Federal Court of Appeal  Cour d'appel fédérale

Date: 20140110

Docket: A-45-13

Citation: 2014 FCA 4

CORAM: **NOËL J.A.**
GAUTHIER J.A.
MAINVILLE J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

AND

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellants

and

Nuwan Dilusha JAYAMAHA MUDALIGE DON

Respondent

Heard at Montréal, Quebec, on December 3, 2013.

Judgment delivered at Ottawa, Ontario, on January 10, 2014.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: GAUTHIER J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision of the Federal Court, wherein Tremblay-Lamer J. (the Federal Court judge) granted an application for judicial review of a decision by a delegate of the Minister of Citizenship and Immigration (Minister's delegate) to issue a removal order under

subsection 44(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) against Mr. Nuwan Dilusha Jayamaha Mudalige Don (the respondent) for his failure to abide by subsection 184(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) which required him to leave Canada within 72 hours after ceasing to be a member of a crew.

[2] In allowing the application, the Federal Court judge certified the following question of general importance (reasons, para. 22):

> Does the Minister's issuance of an exclusion order pursuant to subparagraph 228(1)(*c*)(v) of the [Regulations] 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?

[3] For the reasons which follow, I am of the view that this question ought to be answered in the negative and that the appeal should be allowed.

[4] The relevant legislative provisions are reproduced in the annex to these reasons.

FACTUAL BACKGROUND

[5] The respondent, a citizen of Sri Lanka, was a crew member aboard the foreign registered vessel M/V Lake Ontario (the ship). The respondent had taken up his position as a crew member at the port city of Annaba, Algeria on or about July 11, 2011 (appeal book, pp. 89 and 123).

[6] The Canadian customs entry form filed by the ship captain (Form A5 (1/51)) upon the ship's arrival in Canada indicates that the inward journey began at the port of Dordrecht, Netherlands.

From there the ship sailed to three port cities in the Mediterranean Sea, the last being Nemrut Bay, Turkey and then onto Montreal and Oshawa (appeal book, p. 83).

[7] The ship docked at the port of Oshawa on November 27, 2011 (reasons, paras. 2 and 3). On December 2, 2011, the ship's agent, the Currie Maritime Corporation (the transporter), filed a Notice of Desertion with the Canadian Customs and Excise authorities in Hamilton, Ontario indicating that two crew members had deserted the ship on December 1, 2011, one being the respondent (appeal book, pp. 83 and 84).

[8] On December 4, 2011, the ship departed from Oshawa for the Port of Duluth, Minnesota (appeal book, p. 83). According to the pre-arrival notification filed with Canada customs by the transporter, the ship was scheduled to then return to the Port of Montreal and trace back its inward journey all the way to Dordrecht, where it began (appeal book, p. 87).

[9] By December 8, 2012, immigration authorities were able to ascertain the respondent's country of birth, his citizenship, his age, his marital status (single) and his physical description (appeal book, pp. 80, 84 and 89).

[10] On December 12, 2011, an officer of the Minister of Citizenship and Immigration prepared an inadmissibility report under subsection 44(1) of the Act because the respondent had failed to comply with subsection 184(1) of the Regulations, which required him "to leave Canada within 72 hours after they cease to be a member of a crew" (appeal book, pp. 75 and 76).

[11] On December 13, 2011, the Minister's delegate issued a removal order or more precisely an exclusion order against the respondent pursuant to subsection 44(2) of the Act and subparagraph 228(1)(*c*)(v) of the Regulations (appeal book, pp. 73 and 74). On the same day, Canadian immigration authorities issued a warrant for the respondent's arrest pursuant to subsection 55(1) of the Act (appeal book, p. 78). The warrant was issued on the basis that there were reasonable grounds to believe that the respondent was inadmissible and was unlikely to appear for his removal.

[12] Further to a notice of seizure issued on December 16, 2011 by the Canadian Border Services Agency (CBSA), the transporter provided the immigration authorities with the respondent's passport and a Seaman's Identification and Record Book issued by the Republic of Liberia in the name of the respondent (appeal book, pp. 95 to 110; notice of seizure, appellants' record of motion in writing to file new evidence, p. 6). On December 18, 2011, the immigration authorities received several other documents from the transporter, namely: a Seafarer's Book issued by Antigua-and-Barbuda (appeal book, pp. 111 to 113); a Seaman's Record Book and Certificates of Discharge (appeal book, pp. 114 to 121); the respondent's employment contract (appeal book, p. 123); and an Antigua-and-Barbuda Online Application (appeal book, p. 131; notice of seizure, appellants' record of motion in writing to file new evidence, p. 12).

[13] Amongst the information provided by the transporter on December 18, 2011, was the address of the respondent in Sri Lanka at 523/A Wahatiyagoda, Pamunugama (appeal book, pp. 121, 123 and 131). The documentation showed that this was also the address of his mother whom he had designated as his next-of-kin in the records kept by the transporter (appeal book, p. 121).

[14] On December 16, 2011, the respondent presented himself before Canadian immigration authorities in Montreal and claimed refugee protection (appeal book, pp. 37 and 40). In the affidavit filed before the Federal Court in support of his judicial review application, the respondent explained the reason for the delay in submitting his claim for refugee protection as follows (appeal book, p. 37):

> When we arrived in Canada, the weather was very rainy which forced the vessel to be docked for several days and I was able to jump ship on December 1st 2011. At that time I had no knowledge that the vessel was departing on December 3rd 2011 as I did not know how much time it would take to unload the vessel due to the rain. I therefore came to Montreal the next day and claimed refugee status on December 16th 2011 since I knew that the vessel would have left by that time and I would not be forced to return with the vessel.

[15] By letter dated March 6, 2012, the respondent was informed that his refugee claim had been denied, as "subsection 99(3) of the […] [Act] states that a claim for refugee protection may not be made by a person who is subject to a removal order" (appeal book, p. 42).

