Salinas v. Canada (Minister of Employment and Immigration) [1992] F.C.J. No. 231

Between Marisol Escobar Salinas, Applicant, and The Minister of Employment and Immigration, Respondent
[1992] F.C.J. No. 231
DRS 94-01424
Action Nos. T-3212-90, 91-T-26
52 F.T.R. 7
Federal Court of Canada-Trial Division
Toronto, Ontario Jerome A.C.J.
Heard: December 17, 1990 and February 12, 1991
Judgment: March 20, 1992 (25 pp.)

Application for an order to quash a ruling of the Refugee Board that it could reconvene the applicant's refugee hearing in order to hear evidence of changes in the applicant's country's conditions and for an order staying proceedings before the board. The applicant was a Panamanian citizen whose refugee claim had been founded on fear of persecution by agents of the Noriega regime. Six months after the conclusion of the hearing, but before a decision was rendered, the board sought to reconvene the hearing for the said purpose.
HELD: Application allowed. The Board had no jurisdiction to reconvene a hearing in the absence of a specific statutory provision to that effect. Where there was evidence of political changes that may adversely affect a refugee claim, the proper procedure was for the Minister to apply to the Board for a determination of whether the claimant had ceased to be a Convention refugee. Also, arbitrariness may result if the Board was permitted to reconvene hearings for the present purpose without the request or consent of the parties.

STATUTES, REGULATIONS AND RULES CITED:

Anti-Dumping Act, R.S.C. 1970, c. A-15.
Canadian Charter of Rights and Freedoms, 1982, s. 7.
Customs Act, R.S.C. 1970, c. C-40.
Immigration Act, R.S.C. 1985, c. 1-2, ss. 32.1, 46.02(2), 59, 67(l)(2), 68, 68(4), 68(5), 69, 69.1, 69.1(5), 69.1(9), 69.2 (1), 82.1 (6)
Immigration Act, S.C. 1976-77, c. 52, s. 59.
Federal Court Act, R.S.C. 1985, c. F-7, s. 18, 28, 28(l), 28(3), 29.
Immigration Appeal Board Act, R.S.C. 1970, c. 1-3, ss. 5, 11, 11(3), 12, 22.
Inquiries Act, R.S.C. 1985, c. 1-13, s. 4.
Brenda Wemp, for the Applicant.

Bonnie Boucher, for the Respondent.
JEROME A.C.J. (Reasons for Order):--With appropriate leave, the applicant seeks an order: to quash a ruling of the Immigration and Refugee Board, Convention Refugee Determination Division (the "Board"), that it had jurisdiction to reconvene the applicant's refugee hearing in order to hear evidence of changes in country conditions occurring after the hearing concluded on November 29, 1989; to require the Board to render a decision based on the evidence before it on November 29, 1989; to prohibit the Board from hearing and considering evidence of changes in country conditions occurring after November 29, 1989; and, for a stay of the proceedings before the Board. These matters were heard at Toronto, Ontario on December 17, 1990 and adjourned for further argument to February 12, 1991. At the conclusion of argument on February 12, 1991, I reserved judgment and ordered that further proceedings before the Board be stayed until the decision in this matter had been rendered. On December 17, 1991, in Toronto I gave oral Reasons for Order in this matter and indicated that these written Reasons would follow.
The applicant, a citizen of Panama, came to Canada on July 16, 1989. At an inquiry under the Immigration Act, S.C. 1976-77 c. 52, [now R.S.C. 1985, c. 1-2, as amended] where it was

