Suresh v. Canada (Minister of Citizenship and Immigration) (C.A.), 1999 CanLII 8393 (F.C.A.)

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A-415-99

Manickavasagam Suresh (*Appellant*)

v.

The Minister of Citizenship & Immigration and **The Attorney General of Canada** (*Respondents*)

Indexed as: Suresh v. Canada (Minister of Citizenship and Immigration) (C.A.)

Court of Appeal, Robertson J.A."Ottawa and Toronto (teleconference), July 19; Ottawa, July 23, 1999.

Citizenship and Immigration " Immigration practice " Motion for stay of appellant's removal from Canada pending disposition of appeal from dismissal of application for judicial review of Minister's danger opinion " Applicant, Tamil from Sri Lanka, Convention refugee " Member of LTTE, terrorist organization " Minister issuing security certificate pursuant to Immigration Act, s. 40.1 " Deportation order issued " In dismissing judicial review application, McKeown J. certifying questions for consideration " Application of tripartite test for granting stay formulated in American Cyanamid Co. v. Ethicon Ltd. " (1) Serious issues raised in certified questions " (2) When test formulated, H.L. probably not considering applicability in human rights context " Irreparable harm characterized in terms of that which cannot be compensated in monetary terms only in commercial context " No transgression of human right accurately measured, compensated by money, particularly in immigration cases involving deportation to country failing to abide by international norms respecting human rights " Two approaches to irreparable harm: assessment of risk of personal harm if person deported; assessment of effect of denial of stay application on person's right to have merits of case determined and to enjoy benefits associated with positive ruling " Subject to balance of convenience, if F.C.T.D. judges certifying questions of general importance, not unreasonable to defer execution of deportation orders where serious Charter issues relating to complex scheme for removing persons from this country and possibility would be exposed to inhumane treatment on arrival in former homeland " (3) Appellant's private interest outweighing public interest.

Administrative law " Judicial review " Injunctions " Motion for order staying removal of Convention refugee from Canada pending disposition of appeal from dismissal of application for judicial review of Minister's danger opinion " Application of tripartite test for granting stay formulated by H.L. in American Cyanamid Co. v. Ethicon Ltd. " (1) Certified questions raising serious issues; (2) irreparable harm, as raising serious Charter issues relating to complex scheme for removing persons from Canada, and possibility appellant would be exposed to inhumane treatment on arrival in former homeland; (3) appellant's private interest outweighing public interest as unclear appellant personally involved in acts of terrorism, no evidence appellant's presence in Canada representing threat to personal safety of Canadians, near certainty appellant will be subjected to inhumane treatment if returned to Sri Lanka " Allowing appellant to remain in Canada until appeal heard will not adversely affect Canada's reputation in international community with respect to fighting terrorism.

Judges and Courts " F.C.T.D. denying Convention refugee's application for interlocutory injunction to prevent removal from Canada pending disposition of leave application " Ontario Court (General Division) granting interlocutory injunction to prevent deportation, but staying declaratory component " Problems with exercise of concurrent jurisdiction by two superior courts of record with respect to same constitutional challenges to federal legislation " Prohibition against collateral attacks on orders of superior court " One superior court may not exercise supervisory jurisdiction over another " Only S.C.C. having such power " Ontario courts prepared to entertain concurrent proceedings as denial of injunctive relief would render proceedings in F.C. moot.

This was an expedited motion for an order staying the removal of the appellant from Canada pending the disposition of his appeal from the dismissal of his application for judicial review of the Minister's decision to declare him a danger to the security of Canada. The appellant arrived in Canada in 1990 and was found to be a Convention refugee. In 1995 he became the subject of a security certificate and was detained and given notice that a certificate had been issued under section 40.1 of the *Immigration Act* and that a deportation order might be made against him. A Judge of the Trial Division found that the certificate was reasonable and valid. After that decision was rendered, but before reasons were issued, an adjudicator ordered the appellant deported. Reasons upholding the security certificate were issued on November 14, 1997 and on January 6, 1998, the Minister rendered a decision pursuant to paragraph 53(1)(*b*) that the appellant represented a danger to the security of Canada. The appellant filed an application for leave and for judicial review of the Minister's decision. Although the Trial Division dismissed his application for an interlocutory injunction to prevent his removal from Canada pending the disposition of his leave application, the Ontario Court (General Division) then granted such an interlocutory injunction, but stayed the declaratory component of the application. The appellant was released from detention. The appellant's application for judicial review of the Minister's decision to declare him a danger to the security of Canada was dismissed, and three questions were certified to be of general public importance. Since the Ontario Court injunction has expired, the appellant applied to this Court for the same relief pending the disposition of his appeal from the judicial review application.