[16] On March 21, 2012, the respondent filed an application for judicial review of the Minister's delegate's decision to issue a removal order against him. On January 3, 2013, the Federal Court judge granted the respondent's application for judicial review, set aside the removal order and referred the matter for re-determination by a different delegate. In rendering judgment, the Federal Court judge certified a serious question of general importance pursuant to paragraph 74(*d*) of the Act, hence the appeal before this Court.

DECISION OF THE FEDERAL COURT

[17] The Federal Court judge identified the issue before her in the following terms (reasons, para. 7):

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

[18] After setting out the position of the parties, the Federal Court judge analyzed the five factors identified in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Baker*) to assess the degree of procedural fairness that was required in the case at hand namely: 1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the agency itself (reasons, paras. 17 to 27).

[19] After weighing these factors, the Federal Court judge held 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" (reasons, para. 27). In order to establish the content of the duty of fairness in this particular case, the Federal Court judge relied on this Court's decision in *Canada (Minister of Citizenship and Immigration) v. Cha*, 2006 FCA 126, para. 52 (*Cha*), wherein this Court set forth the basic requirements of procedural fairness in the context of an inadmissibility report and removal order issued on the ground of criminality (reasons, para. 28).

[20] According to the Federal Court judge, the factual situation in the instant case is analogous to that at issue in *Cha*, except for the following two elements: in *Cha*, the foreign national was solely rendered inadmissible pursuant to subsection 44(1) of the Act on the ground of criminality; and contrary to the case at bar, the foreign national's contact information was available to the immigration authorities (reasons, para. 29). As for the second distinguishing factor, the Federal Court judge rejected the appellants' argument that the procedure suggested in *Cha* is impracticable in the case of marine deserters who do not have contact information in Canada (reasons, para. 30).

[21] The Federal Court judge further noted that sections 5.1 and 16 of Citizen and Immigration Canada's (CIC) Manual ENF 6 explicitly provide for participatory rights for individuals who are subject to subsection 44(2) proceedings (reasons, paras. 31 and 32). Given these Guidelines and this Court's reasoning in *Cha*, the Federal Court judge concluded 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. … [A]t 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 (reasons, para. 33)

[22] In the present case, not only was the respondent not notified, but there is no indication that any effort was made to contact him (reasons, para. 34). Consequently, "[…] the delegate breached the duty of procedural fairness by rendering an exclusion order against the [respondent] *in absentia* before the [respondent] had contact with the immigration authorities" [My emphasis] (reasons, para. 34).

[23] Moreover, the Federal Court judge dismissed the appellants' submission that quashing the removal order would serve no purpose in the circumstances. After reviewing the relevant jurisprudence, the Federal Court judge noted that individuals subject to an inadmissibility report under subsection 44(1) might qualify for refugee protection insofar as they apply for refugee status before a removal order is issued against them (reasons, paras. 35 to 37). Therefore, "[q]uashing this exclusion order because it breached the [respondent's] right to procedural fairness will serve the purpose of giving him an opportunity to be eligible to claim refugee protection" (reasons, para. 35).

POSITION OF THE APPELLANTS

[24] The appellants begin their submissions by recalling the legislative history and purpose of the 72-hour limit applicable to crew members, stating that:

> … subsection 184(1) of the current *Regulations*, with its 72-hour limit, was adopted in the same spirit as the above-mentioned amendments in 1993, i.e. *to allow immigration officers to take immediate enforcement action against ship deserters*, rather than having to wait until the person's vessel leaves Canada. This provision therefore helps to prevent smuggling operations where illegal migrants are brought to Canada as crew members and then desert. The 72-hour limit in subsection 184(1) therefore *discourages abuse of the visitor visa exemption for crew members* [and] …. dissuade[s] deserting crew members from remaining in Canada illegally for an indefinite period of time." (appellants' memorandum, paras. 42 and 43).

[25] The appellants argue that the content of procedural fairness should be adapted to this specific purpose and context, in order to determine "what the duty of procedural fairness may *reasonably* require of an authority by way of specific procedural rights in a particular legislative and administrative context" (appellants' memorandum, paras. 44 and 45). The appellants stress that the context of deserting crew members, "who, by definition, have no known Canadian address and are not subject to an additional immigration control until they choose to appear before Canadian

immigration authorities" renders the notice and interview procedures both impracticable and undesirable (appellants' memorandum, para. 48).

[26] According to the appellants, the *Cha* and *Baker* decisions are easily distinguishable from the instant situation, because in both cases, Canadian immigration authorities had the foreign national's contact information (appellants' memorandum, paras. 49 and 50). In contrast, it is impossible for immigration authorities to contact a deserting crew member who does not have an address or phone number in Canada and who does not wish to be found (appellants' memorandum, para. 52).

[27] The appellants submit that the Federal Court judge erred in failing to consider that deserting crew members bear the responsibility of appearing before Canadian immigration authorities to regularize their status and claim refugee protection within the prescribed delay (appellants' memorandum, para. 56). The Federal Court judge also erred in imposing upon the appellants the burden of communicating with the respondent in the absence of any contact information to reach him (appellants' memorandum, para. 57).

