

Federal Court



Cour fédérale

**Date: 20130103**

**Docket: IMM-2779-12**

**Citation: 2013 FC 1**

**Ottawa, Ontario, January 3, 2013**

**PRESENT: The Honourable Madam Justice Tremblay-Lamer**

**BETWEEN:**

**NUWAN DILUSHA JAYAMAHA MUDALIGE  
DON**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION AND THE MINISTER OF  
PUBLIC SAFETY AND EMERGENCY  
PREPAREDNESS**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] for judicial review of a decision by a delegate of the Minister of Citizenship and Immigration [the delegate], dated December 13, 2011. The delegate issued an exclusion order against the applicant for his failure to respect the requirement under subsection 184(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations] to leave Canada within 72 hours after ceasing to be a member of a crew.

## **FACTS**

[2] The applicant is a citizen of Sri Lanka.

[3] He was a crew member of the vessel M/V Lake Ontario which arrived in Oshawa, Ontario – n November 27, 2011. On December 1, 2011 the applicant deserted the ship. He went to Montreal the following day.

[4] The applicant was not aware that on December 12, 2011 an immigration officer signed a report under subsection 44(1) of the Act to the effect that the applicant had failed to respect the requirement under subsection 184(1) of the Regulations that he leave Canada within 72 hours after ceasing to be a member of a crew. The next day, the delegate issued an exclusion order against the applicant under subsection 44(2) of the Act because he was satisfied the applicant had failed to comply with subsection 184(1) of the Regulations. The Canadian immigration authorities proceeded to issue a warrant for the applicant's arrest.

[5] The applicant claimed refugee status on December 16, 2011, twelve days after he lost his temporary resident status in Canada. He submits that he delayed claiming protection because he did not want to be forced to return with his vessel, which he was sure would leave Canada by that date. When he claimed refugee status, he was provided with an interim federal health eligibility document and told to report to Citizenship and Immigration Canada [CIC] every Thursday. In late February or early March 2012, the applicant received a letter requesting he present himself at the CIC Montreal office on March 6, 2012. On that day, he was advised that he could not claim refugee status in Canada because there was an exclusion order made against him on December 13, 2011.

[6] On March 8, 2012 the applicant returned to CIC with his attorney and requested to see the section 44 report and the exclusion order made against him. The immigration officer refused to provide these documents and stated that the applicant should submit an access to information request to obtain them.

## **ISSUE**

[7] The issue in the present application for judicial review is whether the delegate breached his duty of procedural fairness by issuing an exclusion order against the applicant before the applicant had any contact with the Canadian immigration authorities.

## **STANDARD OF REVIEW**

[8] The applicable standard of review to questions of the scope of procedural fairness under subsection 44(2) of the Act is correctness (*Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 at para 16 [*Cha*]).

## **APPLICANT'S POSITION**

[9] The applicant submits that the delegate breached the duty of procedural fairness. He cites the guidance in the CIC Operational Manual on the review of reports issued under subsection 44(1) of the Act that persons must be informed of the nature of the allegations in the reports at the earliest opportunity and be given a reasonable opportunity to respond before a removal order is issued. The manual also states that the Minister's delegate should not issue a removal order against someone who has had no contact with CIC or the Canada Border Services Agency [CBSA]. The applicant

submits that in the present case, the delegate's notes indicate there was no effort in trying to contact him or determine his whereabouts before issuing the exclusion order.

[10] The applicant maintains that the exclusion order was made without his knowledge, and if he had been provided the opportunity to respond to the report he would have filed his claim for refugee status before he was subject to a removal order.

### **RESPONDENTS' POSITION**

[11] The respondents submit that the concept of procedural fairness is not a fixed standard (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] SCJ No 39 at para 21 [*Baker*] and that the Federal Court of Appeal held in *Cha* that when issuing an exclusion order subsequent to a section 44 report for criminality, "a relatively low degree of participatory rights is warranted".