decided that she was inadmissible to Canada, the applicant claimed refugee status stating that she had fled Panama due to an alleged fear of persecution by agents of the Noriega regime.
It was determined that there was a credible basis for her claim and a conditional exclusion order was issued pursuant to s. 32.1 of the Immigration Act. Her refugee claim was then referred to the Immigration and Refugee Board (the "Board") pursuant to s. 46.02(2) and an oral hearing in accordance with s. 69.1 was convened before the Board on November 29, 1989 to consider the refugee claim. After hearing the applicant and the submissions of her counsel and the Refugee Hearing Officer, the Board reserved its decision. The Presiding Member indicated that because the Board was not familiar with conditions in Panama, the applicant's country of nationality, time to review and study the filed documentation was required.
By letter dated April 26, 1990 [See Appendix "All to the affidavit of Marisol Escobar Salinas sworn December 5, 1990, the applicant was advised that the Presiding Member had directed the Registrar to reconvene the hearing for the purpose of hearing evidence relating to changes in the conditions in Panama which had occurred since November 29, 1989 and before a decision had been reached by the Board. These changes arose when the United States sent military force into Panama and removed Noriega from power.
The parties agreed to a rehearing date of September 10, 1990 and a Notice of Hearing dated June 15, 1990 was sent to the applicant. At the outset of the hearing the Presiding Member stated:
This is a resumption of a hearing into the claim of Marisol Eloisa Escobar Salinas, to be a Convention refugee. This hearing opened on November 29, 1989, and is resumed today to hear new evidence.... Ms. Escobar, before this panel reach [sic] the final decision on your claim, a change has occurred in your country of nationality. This panel is here today to receive evidence on the situation in your country of nationality, and to hear how the new political condition in your country relate [sic] to your fear of persecution, should you be returned to Panama [Footnote: See transcript of the September 10, 1990 hearing before the Immigration and Refugee Board, attached as Exhibit "A" to the affidavit of Neelam, Jolly, Counsel, Civil Litigation, Department of Justice sworn December 13, 1990 and see also the recount of the hearing set out in the affidavit of Marisol Escobar Salinas sworn December 5, 1990.].

Counsel for the applicant announced her intention to argue that the Board should not hear any new evidence. After hearing counsel's submission and after providing the Refugee Hearing officer with an opportunity to comment, the Board ruled that it had jurisdiction to reconvene the hearing to hear new evidence and further ruled that the delay had not limited the applicant's right to a full and proper hearing (the "ruling"). An adjournment, requested by counsel for the applicant, was granted by the Board to December 21, 1990.
By motion dated December 5, 1990, the applicant applied for an order to quash the Board's ruling, to require the Board to render a decision based on the evidence before it on November 29, 1989, and to stay the resumption of the reconvened hearing until such time as the Court renders its decision on the application. By motion dated February 6, 1991 (91-T-26) the applicant also requested leave pursuant to s. 82.1 of the Immigration Act, 1976-77, c. 52 to commence a proceeding under s. 18 of the Federal Court Act for an order to prohibit the Board from hearing and considering evidence of changes in country conditions which occurred after the hearing was concluded on November 29, 1989 and pursuant to s. 82.1(6) of the Immigration Act for an extension of time to file the application for leave. Leave was granted as requested.
The applicant submits that the Board has no jurisdiction to reconvene, on its own motion, a hearing which has been concluded, for the purpose of hearing evidence of changes in country conditions and that, if the Board has such jurisdiction, it is prevented from doing so in this case due to delay. The applicant submits that there is a serious issue to be tried, the balance of convenience lies in favour of staying the hearing, and irreparable harm would be caused to the applicant if the stay were not granted. In her affidavit dated December 5, 1990, the applicant swears that "this change may prejudice me in the continued presentation of my refugee claim" and that the delay in receiving a decision had caused her anxiety and insecurity.
In order to dispose of this application three issues must be resolved:
1. Does the Federal Court, Trial Division, have jurisdiction in this matter;

2. If this Court has jurisdiction to review this matter, is the Board's ruling reviewable in the face of s. 67(l) of the Immigration Act;

3. Did the Board exceed its jurisdiction or otherwise err in law in making the decision to reconvene in this instance; and should orders of certiorari, mandamus and prohibition lie in this instance.