[28] The appellants suggest that the question certified by the Federal Court judge would better capture the issue of general importance which arises in this case if it read:

> [C]an [the Minister] issue a removal order *in abstentia*, pursuant to [subparagraph 228(1)(*c*)(v)], against a foreign national who failed to comply with the condition imposed on crew members set out in subsection 184(1) of the *Regulations*? (appellants' memorandum, para. 22)

POSITION OF THE RESPONDENT

[29] Relying on the Supreme Court's decision in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (*Agraira*), the respondent submits that the CIC Guidelines create a legitimate expectation that procedures contained therein "will be followed, and the failure to adopt such procedures constitutes a violation of the right to procedural fairness" (respondent's memorandum, para. 67). Based on the Guidelines, the respondent could legitimately expect that:

> (a) *in abstentia* proceedings [would] be avoided wherever possible; that (b) removal orders [would] not be issued without determining whether or not the person concerned is seeking refugee protection; and (c) and … while *in abstentia* proceedings may be justified in exceptional circumstances, such will not occur before notice is sent to the last known address of the person concerned, following reasonable efforts to ascertain said address. (respondent's memorandum, para. 70).
>
> [My emphasis]

[30] The respondent stresses that the Guidelines make the issuance of a removal order conditional upon the respect of certain procedural safeguards, such as exhaustion of reasonable efforts to provide notice to the person concerned (respondent's memorandum, paras. 55 to 60). It is the respondent's position that:

> […] pursuant to the general principles relating to *in abstentia* proceedings, the proceedings undertaken in the case at bar were unfair and the removal order must therefore be quashed because the Officer and the Delegate failed to even attempt to notify the Respondent of the proceedings and proceeded solely on the basis of the Officer's report (respondent's memorandum, para. 64).

[31] It may have been possible to notify the respondent in the present case since the Minister's delegate had access to the respondent's address in Sri Lanka (respondent's memorandum, para. 17); and the record reveals that the respondent had some contacts with family members in his home

country. In light of these elements, "notification by mail may well have been effective" (respondent's memorandum, para. 89).

[32] Like the appellants, the respondent believes that the question of general importance identified by the Federal Court judge could be better formulated. The respondent suggests the following question:

> When a foreign national enters Canada as a member of a crew and is reported to have deserted from his or her vessel; may the Minister, who does not have the foreign national's contact information in Canada, commence proceedings and issue a removal order, *in abstentia*, without prior effort to contact the individual? (respondent's memorandum, para. 44).

ANALYSIS AND DECISION

The certified question

[33] I see no reason to tamper with the certified question as stated by the Federal Court judge. The certified question must arise from the reasons advanced in support of the decision. Contrary to what the appellants appear to believe, the Federal Court judge's reasons does not purport to deal with ship deserters generally, but those who like the respondent leave their ship with a view of claiming refugee protection. Hence, it is entirely appropriate that the question focuses on the fact that the effect of the removal order is to deprive the foreign national from claiming refugee protection.

[34] The respondent on the other hand considers that the focus of the question should be on the fact that the Minister's delegate made no effort to contact him. This is a fact that the Federal Court judge took into account (reasons, para. 34).

[35] However, her ultimate conclusion is that in the circumstances of the respondent, the Minister's delegate could not issue the removal order before he made contact with the immigration authorities. This is the issue which she identified at paragraph 7 of her reasons as being central to her decision and which she disposed of at paragraph 34 of her reasons. As this is the basis for her decision, it is appropriate that it be the focus of the certified question.

Standard of review

[36] The issue being one of procedural fairness, the Federal Court judge properly identified the standard of review in the matter before her as correctness (*Cha*, para. 16).

[37] The issue before us is therefore whether she properly applied this standard (*Yu v. Canada (Attorney General)*, 2011 FCA 42, para. 19; *Canada Revenue Agency v. Telfer*, 2009 FCA 23 para. 18; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, para. 247; *Agraira*, para. 46).

Was there a breach of procedural fairness?

- *Natural Justice*

[38] As the Federal Court judge makes clear at paragraph 39 of her reasons, her decision does not purport to deal with any situation other that the one confronting the respondent. A review of the context in which the removal order was issued without prior notice being given to him is therefore essential for a proper understanding of the issue raised on appeal.

[39] Part of this context is the regulatory scheme pursuant to which the respondent was allowed to enter Canada. International shipping operations result in a continuous inflow and outflow to and

from Canada of foreign nationals who work aboard ships. In order to accommodate this reality a special regime has been put in place governing the treatment of crew members while in transit.

[40] The feature of significance for present purposes is that crew members can enter Canada without temporary visa, work permit or passport and without the need to report individually (paragraphs 52(2)(g) and 186(s) and subsection 190(3.1) of the Regulations). This special status allows crew members to disembark and circulate freely so long as they remain crew members and leave on the ship on which they came. If for any reason, the persons concerned cease to be crew members, a report must be filed by the transporter and the person is given a period of 72 hours to leave Canada (paragraph 3(1)(b) and subsections 184(1) and 268(1) of the Regulations). Failing this, the persons concerned can be forced to leave Canada (subsection 44(2) and paragraph 148(1)(f) of the Act and sections 274, 276 and 278 of the Regulations).

[41] The respondent therefore had a period of 72 hours or three full days before any action could be taken against him after he deserted the ship on which he was a crew member on December 1, 2011. He had the right to claim refugee protection within this period or at anytime before a removal order was issued against him, as it turned out, a period of up to December 13, 2011 or twelve days after he deserted the ship.

[42] The respondent did not avail himself of this opportunity because he was concerned that he would be forced back on the ship which he had deserted. The Federal Court judge accepted the respondent's assertion that he delayed making contact with immigration officials until December 16, 2011 because he wanted to be certain that the ship had left Canada (reasons, para. 5).

[43] As a result, the respondent was in a situation where a report attesting to his inadmissibility could be signed pursuant to subsection 44(1) of the Act and a removal order could be issued pursuant to subsection 44(2) of the same legislation. Both events materialized on December 12 and 13, 2011 respectively. This triggered the operation of subsection 99(3) of the Act. As a result, the respondent could no longer claim refugee status when he presented himself to an immigration officer in Montreal, on December 16, 2011, and attempted to do so.

[44] There is no question that the Minister's delegate was entitled to issue a removal order on December 13, 2011 since more than 72 hours had elapsed from the time when the respondent deserted his ship, and in these circumstances, subparagraph 228(1)(*c*)(v) of the Regulations expressly provides for the issuance of a removal order. It is also uncontested that the respondent thereby lost his eligibility to claim refugee status since subsection 99(3) of the Act so provides.