Held, the application should be allowed.

The first part of the tripartite test for granting a stay was met. The certified questions raised serious issues.

The issue of irreparable harm can be approached in two ways. The first involves an assessment of the risk of personal harm if a person is deported or deported to a particular country. The appellant will be deported to Sri Lanka where he will certainly be detained by the authorities upon his arrival. While the appropriate standard of risk assessment for irreparable harm is not absolute certainty, it is difficult to speculate on the fate that may await a person who is to be deported to a country whose human rights record falls below international or Canadian standards. When the tripartite test was formulated in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, the House of Lords probably did not consider its applicability in the human rights context. Any court would characterize irreparable harm in terms of that which cannot be compensated in monetary terms only in a commercial context such as that which presented itself in *American Cyanamid*. No transgression of a basic human right can be accurately measured or compensated by money, particularly in immigration cases involving deportation to a country which fails to abide by international norms respecting human rights. Nevertheless, there is no absolute right to remain in Canada, particularly for those whom the Minister has reasonable grounds to believe are terrorists or active supporters of terrorism. Ultimately, the balance of convenience may have to favour the public interest over the interests of a person who is to be deported to a country where human rights abuses exist.

The second approach is to assess the effect of a denial of a stay application on a person's right to have the merits of the case determined and to enjoy the benefits associated with a positive ruling. The appellant argued that his pending appeal will be rendered "moot" or "nugatory" if he is deported prior to the hearing of his appeal. Assuming that the appellant is deported and detained in Sri Lanka prior to that proceeding and that he will be successful on appeal, since the Sri Lankan authorities would be unlikely to release him, he would be unable to avail himself of the fruits of his victory, i.e. the right to remain in Canada until his case is disposed of in accordance with the Charter. Ontario courts have been moved, in part, to grant injunctive relief on this basis. The exercise of concurrent jurisdiction by two superior courts of record with respect to the same constitutional challenges to federal legislation, such as the *Immigration Act* , is highly problematic: there is the question of whether concurrent proceedings can be brought by the same party in two superior courts simultaneously, as well as the well-entrenched prohibition against collateral attacks on orders of a superior court. To permit concurrent

proceedings makes it appear as if one superior court is exercising supervisory jurisdiction over another, a supervisory mandate belonging only to the Supreme Court of Canada. Ontario courts have been prepared to entertain concurrent proceedings only where the denial of injunctive relief would render the proceedings in the Federal Court moot. Subject to the balance of convenience factor, it seems that appellants such as Mr. Suresh are entitled to have their day in court before being deported. If judges of the Trial Division are prepared to certify questions of general importance as a condition precedent to the Court of Appeal hearing an unrestricted appeal on the merits, then it is reasonable to defer the execution of a deportation or removal order in circumstances where it may ultimately be found that persons such as the appellant have not been dealt with as required by law. Similar reasoning may be applied where leave to seek judicial review has been granted in cases raising serious Charter issues relating to a complex scheme for removing persons from Canada and the possibility that they would be exposed to inhumane treatment upon arrival in their former homeland. Until such issues are decided, it is only just that appellants such as Suresh be allowed to remain in Canada.

The third prong of the tripartite test requires the balancing of the private interest of the appellant against the public interest. The former outweighs the latter herein. Accepting that there are reasonable grounds to believe that the appellant represents a threat to Canada's security, it was unclear whether he was personally involved in acts of terrorism. The appellant has not committed any acts of violence in Canada. He is being deported largely because he is the leader of a Canadian organization which raises financial aid for a terrorist organization. There was no evidence to support a valid concern that the appellant's presence in Canada represents a threat to the personal safety of Canadians. If he is returned to Sri Lanka, he will almost certainly be detained, and there is the possibility that he will be subjected to inhumane treatment. Finally, the appellant was released from prison on strict bail conditions and there was no evidence that he had breached any of those conditions.