The statutory provisions relevant to this matter are sections 18, 28 and 29 of the Federal Court Act, and sections 67 and 68 and subsections 69.1(5), 69.1(9) and 69.2(l) of the Immigration Act: Federal Court Act

S. 18.The Trial Division has exclusive original jurisdiction

(a)to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b)to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

S. 28(1)Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, on the ground that the board, commission or tribunal

(a)failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b)erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(c)based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

(2)Any application under subsection (1) may be made by the Attorney General of Canada or any party directly affected by the decision or order by filing a notice of the application in the Court within ten days from the time the decision or order was first communicated to the office of the Deputy Attorney General of Canada or to that party by the board, commission or other tribunal, or within such further time as the Court of Appeal or a judge thereof may, either before or after the expiration of those ten days, fix or allow.

(3)Where the Court of Appeal has jurisdiction under this section to hear and determine an application to review and set aside a decision or order, the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision or order.

(4)A federal board, commission or other tribunal to which subsection (1) applies may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Court of Appeal for hearing and determination.

(5)An application or reference to the Court of Appeal made under this section shall be heard and determined without delay and in a summary way.

(6)Notwithstanding subsection (1), no proceeding shall be taken thereunder in respect of a decision or order of the Governor in Council, the Treasury Board, a superior court or the Pension Appeals Board or in respect of a proceeding for a service offence under the National Defence Act.

S. 29.Notwithstanding sections 18 and 28, where provision is expressly made by an Act of Parliament for an appeal as such to the Federal Court, to the Supreme Court, to the Governor in

Council or to the Treasury Board from a decision or order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except to the extent and in the manner provided for in that Act.

Immigration Act

S. 67(1)The Refugee Division has, in respect of proceedings under section 69.1 and 69.2, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.

(2)The Refugee Division, and each member thereof, has all the powers and authority of a commissioner appointed under Part I of the Inquiries Act and, without restricting the generality of the foregoing, may, for the purposes of a hearing,

(a)issue a summons to any person requiring that person to appear at the time and place mentioned therein to testify with respect to all matters within that person's knowledge relative to the subject-matter of the hearing and to bring and produce any document, book or paper that the person has or controls relative to that subject-matter;

(b)administer oaths and examine any person on oath;

(c)issue commissions or requests to take evidence in Canada; and

(d)do any other thing necessary to provide a full and proper hearing.

S. 68(l)The Refugee Division shall sit at such times and at such places in Canada as are considered necessary by the Chairman for the proper conduct of its business.

(2)The Refugee Division shall deal with all proceedings before it as informally and expeditiously as the circumstances and the considerations of fairness permit.

(3)The Refugee Division is not bound by any legal or technical rules of evidence and, in any proceedings before it, it may receive and base a decision on evidence adduced in the proceedings and considered credible or trustworthy in the circumstances of the case.

(4)The Refugee Division may, in any proceedings before it, take notice of any facts that may be judicially noticed and, subject to subsection (5), of any other generally recognized facts and any information or opinion that is within its specialized knowledge.

(5)Before the Refugee Division takes notice of any facts, information or opinion, other than facts that may be judicially noticed, in any proceedings, the Division shall notify the Minister, if present at the proceedings, and the person who is the subject of the proceedings of its intention and afford them a reasonable opportunity to make representations with respect thereto.

S. 69.1(5)At the hearing into a claim, the Refugee Division

(a)shall afford the claimant a reasonable opportunity to present evidence, cross-examine witnesses and make representations; and

(b)shall afford the Minister a reasonable opportunity to present evidence and, if the Minister notifies the Refugee Division that the Minister is of the opinion that matters involving section E or F of Article 1 of the Convention or subsection 2(2) of this Act are raised by the claim, to cross-examine witnesses and make representations.

(9)The Refugee Division shall determine whether or not the claimant is a Convention refugee and shall render its decision as soon as possible after completion of the hearing and send a written notice of the decision to the claimant and the Minister.