[12] The respondents assert that the procedure set out in *Cha* to be applied by a Minister's delegate when making an exclusion order based on criminality, including an interview, is all together impracticable for the delegate in the case of a marine deserter because the Canadian immigration authorities have no contact information for a marine deserter. It is not reasonable to require Canadian immigration authorities to wait to issue an exclusion order until a marine deserter appears before them, as this could take several years and it imposes an undue burden. It is therefore warranted to proceed with an exclusion order in the individual's absence.

[13] In the case at bar, the respondents submit that considering the applicant remained in Canada more than 72 hours after deserting his ship, despite being without status and therefore illegal, the

process followed by the delegate was perfectly legal. The decision to prepare a section 44 report and issue an exclusion order *in absentia* was the only available procedure in the circumstances.

[14] In the alternative, the respondents submit that should this Court conclude that the delegate breached the duty of procedural fairness in rendering the exclusion order *in absentia*, the decision should not be quashed because no purpose would be served in remitting the matter back for reconsideration.

## **ANALYSIS**

[15] Subsection 44(1) of the Act provides that an immigration officer who is of the opinion that a permanent resident or foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts and shall transmit it to the Minister. Under subsection 44(2) of the Act, the Minister has jurisdiction to make a specific removal order in specific circumstances prescribed in the Regulations. Section 44 and other relevant statutory provisions are reproduced in annex to these reasons.

[16] The parties have not referred the Court to any case law dealing with the scope of the delegate's duty of procedural fairness in the context of a removal order based on the grounds that a foreign national is inadmissible under section 41 of the Act for failing to comply with subsection 184(1) of the Regulations.

[17] As the content of procedural fairness is variable and must be determined in the specific circumstances of each case (*Baker* at para 21), the five non-exhaustive factors set out by the

Supreme Court of Canada in *Baker* at paragraphs 21 to 28 must be reviewed in order to determine what procedural rights the duty of fairness requires in the circumstances in the case at bar. These five factors are:

- a) the nature of the decision being made and the procedures followed in making it;
- b) the nature of the statutory scheme;
- c) the importance of the decision to the individual affected;
- d) the legitimate expectation of the individual challenging the decision; and
- e) the choices of procedure made by the agency.

a) Nature of the decision and procedures

[18] The Federal Court of Appeal noted the following in *Cha* when assessing this factor in the context of a removal order issued by a delegate on grounds of criminality:

44 In the case at bar, we are at the very heart of typically routine administrative decisions where what is essentially at issue is the ascertainment of certain objective facts pertaining to the criminal conviction in Canada of foreign nationals. We are as far removed as we can possibly be from a judicial decision making process. It is precisely because the decision to be made in respect of serious or simple criminality in Canada of a foreign national is straightforward and fact-driven that, according to the manual, the responsibility for taking it has been assigned to the Minister's delegate (ENF 6, paragraph 3). The decision is so much a matter of routine verifications that when dealing with the onus of proof, the Manual explains that the onus is either reasonable grounds or balance of probabilities with respect to all grounds of inadmissibility except those of serious or simple criminality, for which the question of onus is not even mentioned (ENF 1).

45 These are purely administrative decisions which attract a minimal duty of fairness.

[19] I see no reason to depart from the Court of Appeal's understanding of the nature of the role of the delegate in making a subsection 44(2) determination. Whether a foreign national is inadmissible on grounds of criminality or whether he or she is inadmissible on grounds of ceasing to be a member of a crew, the nature of the delegate's decision and the applicable procedures remain the same. Like the process analyzed in *Cha*, the decision-making process in the present case is also straightforward and fact-driven and, as provided in the manual for all removals issued by a delegate, there is little need for the delegate to weigh evidence (ENF 6 at section 3). The delegate's administrative decision in the present context therefore points to a minimal duty of procedural fairness.

b) Nature of the statutory scheme

[20] Like in *Cha*, in this case the applicant's only opportunity to challenge the immigration officer's report would have been before the delegate confirmed the report and issued the removal order, as the delegate's decision is determinative of inadmissibility. The statutory scheme provides no opportunity to challenge the report before the Immigration Division. Judicial review is the only recourse available. This factor points to a higher duty of fairness than where the report is referred to the Immigration Division (*Cha* at para 46).