Allowing the appellant to remain in Canada until his appeal has been heard would not adversely affect Canada's reputation in the international community with respect to fighting terrorism, but merely demonstrate that Canada is committed to its obligations against the *refoulement* of persons to countries where human rights violations persist, at least until such time as any removal accords with the Charter.

statutes and regulations judicially considered

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 2, 7, 12.

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, [1987] Can. T.S. No. 36, Art. 3.

Immigration Act, R.S.C., 1985, c. I-2 , ss. 19(1)(*e*)(iv)(C) (as am. by S.C. 1992, c. 49, s. 11), (*f*)(ii) (as am. *idem*), (iii)(B) (as am. *idem*), 40.1 (as enacted by R.S.C., 1985 (4th Supp.), c. 29, s. 4; S.C. 1992, c. 49, s. 31), 53(1)(*b*) (as am. *idem*, s. 43), 83(1) (as am. *idem*, s. 73), Sch. (as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 34).

United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6.

cases judicially considered

applied:

Suresh v. R. reflex, (1999), 42 O.R. (3d) 797; 116 O.A.C. 329 (Div. Ct.); *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.).

considered:

Suresh v. Canada (Minister of Citizenship and Immigration), [1999] F.C.J. No. 865 (T.D.) (QL); *Suresh, Re* (1997), 140 F.T.R. 88; 40 Imm. L.R. (2d) 247 (F.C.T.D.); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 28 (T.D.) (QL); *Suresh v. R.* reflex, (1998), 38 O.R. (3d) 267; 49 C.R.R. (2d) 131 (Gen. Div.).

referred to:

Moumdjian v. Canada (Security Intelligence Review Committee), [1999] F.C.J. No. 1160 (C.A.) (QL); *Wilson v. R.*, 1983 CanLII 35 (S.C.C.), [1983] 2 S.C.R. 594; (1983), 4 D.L.R. (4th) 577; [1984] 1 W.W.R. 481; 26 Man. R. (2d) 194; 9 C.C.C. (3d) 97; 37 C.R. (3d) 97; 51 N.R. 321; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (S.C.C.), [1998] 1 S.C.R. 982; (1998), 160 D.L.R. (4th) 193; 226

N.R. 201; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39 (QL).

MOTION for an order staying the removal of the appellant from Canada pending the disposition of his appeal from the dismissal of his application for judicial review of a danger opinion issued by the Minister of Citizenship and Immigration. Motion allowed.

appearances:

Ronald P. Poulton and *Barbara Jackman* for appellant.

Cheryl D. Mitchell and *Neeta Logsetty* for respondent.

solicitors of record:

Jackman, Waldman & Associates, Toronto, for appellant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for order rendered in English by

Robertson J.A.: This is an expedited motion for an order staying the removal of the appellant (Mr. Suresh) from Canada pending the disposition of his appeal from the decision of Justice McKeown, dated June 28, 1999 [reasons for judgment dated June 11, 1999 reported at [1999] F.C.J. No. 865 (F.C.T.D.) (QL)], in which Mr. Suresh's application for judicial review was dismissed. The judicial review application was initiated after the Minister of Citizenship and Immigration issued an opinion letter under paragraph 53(1)(*b*) of the *Immigration Act* [R.S.C., 1985, c. I-2 (as am. by S.C. 1992, c. 49, s. 43)] in which she described Mr. Suresh as a danger to the security of Canada.

There has been an increase in the number of stay applications pending the disposition of an appeal to this Court from a dismissal of a judicial review application involving certified questions of general importance under subsection 83(1) [as am. *idem*, s. 73] of the Act. These applications raise an interesting question as to the type of irreparable harm which satisfies the second part of the tripartite test set out in the jurisprudence. In the reasons that follow, I agree with the Ontario Supreme Court that the failure to grant the relief sought in this and similar cases would effectively render the hearing of the appeal on the merits "moot" or "nugatory". I begin my analysis with a recitation of the facts precipitating this stay application.