S. 69.2(l)The Minister may make an application to the Refugee Division for a determination whether any person who was determined under this Act or the regulation to be a Convention refugee has ceased to be a Convention refugee.

Does the Federal Court Trial Division have jurisdiction in this matter?

At the hearing on December 17, 1990, the respondent argued that the Federal Court, Trial Division, did not have jurisdiction in this matter and supplementary memoranda of fact and law were filed by the parties.
The applicant submits that the Trial Division has jurisdiction to review the Board's decision and to grant the relief sought in that the Board's decision to reconvene was a procedural decision within the purported exercise of the Board's powers under the Immigration Act. The Board both refused to perform its statutory duty under s. 69.1(9) to render its decision as soon as possible after the hearing had been completed and, on its own initiative, asserted a jurisdiction which it does not possess. Following the reasoning in Re Attorney-General of Canada and Cylien (1973), 43 D.L.R. (3d) 590 (F.C.A.), the Federal Court of Appeal does not have jurisdiction. Furthermore, the Board's ruling, which is in the nature of an interlocutory decision as to procedure or as to the nature of its powers, does not constitute a "decision or order" within the context of s. 28(l) of the Federal Court Act. Finally, although s. 29 would preclude a s. 18 or s. 28 review of the Board's final decision on the applicant's refugee claim, it does not, at this stage, confer a right to seek review of the Board's decision in the Federal Court of Appeal and does not prevent the applicant from seeking relief pursuant to s. 18.

RESPONDENT'S SUBMISSIONS

The respondent agrees that the Board's initial decision on April 26, 1990 to notify the applicant that her hearing was to be reopened on the motion of the Board was an administrative decision made without a hearing. However, the right to have the decision of April 26, 1990 reviewed under section 18 of the Federal Court Act "merged" with any right of review arising from the decision to reconvene rendered by the Board on September 10, 1990 after hearing full argument on the question on a judicial or quasi-judicial basis. The decision to reconvene is, therefore, a "final" decision in that the Board's jurisdiction relative to the issue to which the decision relates was exhausted, the impugned decision directly and indirectly affects the rights and obligations of the applicant, and it is binding on the parties. As well, the decision would be irreversible once the hearing reopened and any delay in seeking judicial review would render nugatory any available remedy. The respondent also submits that the Board does not have independent statutory authority to make an interlocutory decision on jurisdiction and the decision is, therefore, properly reviewable by the Federal Court of Appeal under section 28 of the Federal Court Act. Furthermore, as the ongoing proceeding is judicial or quasi-judicial in nature, the decision at issue is properly reviewable under s. 28 and, in accordance with s. 28(3), the Trial Division does not have jurisdiction to consider this matter.

ANALYSIS

The Federal Court of Appeal has considered this issue in the context of somewhat similar circumstances on two previous occasions. In Re Attorney-General of Canada and Cylien (1973), supra, the Federal Court of Appeal was asked to review an Immigration Appeal Board's order that the record of inquiry leading to a deportation order be transmitted to the Board and to determine whether the Board's decision was a "decision or order" within the meaning of s. 28 or whether the remedy was under s. 18 of the Federal Court Act. In that case the Board determined that, when considering whether an appeal from a deportation order should be allowed to proceed under s. 11 of the Immigration Appeal Board Act, R.S.C. 1970 c. 1-3, as amended by 1973, c. 27, s. 5 [Footnote 1 appended to judgment], it could take into account not only the "declaration" required by s. 11(2) but also the record of inquiry before the Special Inquiry Officer

who made the deportation order. After an adjournment to consider the suggestion of counsel for the Minister that the Board was required under s. 11(3) to decide whether the appeal should proceed simply on the basis of the respondent's declaration, the Board "decided" to reject counsel's suggestions and confirmed its initial order that the record of inquiry be produced. Jackett C.J. determined [at p. 597-981 that "what the Board did, by the reasons delivered on October 16th, properly regarded" constituted either or both a refusal to perform its duty or a wrongful assertion of jurisdiction.