[45] The only issue therefore is whether the Minister's delegate could issue the removal order on December 13, 2011, without having first given the respondent an opportunity to be heard or attempting to contact him. In disposing of the question, I am willing to accept that, as the Federal Court judge found, the respondent was entitled to be notified of the subsection 44(1) report and be given an opportunity to object to the issuance of a removal order (reasons, para. 33). However, in order to benefit from these rights, it was incumbent upon the respondent to place himself in a position where he could be notified.

[46] Upon deserting the ship, the respondent ceased to have any status in Canada and had the obligation to leave within 72 hours. Failing this, he had the obligation to report for examination

before an immigration officer in order to regularize his status (subsection 184(1) of the Regulations and subsections 29(2) and 18(1) of the Act). As noted, he did not do so until fifteen days had passed.

[47] Beyond remaining outside the reach of immigration officials from the time he deserted until December 16, 2011, the respondent had no known address in Canada. The evidence reveals that he travelled from Oshawa to Montreal on December 1, 2011, where he remained until he made contact with the authorities, but there is no indication as to his whereabouts in Montreal during that period.

[48] In my view, a person in the position of the respondent who challenges a decision on the basis that it was rendered without prior notification must be able to show that he was capable of being notified. At minimum, this requires that the person provides immigration authorities with some means of being reached in Canada. The decision of this Court in *Cha* on which the Federal Court judge placed great reliance must be read in light of the fact that the coordinates of the person concerned in that case were known and therefore the person was capable of being notified.

[49] In the present case, not only were no such means provided, but the respondent was intent on remaining undetected by the immigration authorities until he was satisfied that the ship which he deserted had left Canada. This is incompatible with the exercise of the right to be heard. Given the respondent's behaviour, I do not see how the Minister's delegate can be held to have issued the removal order in breach of his right to be heard.

- *Legitimate expectations*

[50] Neither do I believe that the Guidelines on which the respondent relies created a legitimate expectation that he would be heard. Counsel for the respondent relied extensively on this doctrine both in their written submissions and oral arguments before this Court. Since the Federal Court judge did not explicitly address this doctrine, it is necessary to address the respondent's submissions in some detail. It should be mentioned that the Federal Court judge did not have the benefit of the recent decision of the Supreme Court in *Agraira*, which was released after her decision was issued.

[51] In *Agraira*, the Supreme Court analysed the role of another CIC Manual (chapter 10 of CIC's Inland Processing Manual: "Refusal of National Security Cases / Processing of National Interest Requests") in creating legitimate expectations. It laid out the framework of analysis as follows (*Agraira*, paras. 95 and 96):

> [95] The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in a leading authority entitled *Judicial Review of Administrative Action in Canada*:
>
> > The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified. [My emphasis]

> (D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §7:1710; see also *Mount Sinai Hospital Centre v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41 (CanLII), 2001 SCC 41, [2001] 2 S.C.R. 281, at para. 29; *Canada (Attorney General) v. Mavi*, 2011 SCC 30 (CanLII), 2011 SCC 30, [2011] 2 S.C.R. 504, at para. 68.)

[96] In *Mavi*, Binnie J. recently explained what is meant by "clear, unambiguous and unqualified" representations by drawing an analogy with the law of contract (at para. 69):

> Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.

[52] Turning to the Guidelines in issue in that case, the Court held (*Agraira*, paras. 98 and 99):

> [98] In the case at bar, the Guidelines created a clear, unambiguous and unqualified procedural framework for the handling of relief applications, and thus a legitimate expectation that that framework would be followed. The Guidelines were published by CIC, and, although CIC is not the Minister's department, it is clear that they are "used by employees of [both] CIC and the CBSA for guidance in the exercise of their functions and in applying the legislation" (R.F., at para. 108). The Guidelines are and were publicly available, and, as Appendix 2 to these reasons illustrates, they constitute a relatively comprehensive procedural code for dealing with applications for ministerial relief. Thus, the appellant could reasonably expect that his application would be dealt with in accordance with the process set out in them.
>
> [99] The appellant has not shown that his application was not dealt with in accordance with this process outlined in the Guidelines. In May 2002, he was advised of the ministerial relief process by way of a letter akin to the National Interest Information Sheet. He responded to this letter by making submissions through his counsel, and CIC then prepared its report. The CBSA prepared a briefing note for the Minister, which contained its recommendation, and this note was disclosed to the appellant. The appellant declined to make additional submissions or provide additional documents in response to the recommendation. The appellant's submission and its supporting documentation, the CIC officer's

> report, and the CBSA's recommendation were all forwarded to the Minister, and the Minister rendered a decision on the application. As counsel for the appellant rightly acknowledges, "[i]n the Appellant's case, the Ministerial relief process followed the process set out in the IP 10 guidelines" (A.F., at para. 53). His legitimate expectation in this regard was therefore fulfilled.
>
> [My emphasis]

[53] As in *Agraira*, the CIC Guidelines at issue in this case were presumably both publicly available and relied upon by CIC and CBSA employees. The only issue is whether they provide for a "clear, unambiguous and unqualified" process to be followed in circumstances where a person's contact information is lacking as is the case here. In my view, they do not.

[54] The Guidelines governing removal orders issued to persons *in absentia* (Manual ENF 6), which the Federal Court judge relies on (reasons, paras. 24), do not meet this test as they do not deal with persons whose contact information is lacking. The only passage in Manual ENF 6 which can arguably support the contention that the Guidelines apply when immigration officials have no contact information are the following two paragraphs at section 16, under the heading "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. Where there are reasonable grounds to believe that a person is unlikely to appear for a determination proceeding by the Minister's delegate, it is suggested that a notice be provided immediately to the person concerned, indicating that failure to appear for their determination proceeding may result in the issuance of a removal order in their absence.
>
> 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*.
>
> [My emphasis]

[55] Read in isolation the phrase "who has had no contact with CIC or CBSA" in the first sentence of the first paragraph could refer to one of two distinct situations: 1) immigration authorities have been provided with no contact information; or 2) they have this information, but the person concerned has had no contact with them, or is uncooperative.