FACTS AND LITIGATION

Mr. Suresh, a Tamil from Sri Lanka, arrived in Canada on October 5, 1990 and was found to be a Convention refugee on April 1, 1991. On September 11, 1995, Mr. Suresh became the subject of a security certificate issued pursuant to section 40.1 [as enacted by R.S.C., 1985 (4th Supp.), c. 29, s. 4; S.C. 1992, c. 49, s. 31] of the Act on the grounds that he was inadmissible to Canada by virtue of clause 19(1)(*e*)(iv)(C) [as am. *idem*, s. 11], subparagraph 19(1)(*f*)(ii) [as am. *idem*] and clause 19(1)(*f*)(iii)(B) [as am. *idem*] of the Act. The certificate was based on security intelligence reports and was signed by the Solicitor General and the Minister of Citizenship and Immigration on September 11, 1995. Clause 19(1)(*e*)(iv)(C), subparagraph 19(1)(*f*)(ii) and clause 19(1)(*f*)(iii)(B) of the Act state:

19. (1) . . .

(*e*) persons who there are reasonable grounds to believe

. . .

(iv) are members of an organization that there are reasonable grounds to believe will

(C) engage in terrorism;

(*f*) persons who there are reasonable grounds to believe

. . .

(ii) have engaged in terrorism, . . .

(iii) are or were members of an organization that there are reasonable grounds to believe is or was engaged in

. . .

(B) terrorism. [Emphasis added.]

Mr. Suresh was detained on October 18, 1995, and given notice of the section 40.1 proceedings against him, namely, that a certificate had been issued under section 40.1 and that a deportation order may be made against him.

On August 29, 1997, after more than 50 days of hearings, Justice Teitelbaum held that the certificate issued by the Solicitor General and the Minister of Citizenship and Immigration pursuant to section 40.1 of the Act was valid [written reasons dated November 14, 1997 reported at (1997), 140 F.T.R. 88 (F.C.T.D.)]. Justice Teitelbaum found that there was sufficient evidence for him to conclude that the certificate issued by the Crown was reasonable. He noted that he did not have to consider whether Mr. Suresh was or is a member of the Liberation Tigers of Tamil Eelam (LTTE), but only to determine whether there was evidence upon which the Crown could reasonably conclude that Mr. Suresh was or is such a member. Justice Teitelbaum concluded that there were reasonable grounds to believe that Mr. Suresh was and is a member of the LTTE, based on his earlier activities and the fact that he travelled internationally to head the World Tamil Movement which, Justice Teitelbaum concluded can reasonably be considered part of the LTTE organization or at least strongly supportive of it. Justice Teitelbaum also referred to Mr. Suresh's continual contacts with the leadership of the LTTE, the fact that he devoted a great deal of his time to the LTTE, and the fact that Mr. Suresh collected funds for that organization. Justice Teitelbaum found that Mr. Suresh "lacks total credibility" and that, in his written representations to obtain refugee status "little, if anything, written by [Mr.] Suresh was true". With respect to the meaning of "terrorism" as it is used in the Act, Justice Teitelbaum concluded [at page 101] that it should receive a "wide and unrestricted interpretation for the purposes of a section 40.1 application". Referring to an Appendix containing 140 incidents involving the LTTE, and rejecting Mr. Suresh's witnesses' characterization of such incidents as justified in the struggle for political independence, Justice Teitelbaum found that there were reasonable grounds to conclude that the LTTE committed terrorist acts, regardless of how the word terrorism is defined. Thus, Justice Teitelbaum held that the certificate issued under section 40.1 of the Act was valid. There is no appeal from or judicial review of Justice Teitelbaum's decision, according to subsection 40.1(7) of the Act, which states:

40.1 . . .

(7) Where a certificate has been reviewed by the Federal Court pursuant to subsection (4) and has not been quashed pursuant to paragraph (4)(*d*),

(*a*) the certificate is conclusive proof that the person named in the certificate is a person described in subparagraph 19(1)(*c*.1)(ii), paragraph 19(1)(*c*.2)(*d*), (*e*), (*f*), (*g*), (*j*), (*k*) or (*l*) or subparagraph 19(2)(*a*.1)(ii); . . .