Accordingly, he stated that "it is clearly a case where mandamus or prohibition or both would lie to determine the exact nature of the Board's duty in the circumstances unless such remedy is taken away by s. 28(3) [of the Federal Court Act]". He found, however, that "the Board's conclusion as to the nature of its statutory duty under s. 11(3) is not a decision made by it in the exercise of its "jurisdiction or powers" to make decisions and, therefore, it is not a decision that this Court has jurisdiction to set aside under s. 28(1) of the Federal Court Act." He reasoned [at p. 599]:

...This is a question of law that the Board has no "jurisdiction or powers" to decide. It must, of course, form an opinion on that question but that opinion has no statutory effect. (The statute does not, as it might have done, confer on the Board a jurisdiction to determine its own jurisdiction).

There is a clear difference between a "decision" by the Board of something that it has "jurisdiction or powers" to decide and a decision by it as to the view as to the nature of its own powers upon which it is going to act. Once the Board decides something that it has "jurisdiction or powers" to decide in a particular case, that decision has legal effect and the Board's powers with regard to that case are spent. When, however, the Board takes a position with regard to the nature of its powers upon which it intends to act, that "decision" has no legal effect. The Board itself, whether differently constituted or not, in the very case in which the position was taken, can change its view before it deals with the case and, in fact, proceed on the basis of the changed view.

In Re Danmour Shoes Co. Ltd. (1974), 1 N.R. 422, the Federal Court of Appeal held that a Tariff Board declaration that it did not have jurisdiction to consider the validity of regulations was not a proper subject matter for an application under s. 28 of the Federal Court Act. The ruling was made in the course of a hearing before the Tariff Board to determine the "value for duty" of imported goods under the Customs Act, R.S.C. 1970, c. C-40 and the "normal value" of imported goods under the Anti-Dumping Act, R.S.C. 1970, c. A-15. The Board refused to review regulations made by the Minister declaring that it did not have jurisdiction to deal with the validity of the "Prescriptions". Jackett C.J., consistent with his reasoning in Cylien, held that the Court of Appeal did not have jurisdiction under s. 28(l) to set aside the Tariff Board's declaration:

What we are concerned with here is something different [to an exercise or purported exercise of "jurisdiction or powers" conferred by an Act of Parliament]. The Tariff Board has jurisdiction or powers to decide the appeals against "value for duty" and to decide the appeals against "normal value". It has not, however, as yet, delivered any decision disposing of any of those appeals. The problem that was raised at a preliminary stage before the Tariff Board, and in respect of which the Board has made a preliminary "declaration", is whether, in deciding value for duty or normal value, it is authorized to hold that the "prescriptions" are inoperative because they are invalid. Whether or not it is so authorized is a question of law that the Board has no jurisdiction or power to decide as a question of law independently of the appeals that it has jurisdiction to decide. The Board must, of course, when it comes to dispose of the appeals, take a position on that question that will be reflected in its decision disposing of the appeals, but, in my view, any declaration by the Board on the question prior to, and therefore apart from, the actual disposition of an appeal has no legal effect (The Statutes do not, as they might have done, confer on the Board jurisdiction to determine its own jurisdiction).