[21] However, the applicant could still seek to stay the removal order by applying for a pre-removal risk assessment under section 232 of the Regulations or seek a stay on humanitarian and compassionate or public policy considerations pursuant to section 233 of the Regulations (*Cha* at para 48). This factor points to a lower duty of fairness.

c) Importance of the decision to the individual affected

[22] The exclusion order has a serious impact on the individual affected. Not only is the individual required to obtain a written authorization in order to return to Canada during the one-year period after the exclusion order is enforced pursuant to subsection 225(1) of the Regulations, but in the present case, under subsection 99(3) of the Act, the applicant was also precluded from being eligible to make a claim for refugee protection in Canada once he was subject to the exclusion order. This also points to a higher duty of fairness.

d) The legitimate expectation of the individual challenging the decision

[23] The applicant contravened a major condition of his right of entry to Canada by not leaving Canada within 72 hours after ceasing to be a member of a crew. He could not have expected he would be able to remain in Canada without regulating his status.

[24] Furthermore, the ENF 6 manual states at section 16 that the Minister's delegate should not issue a removal order against someone who has had no contact with CIC or the CBSA. The manual also sets out at section 5.1 the requirements of procedural fairness in the exercise of the delegate's powers. The relevant excerpts from the ENF 6 manual are reproduced below. In *Cha*, the Federal Court of Appeal reviewed these requirements and found that while the claimant has every reason to believe these rules will be followed, the rules are found at the lower end on the continuum of procedural protection (*Cha* at para 50).

[25] The legitimate expectation of the applicant would therefore be procedural rights on the lower end of the spectrum, but not so low that he would be afforded no participatory rights at all.



e) The choice of procedure made by the agency

[26] The Act and the Regulations leave to the decision maker the ability to choose its own procedures. This choice is to be respected (*Baker* at para 27).

[27] Weighing the *Baker* factors, I am led to the conclusion that the content of the duty of fairness in the context of the situation in the case at bar is at the low end of the spectrum.

[28] In the absence of any relevant case law regarding the content of this duty in the precise circumstances at issue, I have considered the content of the duty of fairness in other contexts. In *Cha*, the Federal Court of Appeal determined that the following measures met the requirements of the duty of procedural fairness in the context at issue (*Cha* at para 52):

- provide a copy of the immigration officer's report to the person
- inform the person of the allegation(s) made in the immigration officer's report, of the case to be met and of the nature and possible consequences of the decision to be made
- conduct an interview in the presence of the person, be it live, by videoconference or by telephone
- give the person an opportunity to present evidence relevant to the case and to express his point of view

[29] I recognize that in *Cha* the Federal Court of Appeal did not purport to rule on any situation other than the specific one at issue (*Cha* at para 13). Nevertheless, both the reasoning and conclusion in *Cha* as to the requirements of the duty of fairness are compelling. The circumstances at issue in *Cha* are very similar to the circumstances in the case at hand. In both cases, after an immigration officer made a report under subsection 44(1) of the Act finding a foreign national inadmissible, a Minister's delegate found that the report was well-founded and proceeded to make a

removal order pursuant to section 44(2) of the Act and section 228(1) of the Regulations. However, there are two relevant distinctions between the scenario and statutory context in *Cha* and the one in the present case. In *Cha* the foreign national was inadmissible solely on grounds of criminality and in the case at bar the applicant was inadmissible solely on grounds of failing to comply with section 184 of the Regulations. Second, in *Cha* the foreign national had been legally residing in Canada with a student authorization when the removal order was made, so the immigration authorities had his contact information. In the case at bar, however, 72 hours after he deserted his ship on December 1, 2011, the applicant had lost his legal immigration status in Canada.