After Justice Teitelbaum's decision, but before he issued reasons, an adjudicator ordered Mr. Suresh deported from Canada on the ground that he is a person described in clauses 19(1)(*e*)(iv)(C) and 19(1)(*f*)(iii)(B) of the Act. The adjudicator did not mention subparagraph 19(1)(*f*)(ii), apparently because the adjudicator did not agree with Justice Teitelbaum's decision for which reasons had not yet been issued. As I understand the facts, the Crown has appealed that portion of the adjudicator's decision to the Immigration Appeal Division of the Immigration and Refugee Board. That appeal has yet to be heard. On September 17, 1997, Mr. Suresh was given notice that the Minister was considering issuing a paragraph 53(1)(*b*) opinion that Mr. Suresh was a danger to the security of Canada. As I understand the statutory scheme, one of the effects of the paragraph 53(1)(*b*) opinion is to eliminate any right to appeal to the Immigration and Refugee Board on humanitarian and compassionate grounds. Counsel for Mr. Suresh made submissions to the Minister on October 1, 1997, but requested that the Minister refrain from making a decision under paragraph 53(1)(*b*) until Justice Teitelbaum's reasons upholding the security certificate were issued. Justice Teitelbaum issued his reasons on November 14, 1997. On January 6, 1998, the Minister of Citizenship and Immigration rendered a decision pursuant to paragraph 53(1)(*b*) that Mr. Suresh represents a

danger to the security of Canada. Mr. Suresh filed an application for leave and for judicial review of the Minister's decision. He also sought an interlocutory injunction to prevent his removal from Canada pending the disposition of his leave application. On January 16, 1998, Justice Tremblay-Lamer dismissed the injunction, finding that Mr. Suresh would not suffer irreparable harm and that the balance of convenience favoured the Minister [[1998] F.C.J. No. 28 (T.D.) (QL)]. Thus, on January 19, 1998, Mr. Suresh commenced a notice of application in the Ontario Court (General Division), as it then was, seeking an injunction to prevent his deportation. Justice Lane dismissed the jurisdictional challenge to the Ontario Court's authority and granted the interlocutory injunction, but he stayed the underlying notice of application [*Suresh v. R.* reflex, (1998), 38 O.R. (3d) 267]. Justice Teitelbaum authorized the release of Mr. Suresh from detention on March 23, 1998, on terms and conditions stipulated in subsection 40.1(9) of the Act. The Ontario Divisional Court dismissed the Crown's appeals from the two orders of Justice Lane on January 8, 1999 [*Suresh v. R.* reflex, (1999), 42 O.R. (3d) 797].

On June 28, 1999, Justice McKeown dismissed Mr. Suresh's application for judicial review of the decision of the Minister of Citizenship and Immigration to declare Mr. Suresh a danger to the security of Canada pursuant to paragraph 53(1)(*b*) of the Act. In doing so, he addressed a number of constitutional and administrative law issues including the Federal Court's jurisdiction to determine the constitutionality of paragraphs 19(1)(*e*), 19(1)(*f*) and 53(1)(*b*) of the Act, whether sections 2, 7 and 12 of the Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] were violated, whether the Minister's decision was procedurally unfair, and whether Mr. Suresh had been given sufficient notice of all of the evidence considered by the Minister. Parenthetically, I note that a number of similar issues were considered in *Moumdjian v. Canada (Security Intelligence Review Committee)*, [1999] F.C.J. No. 1160 (C.A.) (QL), which was only recently filed by this Court.