Recently, in Canada (Attorney General) v. S.F. Enterprises Inc. (1990), 107 N.R. 100 (F.C.A.), the Federal Court of Appeal held that the Tax Court of Canada's decision that two shareholders of a corporate taxpayer lacked standing to appeal a tax assessment was a preliminary ruling, clearly interlocutory, and, accordingly, not a "final" decision subject to review under s. 28 of the Federal Court Act. MacGuigan J.A. commented [at p. 1021:

[8]At first blush the applicant would appear to be helped by Lutes v. Commissioner of the Royal Canadian Mounted Police, [19485] 2 F.C. 326; 61 N.R. 1 (F.C.A.), where this Court reviewed and set aside a decision by the Commissioner of the R.C.M.P. to order a new review of a recommendation for discharge. However, a close reading of the reasons for judgment of Heald, J.A., on this point makes clear that what was decisive was the fact that the Commissioner had fully exercised his lawful powers, and that what followed would be in effect a new review. Heald, J.A., wrote (4at 340):

"Applying the Danmor test, can it be said that the Commissioner's decision herein is a decision which he has been expressly mandated to make? I conclude that this question must be answered affirmatively.

Clearly, where legislated powers have been fully utilized, there is no further decision to be made. Of course, the matter might ultimately return to the Commissioner again as the final stage of the review he ordered, but that would be in a new proceeding. The initial proceeding was exhausted by the Commissioner's decision.
On this basis, he concluded [at p. 103] that, "[i] n the case at bar, the decision of the Tax Court judge that the two individual respondents do not have standing is merely a preliminary ruling enabling the Court to proceed to consider the substantive issue relating to the appeal against the tax assessments".
Here, as in Re Cylien and Re Danmour Shoes, the question as to whether the Board may reconvene to hear further evidence on change in conditions in the country of nationality is not a question the Board has "jurisdiction or powers" to decide. Although the Board must form an opinion on that question, such opinion has no legal effect except as a contribution to the determination of the applicant's refugee claim.
The Board's decision to reconvene is procedural. The respondent argues that because it was followed by a hearing on the issue of the Board's jurisdiction to reconvene, the decision was then converted into a decision made on a judicial or quasi-judicial basis. I cannot accept this proposition. It is questionable whether what occurred on September 10, 1990 constituted a "hearing" of the issue. In any event, the fact that a Board allows submissions on a procedural point, or even if the Board goes so far as to conduct a "hearing" on the matter, if it so chooses, does not change the nature of the decision before it. Accordingly, I reject the respondent's submission that the right to review the administrative decision of April 26, 1990 "merged" with the quasi-judicial decision to reconvene made on September 10, 1990.
Counsel for the respondent relies on my decision in Chan v. Minister of Employment & Immigration (1987), 2. Imm. L.R. (2d) 99. In Chan, the Immigration Appeal Board had dismissed the applicant's appeal of an exclusion order. An application for leave to appeal to the Federal Court of Appeal had been dismissed and the applicant was seeking to quash the report upon which the exclusion order was based. Based on the following reasoning in Cynamid Agricultural de Puerto Rico Inc. v. Commr. of Patents (1983), 74 C.P.R. (2d) 133 (Fed T.D.) at p. 136, I held [at p. 1081 that once the Immigration Appeal Board had reached a final decision as to its jurisdiction, its ruling on the validity of the report must be taken to have merged in the final decision.

Here, a final decision has not been made and the doctrine of "merger" simply does not apply. As in Lutes, the initial proceeding has not been exhausted and the Board remains functus officio in that it has not as yet rendered a decision on the applicant's refugee claim. I conclude, as did MacGuigan J.A. in S.F. Enterprises Inc, that the Board's ruling in this instance is merely a procedural ruling enabling the Board to continue to consider the substantive issue before it-the question of whether the applicant is a convention refugee.
Although the Board's decision perhaps cannot be considered to be "preliminary" in the sense that it was not made before the Board embarked on a consideration of the applicant's refugee claim, it is nevertheless "preliminary" to the disposition of the actual question before the Board, that is, whether or not the claimant is a refugee. In this sense, the Board's decision is "incidental to the conduct of the hearing" and as discussed, the decision does not purport to have legal effect. Finally, I reject the respondent's proposition that the decision is a final decision or order simply because it affects the rights of the applicant. Every decision or ruling, whether it be

procedural, interlocutory or final, will impact to at least some extent on the rights of any party affected by the decision.
In my opinion the Board's ruling, in this instance, does not constitute a decision or order that is required to be made on a judicial or quasi-judicial basis and it is not a final decision or order that the Board is mandated to make. Accordingly, it is reviewable under s. 18 of the Federal Court Act.