[30] The respondents argue that the procedure set out in *Cha* is impracticable for the Minister's delegate to apply in the case of a marine deserter because the Canadian immigration authorities will have no way to contact the deserter to conduct an interview unless the deserter appears voluntarily or is stopped or arrested by the police for some reason. I am not persuaded by this argument. The immigration authorities have the same recourses available to them to make contact with marine deserters who have not left Canada by the end of their authorized stay as are available for them to make contact with other individuals living in Canada without legal immigration status (see for example the foreign nationals arrested prior to being subject to a removal order in *Li v Canada (Minister of Citizenship and Immigration)*, 2007 FC 941 [*Li*], *Mitchell v Canada (Minister of Citizenship and Immigration)*, 2008 FC 918 [*Mitchell*] and *Chaabane v Canada (Minister of Citizenship and Immigration)*, 2010 FC 675 [*Chaabane*]). I therefore see no reason why the Minister's sole concern over practicability warrants lower participatory rights for a marine deserter who is subject to a subsection 44(2) proceeding before a delegate than the already minimal

participatory rights required in the case of an individual reported inadmissible on grounds of criminality and who is subject to the same proceeding.

[31] Moreover, CIC's ENF 6 Manual on the review of reports issued under subsection 44(1) contains directives to be followed to ensure procedural fairness and also steps to be followed before a removal order is issued *in absentia*:

### **5.1. Procedural fairness**

The principles of procedural fairness apply to the exercise of the powers of the Minister's delegate. In this context, procedural fairness includes the right of persons affected by a decision to a fair process; the opportunity to know the case one has to meet and respond to it; the opportunity to be represented by counsel; and the right to be tried by an independent and impartial decision-maker (that is, as a disinterested decision-maker).

...

Persons must be informed of the nature of the allegations made against them in the report(s) at the earliest opportunity, and must be given a reasonable opportunity to respond to those allegations before a removal order is issued.

Prior to their interview with the Minister's delegate, the persons concerned must be informed of the purpose of the interview and the possible outcomes of it. Also prior to the interview, the Minister's delegate should give persons the opportunity to obtain the services of an interpreter.

...

### **16. Procedure: Issuing removal orders to persons *in absentia***

...

It should be noted that, in the context of an *in absentia* proceeding, the Minister's delegate should not issue a removal order against someone who has had no contact with CIC or the CBSA.

In addressing the issue of procedural fairness, the following *in absentia* procedures meet the principles of procedural fairness so long as reasonable efforts have been made to give the person concerned an opportunity to be cooperative. Procedural fairness requires that the person concerned be given an opportunity to be heard. Where a person is not cooperative

and reasonable efforts have been made to give them the opportunity to be heard, it is not contrary to the principles of procedural fairness to proceed *in absentia*.

...

[Emphasis added.]

[32] Although this manual is not mandatory or exhaustive (*Atahi*, above, at para 37), I note that these guidelines require the same minimal participatory rights for individuals who are subject to any proceeding under subsection 44(2) of the Act as *Cha* requires for the specific subsection 44(2) proceeding in that case.

[33] I therefore agree with the applicant that a marine deserter is entitled to some participatory rights before a delegate issues a removal order against them pursuant to subsection 44(2) of the Act and subsection 184(1) of the Regulations. I am of the view that at the very minimum, before the removal order is issued, the individual is entitled to a copy of the immigration officer's report and an opportunity to present evidence and express his or her point of view to the delegate.

[34] As for whether the applicant's right to procedural fairness was breached, the facts are not in dispute: the applicant was not informed of the immigration officer's report and the exclusion order made under subsection 44(2) was also made without his knowledge. There is no indication in the immigration officer's report or in the delegate's notes that any effort was made to contact the applicant. It is clear that none of the minimal participatory rights I have identified as being required were provided to the applicant in the case at bar. Accordingly, in the Court's view the delegate breached the duty of procedural fairness by rendering an exclusion order against the applicant *in absentia* before the applicant had contact with the immigration authorities.