With respect to the jurisdictional issue, Justice McKeown affirmed the Federal Court's jurisdiction to declare legislation of no force and effect on an application for judicial review. With respect to the Minister's discretionary decision under section 53 of the Act, Justice McKeown was of the view that the Minister's decision was reasonable, since the Minister balanced the risk of returning a Convention refugee to Sri Lanka against the danger that Mr. Suresh poses to Canadian security. Justice McKeown also held that the requirements of procedural fairness were satisfied since adequate disclosure was made to Mr. Suresh of the material before the Minister, and the Minister's decision was reasonably open to her, based on the evidence. With respect to Mr. Suresh's Charter arguments, Justice McKeown found that the balancing undertaken by the Minister in making her decision under paragraph 53(1)(*b*) did not violate the principles of fundamental justice, nor did it violate Article 3 of the Convention Against Torture [*Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, December 10, 1984, [1987] Can. T.S. No. 36]. Justice McKeown also noted that Mr. Suresh failed to satisfy the high evidentiary threshold required by Article 3 of the Convention Against Torture (which is not binding under Canadian law) and the *United Nations Convention Relating to the Status of Refugees* [July 28, 1951, [1969] Can. T.S. No. 6] (which has been implemented into the *Immigration Act* [Sch. (as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 34)]) because he failed to submit a personal statement to the Minister outlining why he would be at risk if he were returned to Sri Lanka. According to Justice McKeown, paragraphs 19(1)(*e*), 19(1)(*f*) and 53(1)(*b*) of the Act do not violate Mr. Suresh's exercise of expressive and associational freedoms, nor do they constitute cruel and unusual punishment or treatment. Finally, Justice McKeown held that the expression "danger to the security of Canada" was not unconstitutionally vague. In dismissing Mr. Suresh's application for judicial review, Justice McKeown certified the following three questions of general public importance pursuant to subsection 83(1) of the Act:

1. Do ss. 19(1)(e)(iv)(C), 19(1)(f)(ii) and 19(1)(f)(iii)(B) of the *Immigration Act* infringe freedoms guaranteed under ss. 2(b) and 2(d) of the *Charter* and if they do, is that demonstrably justified in a free and democratic society within s. 1 of the *Charter*?

2. (A) Does ss. 53(1)(h) of the *Immigration Act* infringe section 7 of the *Charter* and if it does, is that demonstrably justified in a free and democratic society within s. 1 of the *Charter*?

(B) Are the principles of fairness at common law and the principles of fundamental justice under section 7 of the *Charter* met by the present administrative process for the determination by the Minister under section 53(1) of the *Immigration Act* of whether in her opinion a person constitutes a danger to the security of Canada, given that the Court has read into this subsection a determination by the Minister of the risk of torture a person may face if

removed to a particular country?

3. Is it contrary to this *Charter* to deport a Convention refugee from Canada to his or her country of origin if that person is the subject of a s. 40.1 security certificate, the reasonableness of which has been upheld, is a person described under ss. 19(1)(e) and (f) of the *Immigration Act* and has been found by the Minister of Citizenship and Immigration, pursuant to ss. 53(1)(b) of the *Act*, to be a danger to the security of Canada?

I turn now to the merits of the stay application.

ANALYSIS

With respect to the tripartite test for granting a stay, it is common ground that the certified questions raise serious issues and, therefore, the first prong of the test is satisfied. In my view, the more problematic aspect of this case pertains to the second part of the three-pronged test, namely, the issue of irreparable harm.

The evidence before me is that if Mr. Suresh is deported, he will be deported to Sri Lanka, as no other country is prepared to accept him. Within this context, the general thrust of Mr. Suresh's argument is that if he is deported to Sri Lanka, it is likely that he will be detained by the Sri Lankan authorities on arrival and subjected to torture. In response, the Minister points out that the Government of Canada has received written assurances from representatives of the Sri Lankan government that although Mr. Suresh may be detained upon his return, "he would not be subjected to torture or degrading treatment". In reply, counsel for Mr. Suresh maintains that such assurances are hollow promises in light of the documented history of human rights abuses perpetrated by Sri Lankan police on those believed to be members of the LTTE. At issue is the ability of the Sri Lankan government to exert sufficient influence over those responsible for enforcing the laws of that country.

Based on the documentary evidence, I have no doubt that Mr. Suresh will be detained by the authorities upon his arrival in Sri Lanka. Not only has Mr. Suresh's case garnered widespread attention in Canada, it has also attracted the attention of the Sri Lankan authorities, both in Canada and Sri Lanka. Unfortunately, I am not as confident that Mr. Suresh's basic human rights will be respected once he is detained. This is not to suggest that the appropriate standard of risk assessment for irreparable harm is absolute certainty. The jurisprudence clearly states otherwise. Yet it is difficult to speculate on the fate that may await a person who is to be deported to a country whose human rights record falls below international or Canadian standards. I have always found it difficult to accept that when the House of Lords formulated the tripartite test in its seminal decision of *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, consideration was ever given to its applicability in the human rights context. It is only in a commercial context such as that which presented itself in *American Cynamid* that any court would characterize irreparable harm in terms of that which cannot be compensated in monetary terms. No transgression of a basic human right can be accurately measured or compensated by money. This is particularly true in immigration cases involving deportation to a country which fails to abide by international norms respecting human rights. Nevertheless, it is equally true that there is no absolute right to remain in Canada, particularly for those whom the Minister has reasonable grounds to believe are terrorists or active supporters of terrorism. Ultimately, the balance of convenience may have to favour the public interest over the interests of a person who is to be deported to a country where human rights abuses exist. However, it is not necessary at this stage to dwell on the fate that may await Mr. Suresh if he is returned to Sri Lanka, for there is an alternate basis upon which to find that he will suffer irreparable harm if his stay application is not granted.