If this Court has jurisdiction to review this matter, the impugned decision reviewable in the face of the privative clause contained in s. 67(l) of the Immigration Act?

In the alternative, the respondent submits that the "sole and exclusive jurisdiction" clause found at s. 67(l) of the Immigration Act prevents any other Court or tribunal from reviewing the decision unless the Board had exceeded its jurisdiction, declined to exercise its jurisdiction, breached the rules of natural justice or procedural fairness, or violated the applicant's rights under s. 7 of the Charter in making the decision. The respondent submits that the phrase, "sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction", has been held to exclude review by any Court or tribunal with respect to matters so confined exclusively to the Board.
In Pringle v. Fraser, [1972] S.C.R. 821, 26 D.L.R. (3d) 28, the Court considered the single question of the jurisdiction of the Supreme Court of Ontario to entertain certiorari proceedings to quash a deportation order made under the Immigration Act in the light of the scheme set out in sections 11, 12, and 22 of the Immigration Appeal Board Act, S.C. 1966-67, c. 90 [R.S.C. 1970, c. 1-31 [Footnote 2 appended to judgment]. Laskin J. [as he then was], for the Court, noted that Parliament's authority to deny or to remove certiorari jurisdiction from provincial superior courts over deportation orders was not challenged and he held [at D.L.R. p 32]:
I am satisfied that in the context of the over-all scheme for the administration of immigration policy the words in s. 22 ("sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction") are adequate not only to endow the Board with the stated authority but to exclude any other Court or tribunal from entertaining any type of proceedings, be they by way of certiorari or otherwise, in relation to the matters so confided exclusively to the Board. (my emphasis)
However, it should be noted that Laskin J. had not considered the effect of the newly proclaimed Federal Court Act. He stated [at D.L.R. 301 that "this Court is not concerned in this case with the effect of the Federal Court Act, 1970-71-72 (Can.), c. 1, which came into force on June 1, 1971".
Nevertheless, in Law v. Solicitor General of Canada and Minister of Employment and Immigration (1984), 57 N.R. 46 (F.C.A.), the Court considered the effect of s. 59 of the Immigration Act, S.C. 1976-77, c. 52, which provided that the Immigration Appeal Board had "sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction, that may arise in relation to the making of a removal order". Hugessen J.A., in a minority concurring opinion, stated [at p. 48]:
While it might be tempting to say that the board's exclusive jurisdiction cannot extend to questions concerning the limits of its own jurisdiction, since that is solely the attribute of a superior court, to do so would be to fly in the face of the decision of the Supreme Court in Pringle v. Fraser, [19721 S.C.R. 821.
In Chan v. Minister of Employment & Immigration, I considered the decisions in Pringle v. Fraser and Law and concluded that "even if the board had not reached a decision on these questions [concerning the validity of a report upon which an exclusion order was based], I would be without jurisdiction to pursue it by means of judicial review" in the light of the Immigration Appeal Board's decision to dismiss the applicant's appeal of the exclusion order and the privative clause set out in s. 59 of the Immigration Act.

However, if as alleged by the applicant, the Board has exceeded its jurisdiction by reconvening the hearing or failed to exercise its jurisdiction by not rendering a decision in an expeditious manner following the hearing on November 29, 1989, then clearly the privative clause will not prevent a review of the Board's ruling. I note that in Re Cylien and Re Danmour Shoes a similar "privative provision" set out in s. 22 of the Immigration Appeal Board Act did not preclude a s. 18 review of the "decisions" dealt with in those cases. Furthermore, unlike the situation in C.U.P.E. Loc. 963 v. New Brunswick Liquor Corporation, [1979) 2 S.C.R. 227, the question here does not fall "logically at the heart of the specialized jurisdiction confided to the Board". As the ruling involves a purely procedural matter, not necessarily dependent upon the sensitivity, accumulated experience, and broad powers of the Board to conduct proceedings in a unique area of the law, special deference need not be given to the Board's decision on this matter. Accordingly, whether s. 67(l) will be effective to oust this Court's review will ultimately depend upon whether the Board in making its ruling exceeded or failed to exercise its jurisdiction or violated a principle of natural justice as alleged by the applicant.