[35] I disagree with the respondents that no purpose would be served in setting aside the delegate's decision to issue a removal order. The applicant claimed refugee protection in Canada on December 16, 2011 and was informed on March 6, 2012 that under subsection 99(3) of the Act he was ineligible to make such a claim because an exclusion order had been issued against him on December 13, 2011. Quashing this exclusion order because it breached the applicant's right to procedural fairness will serve the purpose of giving him an opportunity to be eligible to claim refugee protection.

[36] This Court has examined a number of cases where the subject of an inadmissibility report under subsection 44(1) would have been eligible to claim refugee protection if he or she could establish on a balance of probabilities that they had done so before a delegate issued a removal order against them (see *Elemuwa v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1026 at paras 16-17 [*Elemuwa*], *Mitchell* at paras 21-27, and *Chaabane* at paras 14-20). The applicants in *Elemuwa*, *Mitchell*, and *Chaabane* all alleged that they had claimed refugee protection prior to the removal order being issued against them, but in each case the Court found the applicants had failed to establish this allegation on a balance of probabilities. It is noteworthy that the applicants in each of these cases were interviewed on the subject of their admissibility prior to the removal orders being issued against them.

[37] I invited the parties to provide the Court, in post-hearing submissions, with examples in the jurisprudence where an arrest warrant was issued against a person prior to a removal order being issued and the person had the opportunity to claim protection before being the subject of a removal order. While the respondents did not provide any case law to the Court, the applicant referred the

Court to *Li*, above, in his post-hearing submissions. In that case, two inadmissibility reports were issued against the applicants *in absentia* and arrest warrants were issued by the immigration authorities in order to locate them. It was not until after the applicants were located and given copies of the inadmissibility reports, and the delegate interviewed the applicants to confirm the findings of the reports, that the delegate issued the exclusion order (*Li* at paras 7-8 and 17-19). The applicants in *Li* argued that they had claimed refugee protection before the delegate issued the exclusion order, but the Court concluded that the applicants were ineligible to file a refugee claim because there was no evidence the applicants, after being given an opportunity to hear the contents of the inadmissibility reports, expressed a fear of returning to their country of nationality or revealed an intention to file a refugee claim before the oral exclusion order was made (*Li* at paras 48 and 55). The Court did not question the notion that the applicants would have had the opportunity to claim refugee protection after learning the contents of the inadmissibility reports as long as they would have done so before the delegate ordered them excluded.

[38] After reviewing these examples in the jurisprudence, I am satisfied that quashing the decision in the case at bar will provide the applicant the opportunity to file a refugee claim. It is therefore not at all futile to set aside the exclusion order. If a valid exclusion order is subsequently issued against him, it is at that time that he will become ineligible to claim refugee protection pursuant to subsection 99(3) of the Act.

[39] In closing, I would like to emphasize that the present application deals with participatory rights in the context of a delegate's review, under subsection 44(2) of the Act, of an inadmissibility report grounded on the fact that a foreign national failed to comply with subsection 184(1) of the

Regulations. In setting out the procedural rights for these circumstances, I do not intend to rule on the procedural rights for individuals in any situation other than the one at issue.

[40] For these reasons, the application for judicial review is allowed. The exclusion order is set aside and the matter is sent back for redetermination by a different delegate.

### **CERTIFIED QUESTION**

[41] The respondents have submitted the following question for the Court's certification:

Can the Minister issue a removal order *in absentia* pursuant to subparagraph 228(1)(c)(v) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations), against a foreign national who failed to comply with the condition imposed on crew members set out in paragraph 184(1) of the Regulations?

[42] The applicant argues this question does not reflect the issue in the case at bar and has already been answered in the jurisprudence.

[43] The Court agrees that the question as formulated by the respondents does not reflect the true issue in the present case. Thus, the Court will modify it and certify the following question:

Does the Minister's issuance of an exclusion order pursuant to subparagraph 228(1)(c)(v) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 before the member of a crew subject to the exclusion order has any contact with the immigration authorities constitute a breach of procedural fairness because it deprives the foreign national of the opportunity to make a refugee claim?

