danger opinion. It may be that the Minister of Citizenship and Immigration was motivated to seek the 2011 Danger Opinion because he thought that the 2003 Order was in force. However, I do not think there is any legal basis to this argument. As noted above, the jurisprudence the Respondent has cited establishes that the administrative processes surrounding removal and the validity of the underlying removal order are separate.

[110] The current case is similar to *Wajaras*, above, where Justice Barnes held that it was not an abuse of process for the Minister of Citizenship and Immigration to seek a deportation order through the admissibility process, even though a Minister's Delegate had found Wajaras was not a danger to

the public. Justice Barnes found that the two processes were separate and rejected the argument that the admissibility processes should be halted as soon as the delegate found that Wajaras was not a danger to the public. In a similar way, the underlying validity of the 2003 Order cannot and does not depend on where the Applicant is in the section 115 process.

Abuse of Process

[111] The Respondent also argues that holding the 2003 Order invalid and forcing him to seek a new deportation order is an abuse of process. On the facts and for reasons given above, this argument has no merit in my view.

The Applicant has Conceded the 2003 Order's Validity

[112] The Respondent also says that the Applicant has conceded that the 2003 Order is valid. This argument is not persuasive on the facts; the Applicant has only conceded that, when it was issued, the 2003 Order was valid. What is at issue in this application is whether the 2003 Order continues to be valid and authorizes the Respondent to remove the Applicant. Also, even if the Applicant had conceded that the 2003 Order was valid, I do not see how the Respondent's authority to remove the Applicant can be enlarged by consent.

A New Order is a Waste of Time and Money

[113] The Respondent also argues that forcing him to seek a new order is a waste of the ID's resources. Whether or not this is the case, I do not see how it can perpetuate the Respondent's authority to remove the Applicant under a deportation order whose force is spent.

No Means of Removal

[114] Finally, the Respondent argues that, because the admissibility finding from 2003 remains in place and has been upheld on judicial review, holding that the 2003 Order is spent will leave him without a means to remove the Applicant because the ID cannot re-declare him inadmissible. It seems somewhat contradictory to me for the Respondent to argue that seeking a new order is a waste of time and money and then to argue that the Respondent has no means of removing the Applicant. In any event, the situation before the Court arose because of the Respondent's undertaking to the Ontario Court of Justice in 2005 to return the Applicant to Canada. A strategic choice was made to deal with the Applicant in a particular way. If the consequences of that choice are not what the Respondent expected, I do not think the Court can base its views of the present status of the 2003 Order upon that fact. The Respondent has to be taken to have known the law when the choice was made.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed in part. The Court declares the 2003 Order dated 28 May 2003, although valid when made, has now been executed and its force is spent. Hence, it cannot now be used as the basis of any future deportation of the Applicant and the Court prohibits the Respondent from using the 2003 Order to remove the Applicant from Canada.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	March 27, 2012

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