[56] In my view, the second situation is the one contemplated. When read in context, the phrase in question necessarily refers to persons whose coordinates are known, but who have refused to contact immigration authorities despite being invited to do so, as is made clear by the sentence which follows and the rest of the Guidelines. The second paragraph develops the same theme by spelling out that in these circumstances – *i.e.* where the person concerned is not cooperative – efforts should nevertheless be made to give the person the opportunity to be cooperative and to be heard. Obviously, such efforts cannot be made unless immigration officials can communicate with the person, which necessarily presupposes that they have the required contact information.

[57] Consistent with this, the remaining parts of Manual ENF 6 dealing with *in absentia* proceedings are drafted on the assumption that immigration authorities have contact information and provide guidance as to when and how often notification should be effected (Manual ENF 6, section 16.1 under the heading "Handling *in absentia* proceedings", "Stage one", "Stage two", "Final Stage").

[58] When read in context, the above two paragraphs apply to situations where immigration officials have contact information in hand and set out the procedure for dealing with persons who are unlikely to participate in proceedings affecting them despite being invited to do so. While the Guidelines correctly emphasize that *in absentia* proceedings will be rare, one obvious situation where the need to proceed *in absentia* may arise is when immigration authorities do not have information which allows them to reach the person concerned. No such information was in the possession of the immigration authorities at the time when the removal order was issued.

[59] Seemingly aware of this problem, the respondent argued for the first time before us that the Minister's delegate had his home address in Sri Lanka "at the time of adjudication" (respondent's memorandum, para. 17). However, as it turns out this information was not before the Minister's delegate when the removal order was issued.

[60] Because no evidence had been led before the Federal Court judge as to precisely what was before the Minister's delegate when the removal order was issued, the appellants were granted leave to file fresh evidence on this point. The new evidence establishes that the address in Sri Lanka was not before the Minister's delegate. This information was turned over to the CBSA by the transporter on December 18, 2011 in response to the notice of seizure issued to assist in the execution of the removal order (appeal book, pp. 121, 123 and 131).

[61] The Minister's delegate therefore had no information of any sort as to where or how the respondent could be notified when the removal order was issued.

[62] The crux of the respondent's case insofar as it is based on legitimate expectations appears to rest on the Guidelines dealing with reports written pursuant to subsection 44(1) (Manual ENF 5). The following passage at section 11.3 under the heading "After the report is written" is particularly relevant:

> Wherever possible, an officer who writes a report must also provide a copy of that report to the person concerned. The officer must make all reasonable efforts to locate this person, and all steps and actions taken to do so should be clearly indicated on the person's file.
>
> In port-of-entry cases, where the person concerned is immediately available, this should pose little difficulty. In other cases, however, such as where the person's whereabouts are unknown or the person is otherwise unavailable, this policy proves difficult to implement. […]
>
> [My emphasis]

[63] The respondent's contention is that this reflects a promise that efforts to locate him would be made in order to notify him of the subsection 44(1) report, and that no such efforts were made (respondent's memorandum, para. 70). Had immigration officials made efforts, they would have been able to obtain his home address in Sri Lanka without delay as it was in the possession of the transporter (respondent's written submissions in response to the appellants' motion in writing dated November 26, 2013, para. 48). Relying on the above Guidelines, Counsel submits that the respondent could legitimately expect that immigration officials would obtain his home address and attempt to notify him there.

[64] I would first observe that the promise to make reasonable efforts is not "clear, unambiguous and unqualified" as the words "whenever possible" demonstrate. The closing statement that "this policy proves difficult to implement" where the person's whereabouts are unknown, as is the case

here, gives rise to further equivocation. In my view, these words would preclude the respondent from obtaining relief in a private law context for CIC's or CBSA's alleged failure to attempt to contact him (*Canada (Attorney General) v. Mavi*, 2011 SCC 30, para. 69 (*Mavi*)). This is particularly so when regard is had to the fact that, in contrast, the respondent had the obligation to report and did not abide by it.

[65] Moreover, the efforts contemplated by the Guidelines are "reasonable efforts", which means that they must be reasonably capable of allowing the person concerned to be reached. Attempting to notify him at his home address in Sri Lanka is not amongst the efforts which the respondent could reasonably expect would be made in order to notify him as he was in Canada at the relevant time.

[66] The respondent's further contention that notification by mail at his home address in Sri Lanka should nevertheless have been attempted because the evidence shows that he communicated with his family from time to time (respondent's memorandum, para. 89), is of no assistance as that evidence is contained in the affidavit sworn by the respondent five months later, in support of his application for judicial review (respondent's affidavit, para. 5, appeal book, p. 37). Immigration officials had no reason to believe that notification at his home address could be effective at the relevant time.

[67] Pursuing the same line of argument, Counsel for the respondent submitted at the close of the hearing that immigration officials had yet another mode of communication available to them. Counsel pointed to the list of belongings produced by the transporter which showed that the respondent had a cell phone in his possession. However, the cell phone number was not revealed by

this document. Knowing that the respondent had a cell phone without anything more is of no assistance.

[68] I therefore conclude that the above quoted passages from Manual ENF 5 cannot give rise to a legitimate expectation that efforts would be made in this case.

[69] Finally, even if the Guidelines gave rise to a legitimate expectation that immigration authorities would make efforts to locate him, the respondent could have been heard before any measure was taken against him. The only reason this right was not exercised is that he was intent on not reporting until December 16, 2011. The respondent is in effect attempting to recreate through the doctrine of legitimate expectation a right which was available to him but which he did not exercise in a timely fashion.