[44] In my view this question meets the requirements for certification. It raises a serious issue of general importance which would be dispositive of an appeal (*Kunkel v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 347 at paras 8-10).



**JUDGMENT**

**THIS COURT’S JUDGMENT is that:**

1. The application for judicial review is granted and the exclusion order is set aside;
2. The matter is referred for redetermination by a different delegate; and
3. The following question is certified:

Does the Minister’s issuance of an exclusion order pursuant to subparagraph 228(1)(c)(v) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 before the member of a crew subject to the exclusion order has any contact with the immigration authorities constitute a breach of procedural fairness because it deprives the foreign national of the opportunity to make a refugee claim?

“Danièle Tremblay-Lamer”

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Judge

ANNEXRelevant Statutory Provisions

*Immigration and Refugee Protection Act, SC 2001, c 27:*

## PART 1

## IMMIGRATION TO CANADA

...

## DIVISION 3

ENTERING AND REMAINING IN  
CANADA

...

*Rights and Obligations of Permanent  
and Temporary Residents*

...

Right of temporary residents

29. (1) A temporary resident is, subject to the other provisions of this Act, authorized to enter and remain in Canada on a temporary basis as a visitor or as a holder of a temporary resident permit.

Obligation — temporary resident

(2) A temporary resident must comply with any conditions imposed under the regulations and with any requirements under this Act, must leave Canada by the end of the period authorized for their stay and may re-enter Canada only if their authorization provides for re-entry.

...

## PARTIE 1

## IMMIGRATION AU CANADA

...

## SECTION 3

## ENTRÉE ET SÉJOUR AU CANADA

...

*Droits et obligations des résidents  
permanents et des résidents  
temporaires*

...

Droit du résident temporaire

29. (1) Le résident temporaire a, sous réserve des autres dispositions de la présente loi, l'autorisation d'entrer au Canada et d'y séjourner à titre temporaire comme visiteur ou titulaire d'un permis de séjour temporaire.

Obligation du résident temporaire

(2) Le résident temporaire est assujéti aux conditions imposées par les règlements et doit se conformer à la présente loi et avoir quitté le pays à la fin de la période de séjour autorisée. Il ne peut y rentrer que si l'autorisation le prévoit.

...

DIVISION 4

INADMISSIBILITY

Rules of interpretation

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

...

Non-compliance with Act

41. A person is inadmissible for failing to comply with this Act

(a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and

(b) in the case of a permanent resident, through failing to comply with subsection 27(2) or section 28.

...

DIVISION 5

LOSS OF STATUS AND REMOVAL

*Report on Inadmissibility*

Preparation of report

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

SECTION 4

INTERDICTIONS DE TERRITOIRE

Interprétation

33. Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

...

Manquement à la loi

41. S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.

...

SECTION 5

PERTE DE STATUT ET RENVOI

*Constat de l'interdiction de territoire*

Rapport d'interdiction de territoire

44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

Referral or removal order

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

...

## PART 2

## REFUGEE PROTECTION

...

## DIVISION 2

CONVENTION REFUGEES AND  
PERSONS IN NEED OF  
PROTECTION*Claim for Refugee Protection*

...

Claim inside Canada

99.(3) A claim for refugee protection made by a person inside Canada must be made to an officer, may not be made by a person who is subject to a removal order, and is governed by this Part.

Suivi

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

...

## PARTIE 2

## PROTECTION DES RÉFUGIÉS

...

## SECTION 2

RÉFUGIÉS ET PERSONNES À  
PROTEGER*Demande d'asile*

...

Demande faite au Canada

99.(3) Celle de la personne se trouvant au Canada se fait à l'agent et est régie par la présente partie; toutefois la personne visée par une mesure de renvoi n'est pas admise à la faire.

*Immigration and Refugee Protection Regulations, SOR/2002-227:*

## PART 1

INTERPRETATION AND  
APPLICATION

## DIVISION 1

## INTERPRETATION

...