Clearly, the issue of irreparable harm can be answered in one of two ways. The first involves an assessment of the risk of personal harm if a person is deported or deported to a particular country. The second involves an assessment of the effect of a denial of a stay application on a person's right to have the merits of his or her case determined and to enjoy the benefits associated with a positive ruling.

The alternative argument advanced by counsel for Mr. Suresh is that his pending appeal will be rendered "moot" or "nugatory" if he is deported prior to the hearing of his appeal. Assuming that Mr. Suresh is deported and detained in Sri Lanka prior to that proceeding, and assuming that he is successful on appeal, Mr. Suresh's successful constitutional challenge would be a hollow victory, since the Sri Lankan authorities would be unlikely to release him and, therefore, he would be unable to avail himself of the fruits of his victory, most likely, the right to remain in Canada until such time as his case is disposed of in accordance with the Charter. Were he to remain in Canada and be successful on his appeal, I take it for granted that the Minister would be unable to act on the deportation

order.

The jurisprudence makes it clear that the Ontario courts have been moved, in part, to grant injunctive relief on this very basis, even though such relief had already been refused in the Federal Court and proceedings were ongoing. In this regard, I need go no further than the present case. As noted earlier, the Trial Division of this Court refused to stay the deportation of Mr. Suresh pending the outcome of the judicial review application before Justice McKeown. Thus, Mr. Suresh brought an application in the Ontario Court (General Division) for a declaration that the deportation order and the legislation on which it was based were unconstitutional, and for an order preventing the Minister from removing him from Canada pending the outcome of that application. The Ontario Court stayed the declaratory component of Mr. Suresh's application, but granted injunctive relief restraining the Minister from removing him from Canada until 10 days after his application for judicial review in the Federal Court had been determined. Since the Ontario injunction against deportation expired, Mr. Suresh has turned to this Court for the same relief pending the disposition of his appeal from the judicial review application.

There is no doubt that the exercise of concurrent jurisdiction by two superior courts of record with respect to the same constitutional challenges to federal legislation, such as the *Immigration Act*, is highly problematic. It is not a question of whether two superior courts have concurrent jurisdiction over the constitutional validity of federal legislation; rather it is a question of whether concurrent proceedings can be brought by the same party in two superior courts simultaneously. It is equally problematic that one superior court would grant injunctive relief after another has already denied that very relief. The prohibition against collateral attacks on orders of a superior court is well entrenched in the jurisprudence of the Supreme Court: see *Wilson v. R.*, 1983 CanLII 35 (S.C.C.), [1983] 2 S.C.R. 594. Furthermore, to permit concurrent proceedings makes it appear as if one superior court is exercising supervisory jurisdiction over another. Only the Supreme Court of Canada has that supervisory mandate. Admittedly, the Ontario courts are cognizant of the role of the Federal Court in immigration matters and are reluctant to assume jurisdiction unless there are compelling reasons. As I read the jurisprudence, the only reason the Ontario courts have been prepared to entertain concurrent proceedings stems from the fact that the denial of injunctive relief would render the proceedings in the Federal Court moot. In this regard, I respectfully agree with the following comments of Justice Southey in *Suresh v. R.* reflex, (1999), 42 O.R. (3d) 797 (Divisional Court) [at page 799], affg reflex, (1998), 38 O.R. (3d) 267 (General Division):

It appears to us that, barring the intervention of Lane J., the order made in the Federal Court of Canada on January 16, 1998, carried with it an unjustifiable risk of rendering practically nugatory any remedy available in the judicial review proceeding still alive in the Federal Court.