[70] The situation is similar the one before the Supreme Court in *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 [2002] 1 S.C.R. 249. In that case, the Supreme Court held that the failure to exercise the right to be heard when available precludes the application of the doctrine of legitimate expectation in order to get a second chance (para. 79):

> In the circumstances of this case, I cannot accept that the Council violated Judge Moreau-Bérubé's right to be heard by not expressly informing her that they might impose a sanction clearly open to them under the Act. The doctrine of legitimate expectations can find no application when the claimant is essentially asserting the right to a second chance to avail him- or herself of procedural rights that were always available and provided for by statute. […]
>
> [My emphasis]

[71] The rule so stated is a straightforward form of estoppel. A person who does not avail him or herself of the right to be heard in a timely fashion cannot expect this right to remain available under the doctrine of legitimate expectations.

[72] To sum up, the respondent is the one who had the obligation to provide contact information, not the other way around. Given his failure to report and his decision to remain underground during the twelve days leading to the issuance of the removal order, it was open to the Minister's delegate to proceed *in absentia*. I can detect no breach of procedural fairness.

The reasons of the Federal Court judge

[73] As noted, the Federal Court judge does not deal with the fact that the respondent provided no contact information and was intent on remaining undetected by immigration officials during the period leading to the issuance of the removal order. Based on her reasons, this would have been immaterial as the Minister's delegate could not issue the removal order before the respondent made contact (reasons, paras. 7 and 34).

[74] In my respectful view, the Federal Court judge's reasoning disregards both the wording of the relevant legislation and its intent. The 1993 amendments to the Regulations excluding deserters from the definition of "member of a crew" was intended to allow immigration officials to take timely action when a person ceased to qualify as a crew member (SOR/93-44, section 12, enacting section 12.1). Prior to that amendment, no enforcement action could be taken until the ship had left port (paragraph 27(2)(*j*) of the Act, R.S. 1985, c. I-2, repealed by S.C. 1992, c. 49, subsection 16(8)).

[75] In 2002, paragraph 184(1)(*b*) of the Regulations imposed a 72-hour limitation on any member of a crew who ceases to be a crew member (subsection 184(1) of the current Regulations (SOR/2004-167, section 50). As was the case in 1993, this limitation was intended to allow immigration officials to take timely action. Delaying action until the deserter chooses to make contact would defeat that intent and read the 72-hour limitation out of the Regulations.

[76] Counsel for the respondent argued that the Minister's delegate did not have to issue the removal order on December 13, 2011 and should have exercised his discretion accordingly. There are circumstances where enforcement action, although authorized, should be delayed. However, none of these arise where a ship deserter is believed on reasonable grounds to have gone underground. The procedure outlined in Manual ENF 17 under heading 8.5 "Crew members other than deserters who cease to perform their duties" illustrates this point:

> R184(1)(*b*) requires crew members to leave Canada within 72 hours of ceasing to be members of the crew. In such cases officers should follow the same procedures for taking enforcement action as apply in cases of desertion. The following circumstances may lead to the loss of crew member status:
>
> - a labour dispute aboard a vessel;
> - the crew member's arrest on criminal charges;
> - the seizure of a vessel by court order or other autority; or
> - suspension of a ship's operations due to an accident or mechanical problems.
>
> In determining whether or not enforcement action is appropriate, an officer should assess whether or not the unwillingness or inability to perform duties will continue after the problem has been resolved. If no resolution is in sight, or if the officer has reason to believe that the crew member will not resume duties, enforcement action should be initiated as soon as possible after the 72-hour period expires.[…]
>
> [My emphasis]

[77] In the present case, immigration officials waited nine days beyond the expiration of the 72-hour period before initiating enforcement actions. As the respondent had still not reported, they had reasonable grounds to believe that he had gone underground. Despite the respondent's argument to the contrary, immigration officials did not act precipitously.

[78] Counsel for the respondent further argued that immigration officials should only have completed the subsection 44(1) report and issued the arrest warrant since no useful purpose was served by issuing the removal order right away. According to Counsel, immigration officials should have exercised their discretion not to issue the removal order until the respondent contacted them in order to preserve his right to claim refugee status.

[79] Again, this would put the timing of the issuance of the removal order, together with the attendant consequences, in the hands of the person concerned. This is not what was intended. In allowing for the timely issuance of a removal order, the legislator must be taken to have acted coherently, in full knowledge of the impact that such order has on the right to claim refugee protection (subsection 99(3) of the Act). The result is that persons who desert a ship in Canada in order to claim refugee protection should report to the immigration authorities and make their claim promptly. The 72-hour limitation makes it clear that they cannot expect to claim this status at a time of their choice.

The spectre of a legal error

[80] At the close of the hearing, Counsel for the respondent made the point that *in absentia* proceedings can give rise to legal errors.

[81] Two scenarios were mentioned. The first is where the deserter leaves Canada within the 72-hour limit without having reported and a removal order is issued *in absentia* in the belief that the deserter remains in Canada and is evading the authorities. The other scenario is where the deserter is incapacitated and incapable of reporting as required for medical reasons and a removal order is issued *in absentia* again in the belief that the deserter remains in Canada and is evading the authorities.

[82] I note with respect to this last scenario that a crew member who leaves ship in order to be hospitalized maintains his status as a crew member (subparagraph 3(1)(b)(iii) of the Regulations). The scenario is therefore restricted to persons who are incapacitated for medical reasons, without being hospitalized.

[83] In my view, judicial review would be available to correct legal errors under either scenario. As to the first, a demonstration that the person had left Canada would lead to the removal order being set aside as the condition precedent for its issuance would not have been in existence at the relevant time.

[84] As to the second scenario, a demonstration that the person would have reported but was incapable of doing so could lead to the removal order being set aside on the ground that the person was unable to make contact within the three-day period provided for by the Regulations for reasons beyond his or her control and was, as a result, deprived of the right to be heard.