## PARTIE 1

DÉFINITIONS ET CHAMP  
D'APPLICATION

## SECTION 1

DÉFINITIONS ET  
INTERPRÉTATION

Interpretation — member of a crew

3. (1) For the purposes of these Regulations,

(a) “member of a crew” means a person who is employed on a means of transportation to perform duties during a voyage or trip, or while in port, related to the operation of the means of transportation or the provision of services to passengers or to other members of the crew...

(b) a person ceases to be a member of a crew if

- (i) they have deserted;
- (ii) an officer believes on reasonable grounds that they have deserted;

...

PART 9

TEMPORARY RESIDENTS

...

DIVISION 2

CONDITIONS ON TEMPORARY RESIDENTS

...

Condition imposed on members of a crew

184. (1) A foreign national who enters Canada as a member of a crew must leave Canada within 72 hours after they cease to be a member of a crew.

...

PART 13

REMOVAL

DIVISION 1

REMOVAL ORDERS

...

Interprétation : membre d'équipage

3. (1) Pour l'application du présent règlement :

a) « membre d'équipage » s'entend de la personne employée à bord d'un moyen de transport en déplacement ou en gare pour accomplir des tâches liées au fonctionnement de celui-ci ou à la prestation de services aux passagers ou aux autres membres d'équipage;...

b) le membre d'équipage perd cette qualité dans les cas suivants :

- (i) il a déserté,
- (ii) un agent a des motifs raisonnables de croire qu'il a déserté,

...

PARTIE 9

RÉSIDENTS TEMPORAIRES

...

SECTION 2

CONDITIONS LIÉES AU STATUT

...

Condition : membres d'équipage

184. (1) L'étranger qui entre au Canada en qualité de membre d'équipage doit quitter le Canada dans les soixante-douze heures après avoir perdu cette qualité.

...

PARTIE 13

RENVOI

DIVISION 1

MESURES DE RENVOI

Types of removal order

223. There are three types of removal orders, namely, departure orders, exclusion orders and deportation orders.

...

DIVISION 2

SPECIFIED REMOVAL ORDER

Subsection 44(2) of the Act — foreign nationals

228. (1) For the purposes of subsection 44(2) of the Act, and subject to subsections (3) and (4), if a report in respect of a foreign national does not include any grounds of inadmissibility other than those set out in the following circumstances, the report shall not be referred to the Immigration Division and any removal order made shall be

...

(c) if the foreign national is inadmissible under section 41 of the Act on grounds of

...

(v) failing to comply with subsection 29(2) of the Act to comply with any condition set out in section 184, an exclusion order; ...

Types

223. Les mesures de renvoi sont de trois types : interdiction de séjour, exclusion, expulsion.

...

SECTION 2

MESURES DE RENVOI À  
PRENDRE

Application du paragraphe 44(2) de la Loi : étrangers

228. (1) Pour l'application du paragraphe 44(2) de la Loi, mais sous réserve des paragraphes (3) et (4), dans le cas où elle ne comporte pas de motif d'interdiction de territoire autre que ceux prévus dans l'une des circonstances ci-après, l'affaire n'est pas déférée à la Section de l'immigration et la mesure de renvoi à prendre est celle indiquée en regard du motif en cause :

...

c) en cas d'interdiction de territoire de l'étranger au titre de l'article 41 de la Loi pour manquement à :

...

(v) l'obligation prévue au paragraphe 29(2) de la Loi de se conformer aux conditions imposées à l'article 184, l'exclusion;

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-2779-12

**STYLE OF CAUSE:** *Nuwan Dilusha Jayamaha Mudalige Don v The Minister of Citizenship and Immigration and The Minister of Public Safety and Emergency Preparedness*

**PLACE OF HEARING:** Montréal, Québec

**DATE OF HEARING:** December 11, 2012

**REASONS FOR JUDGMENT AND JUDGMENT:** TREMBLAY-LAMER J.

**DATED:** January 3, 2012

**APPEARANCES:**

Viken Artinian

FOR THE APPLICANT

Catherine Brisebois  
Normand Lemyre

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