We note that the disposition by Lane J. on January 19, 1998, and January 28, 1998 . . . interferes as little as possible with the role of the Federal Court or the statutory scheme created by Parliament. It reflects the jurisdictional deference which ought normally to govern these matters. [Emphasis added.]

Subject to the balance of convenience factor, it seems to me that appellants such as Mr. Suresh are entitled to have their day in court before being deported. If judges of the Trial Division are prepared to certify questions of general importance as a condition precedent to the Court of Appeal hearing an unrestricted appeal on the merits (on this latter point, see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (S.C.C.), [1998] 1 S.C.R. 982 and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39), then it is not unreasonable to defer the execution of a deportation or removal order in circumstances where it may ultimately be found that persons such as Mr. Suresh have not been dealt with as required by law. Similar reasoning may be applied to cases where leave to seek judicial review has been granted. These cases raise serious Charter issues relating to a complex scheme for removing persons from this country and the possibility that they would be exposed to inhumane treatment on arriving in their former homeland. Until such issues are decided, it is only just that the appellants such as Mr. Suresh be allowed to remain in Canada. While there may be instances in which a person can return to Canada following deportation and a successful appeal, this is not one of those cases.

The only question which remains is whether, on a balance of convenience, the stay should be granted. The third prong of the tripartite test requires me to balance the private interest of Mr. Suresh against the public interest. In my opinion, the former outweighs the latter.

I accept the Minister's decision to classify Mr. Suresh as a danger to the security of Canada, as there are

reasonable grounds to believe that Mr. Suresh represents a threat to Canada's security. However, it is unclear whether Mr. Suresh was personally involved in acts of terrorism. In his reasons, Justice Teitelbaum indicates that he was, but the adjudicator failed to include this fact in the deportation order. What is clear is that Mr. Suresh has not committed any acts of violence in Canada. He is being deported largely because he is the leader of a Canadian organization which raises financial aid for a terrorist organization, namely, the LTTE. In short, there is no evidence to support a valid concern that Mr. Suresh's presence in Canada represents a threat to the personal safety of Canadians. If he is returned to Sri Lanka, however, he will almost certainly be detained, and there is the possibility that he will be subjected to inhumane treatment. Finally, I note that Mr. Suresh was incarcerated from October 18, 1995 until March 23, 1998, and was released from prison on stringent bail conditions, which were the subject of an unsuccessful Charter challenge. There is no evidence to suggest that Mr. Suresh has breached any of the bail terms imposed upon him.

In concluding that the balance of convenience favours the private interest, I do not wish these reasons to be viewed as undermining the legitimate attempts of the Minister to deport those who actively support terrorist organizations and their violent objectives. Canada cannot and should not be viewed as a safe haven for terrorist groups, such as the LTTE, to engage in fund-raising activities. One only has to review the multitude of refugee claims in which the Refugee Division accepted that a claimant had been tortured at the hands of the LTTE to appreciate that the LTTE is a terrorist organization. Nevertheless, I do not believe that allowing Mr. Suresh to remain in Canada until such time as his appeal has been heard is going to adversely affect Canada's reputation in the international community with respect to fighting terrorism. It merely demonstrates that Canada is committed to its obligations against the *refoulement* of persons to countries where human rights violations persist, at least until such time as any removal accords with the Charter.

In summary, there are serious Charter issues to be resolved with respect to Mr. Suresh's appeal. Mr. Suresh would suffer irreparable harm if he were to be deported prior to the hearing of his appeal, as it would be rendered moot for all intents and purposes. The balance of convenience also clearly favours Mr. Suresh. Surely, the public interest is not going to be seriously affected if Mr. Suresh remains in Canada for a few more months"he has already been living in Canada for close to nine years.

During the teleconference call, counsel for Mr. Suresh indicated that if this Court were prepared to grant a stay, they would be prepared to pursue the appeal in an expedited fashion and, in fact, are presently doing so. For the above reasons, I will grant the stay requested and order Mr. Suresh to obtain a hearing date from the Judicial Administrator for the appeal in A-415-99 by Friday, August 6, 1999. The hearing date shall be as soon as practicable.