[85] Although the issuance of a removal order *in absentia* can result in legal errors, I cannot conceive of any error of the type alluded by Counsel which could not be cured by invoking the judicial review jurisdiction of the Federal Court.

DISPOSITION

[86] For these reasons, I would answer the certified question in the negative, allow the appeal, set aside the decision of the Federal Court judge, and giving the decision which she ought to have given, I would dismiss the judicial review application.

"Marc Noël"

J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
Robert M. Mainville J.A."

ANNEX

RELEVANT LEGISLATIVE PROVISIONS:

- *Immigration and Refugee Protection Act* (S.C. 2001, c. 27)

18. (1) Every person seeking to enter Canada must appear for an examination to determine whether that person has a right to enter Canada or is or may become authorized to enter and remain in Canada.	**18.** (1) Quiconque cherche à entrer au Canada est tenu de se soumettre au contrôle visant à déterminer s'il a le droit d'y entrer ou s'il est autorisé, ou peut l'être, à y entrer et à y séjourner.
29. (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.	**29.** (2) Le résident temporaire est assujetti 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.
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 …	**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.
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	**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

report shall be transmitted to the Minister.

(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.

52. (1) If a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances.

…

55. (1) An officer may issue a warrant for the arrest and detention of a permanent resident or a foreign national who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, for an admissibility hearing, for removal from Canada or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2).

…

ministre.

(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.

52. (1) L'exécution de la mesure de renvoi emporte interdiction de revenir au Canada, sauf autorisation de l'agent ou dans les autres cas prévus par règlement.

[…]

55. (1) L'agent peut lancer un mandat pour l'arrestation et la détention du résident permanent ou de l'étranger dont il a des motifs raisonnables de croire qu'il est interdit de territoire et qu'il constitue un danger pour la sécurité publique ou se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi, ou à la procédure pouvant mener à la prise par le ministre d'une mesure de renvoi en vertu du paragraphe 44(2).

[…]

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.

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.

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

112. (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

148. (1) A person who owns or operates a vehicle or a transportation facility, and an agent for such a person, must, in accordance with the regulations,

…

(f) carry from Canada a person whom it has carried to or caused to enter Canada and who is prescribed or whom an officer directs to be carried;

…

148. (1) Le propriétaire ou l'exploitant d'un véhicule ou d'une installation de transport, et leur mandataire, sont tenus, conformément aux règlements, aux obligations suivantes :

[…]

f) sur avis ou dans les cas prévus par règlement faire sortir du Canada la personne qu'il a amenée ou fait amener;

[…]

- *Immigration and Refugee Protection Regulations* (SOR/2002-227)

3. (1) For the purposes of these Regulations,	**3.** (1) Pour l'application du présent règlement :
…	[…]
(*b*) a person ceases to be a member of a crew if	*b*) le membre d'équipage perd cette qualité dans les cas suivants :
(i) they have deserted;	(i) il a déserté,
(ii) an officer believes on reasonable grounds that they have deserted;	(ii) un agent a des motifs raisonnables de croire qu'il a déserté,
(iii) they have been hospitalized and have failed to return to the means of transportation or leave Canada after leaving the hospital, or	(iii) il n'est pas retourné au moyen de transport ou n'a pas quitté le Canada après la fin d'une hospitalisation,
(iv) they have been discharged or are otherwise unable or unwilling to perform their duties as a member of a crew and failed to leave Canada after the discharge or after they first became unable or unwilling to perform those duties.	(iv) il ne quitte pas le Canada après son licenciement ou le moment à partir duquel il ne peut ou ne veut plus exercer ses fonctions.
52. (1) In addition to the other requirements of these Regulations, a foreign national seeking to become a temporary resident must hold one of the following documents that is valid for the period authorized for their stay:	**52.** (1) En plus de remplir les autres exigences réglementaires, l'étranger qui cherche à devenir résident temporaire doit détenir l'un des documents suivants, valide pour la période de séjour autorisée :

(*a*) a passport that was issued by the country of which the foreign national is a citizen or national, that does not prohibit travel to Canada and that the foreign national may use to enter the country of issue;

…

(2) Subsection (1) does not apply to

…

(*g*) persons seeking to enter Canada as members of a crew who hold a seafarer's identity document issued under International Labour Organization conventions and are members of the crew of the vessel that carries them to Canada.

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.

(2) The following conditions are imposed on a foreign national who enters Canada to become a member of a crew:

(*a*) [Repealed, SOR/2004-167, s. 50]

(*b*) to join the means of transportation within the period imposed as a condition of entry or, if no period is imposed, within 48 hours after

a) un passeport qui lui a été délivré par le pays dont il est citoyen ou ressortissant, qui ne lui interdit pas de voyager au Canada et grâce auquel il peut entrer dans le pays de délivrance;

[…]

(2) Le paragraphe (1) ne s’applique pas

[…]

g) à la personne cherchant à entrer au Canada à titre de membre d’équipage et qui est titulaire d’une pièce d’identité de marin lui ayant été délivrée aux termes des conventions de l’Organisation internationale du Travail, si elle est membre d’équipage du bâtiment qui l’amène au Canada.

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.

(2) Les conditions ci-après sont imposées à l’étranger qui entre au Canada pour devenir membre d’équipage :

a) [Abrogé, DORS/2004-167, art. 50]

b) il doit se rendre au moyen de transport dans le délai imposé comme condition d’entrée ou, à défaut, dans les quarante-huit heures suivant

they enter Canada; and

(*c*) to leave Canada within 72 hours after they cease to be a member of a crew.

son entrée au Canada;

c) s'il perd la qualité de membre d'équipage, il doit quitter le Canada dans les soixante-douze heures qui suivent.

186. A foreign national may work in Canada without a work permit

…

(*s*) as a member of a crew who is employed by a foreign company aboard a means of transportation that

(i) is foreign-owned and not registered in Canada, and

(ii) is engaged primarily in international transportation;

186. L'étranger peut travailler au Canada sans permis de travail :

[…]

s) à titre de membre d'équipage employé par une société étrangère à bord d'un moyen de transport qui, à la fois :

(i) est d'immatriculation étrangère et dont le propriétaire est un étranger,

(ii) est utilisé principalement pour le transport international;

190. (3.1) A foreign national who is a member of a crew and who is carried to Canada by a vessel is exempt from the requirement to obtain a temporary resident visa if they are seeking

(*a*) to enter Canada as a member of the crew of the vessel; and

(*b*) to remain in Canada solely as a member of the crew of that vessel or any other vessel.

190. (3.1) Est dispensé de l'obligation d'obtenir un visa de résident temporaire l'étranger membre d'équipage qui arrive au Canada à bord d'un bâtiment et qui cherche, à la fois :

a) à entrer au Canada à titre de membre d'équipage du bâtiment;

b) à séjourner au Canada à seule fin d'agir à titre de membre d'équipage du bâtiment ou de tout autre bâtiment.

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, a removal order; and

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;

268. (1) A transporter must, without delay, notify an officer at the nearest port of entry of any foreign national who ceases to be a member of the crew for a reason listed in paragraph 3(1)(b). The transporter must record that information and provide it in writing on the request of the officer

…

268. (1) Le transporteur informe sans délai l'agent du point d'entrée le plus proche lorsqu'un étranger cesse d'être un membre d'équipage pour le motif prévu à l'alinéa 3(1)b). Le renseignement est consigné et fourni par écrit à l'agent sur demande.

[…]

274. (1) If a transporter carries, or causes to be carried, a foreign national to Canada as a member of its crew or to become a member of its crew, and the foreign national is subject to an enforceable removal order, the

274. (1) Il incombe au transporteur qui a amené ou fait amener au Canada un étranger qui est membre de son équipage ou entend le devenir et qui fait l'objet d'une mesure de renvoi exécutoire de transporter celui-ci à

transporter must carry that foreign national from Canada to the applicable country as determined under Division 4 of Part 13.

(2) The transporter must transport the foreign national referred to in subsection (1) from wherever the foreign national is situated in Canada to the vehicle in which they will be carried to another country.

destination du pays déterminé aux termes de la section 4 de la partie 13.

(2) Le transporteur est tenu de transporter l'étranger visé au paragraphe (1), peu importe où ce dernier se trouve au Canada, jusqu'au véhicule qui servira à le faire sortir du Canada.

276. (1) When a foreign national seeking to enter Canada is made subject to a removal order and a transporter is or might be required under the Act to carry that foreign national from Canada, an officer shall

(a) notify the transporter that it is or might be required to carry that foreign national from Canada; and

(b) when the removal order is enforceable, notify the transporter that it must carry the foreign national from Canada and whether the foreign national must be escorted.

(2) After being notified under paragraph (1)(b), the transporter must without delay notify an officer of arrangements made for carrying the foreign national from Canada.

…

276. (1) Lorsque l'étranger qui cherche à entrer au Canada est visé par une mesure de renvoi et qu'un transporteur est ou peut être tenu, en vertu de la Loi, de le faire sortir du Canada :

a) l'agent avise le transporteur qu'il est ou peut être tenu de le transporter ou de le faire transporter hors du Canada;

b) lorsque la mesure de renvoi devient exécutoire, l'agent avise le transporteur de son obligation de faire sortir l'étranger du Canada et, s'il y a lieu, de le faire escorter.

(2) Après avoir été avisé aux termes de l'alinéa (1)b), le transporteur avise sans délai l'agent des arrangements qu'il a pris pour faire sortir l'étranger du Canada.

[…]

278. A transporter that is required under the Act to carry a foreign

278. Le transporteur auquel il incombe aux termes de la Loi de faire

national from Canada must pay the following costs of removal and, if applicable, attempted removal:

(*a*) expenses incurred within or outside Canada with respect to the foreign national's accommodation and transport, including penalties for changes of date or routing;

(*b*) accommodation and travel expenses incurred by any escorts provided to accompany the foreign national;

(*c*) fees paid in obtaining passports, travel documents and visas for the foreign national and any escorts;

(*d*) the cost of meals, incidentals and other expenses as calculated in accordance with the rates set out in the *Travel Directive* published by the Treasury Board Secretariat, as amended from time to time;

(*e*) any wages paid to escorts and other personnel; and

(*f*) the costs or expenses incurred with respect to interpreters and medical and other personnel engaged for the removal.

sortir du Canada un étranger paie les frais suivants, même en cas d'échec du renvoi :

a) les frais d'hébergement et de transport engagés à l'égard de l'étranger, à l'intérieur ou à l'extérieur du Canada, y compris les frais supplémentaires résultant de changements de date ou d'itinéraire;

b) les frais d'hébergement et de transport engagés par l'escorte fournie pour accompagner l'étranger;

c) les frais versés pour l'obtention de passeports, visas et autres titres de voyage pour l'étranger et pour toute personne l'escortant;

d) les frais de repas, faux frais et autres frais, calculés selon les taux publiés par le Secrétariat du Conseil du Trésor dans la *Directive sur les voyages d'affaires*, avec ses modifications successives;

e) la rémunération des escortes ou de tout autre intervenant;

f) le coût des services fournis pendant le processus de renvoi par des interprètes ou des personnels médical ou autres.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-45-13

APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE TREMBLAY-LAMER OF THE FEDERAL COURT OF CANADA DATED JANUARY 3, 2013, DOCKET NUMBER IMM-2779-12.

DOCKET:	A-45-13
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v. Nuwan Dilusha JAYAMAHA MUDALIGE DON
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	DECEMBER 3, 2013
REASONS FOR JUDGMENT BY:	NOËL J.A.
CONCURRED IN BY:	GAUTHIER J.A. MAINVILLE J.A.
DATED:	JANUARY 10, 2014

APPEARANCES:

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