Did the Board exceed its jurisdiction or otherwise err in making the impugned decision to reconvene in this instance and should orders of certiorari, mandamus and prohibition lie?

APPLICANT'S SUBMISSIONS

The applicant submits that the Board, a creature of statute, has only those powers specified in the Immigration Act, specifically sections 67, 69.1 and 69.2 and that it has no inherent jurisdiction to deal with refugee claims. The Board failed to comply with s. 69.1(9) which requires the Board to render its decision as soon as possible after completion of the hearing. On November 29, 1989, the hearing was "completed" in that all the evidence had been presented, submissions made, and it had been "concluded" by the Presiding Member. The Board's refusal to perform its statutory duty under s. 69.1(9) constitutes a jurisdictional error. The refugee determination process is not an ongoing process and, in the light of the Board's adjudicative role in this process, the determination must be made "as soon as possible after completion of the hearing".
The applicant denies that the Board has statutory authority to reconvene, on its own initiative, a completed hearing in order to hear new evidence. Section 68(4), which allows a Board to take notice of generally recognized facts, information or opinion within its specialized knowledge, does not confer on the Board a continuing jurisdiction to monitor developments in the applicant's country of nationality, particularly after a hearing has been completed. Although s. 67(2) (d) allows the Board to "do any other thing necessary to provide a full and proper hearing", it does not apply once a proceeding described in s. 69.1 has been completed. An implied jurisdiction to reconvene a concluded hearing must be narrowly construed in a manner consistent with the principles of natural justice and the Canadian Charter of Rights and Freedoms (being Pt. 1 of the Constitution Act, 1982 [en. by the Canada Act, 1982 (U.K.), c. 11, s. 11). Since refugee law is based on humanitarian principles and is beneficial in nature, any interpretation of the Board's jurisdiction must be consistent with ensuring fairness to the refugee claimant.
The applicant submits that the Minister's right to apply to the Board under s. 69.2 to determine whether a person has ceased to be a Convention refugee, on the basis that there have been changes of circumstances in the country of feared persecution, supports her position that the Board has no jurisdiction to reconvene a completed hearing. She notes that the refugee claimant has no corresponding right once a decision is rendered and furthermore, by reconvening the hearing instead of bringing an application under s. 69.2(1), the applicant is denied procedural fairness. Under s. 69.2(l) the Minister bears an onus of establishing the existence of changes of

such a fundamental nature that the reasons for the fear of persecution have ceased, whereas when the hearing is merely reconvened to hear new evidence the burden of proof remains on the applicant to establish her claim.

RESPONDENT'S SUBMISSIONS

The respondent submits that the decision to reconvene is not reviewable in that the Board did not exceed its jurisdiction or otherwise err in making its decision to reconvene the hearing. The Board's mandate under the Immigration Act is to determine whether the applicant is a Convention refugee. Until a final decision has been rendered on that specific question, the Board continues to be seized with the claim and has the implicit and discretionary power to reconvene a hearing after the hearing has been concluded. Each member of the Refugee Division has all the powers and authority of a commissioner appointed under the Inquiries Act, R.S. c. 113, s. 4, to summon and require witnesses to give evidence, orally or in writing, and to produce documents and things deemed requisite to the "full examination of the matters in which they are appointed to examine". In addition, specifically for the purposes of a hearing, the Immigration Act, s. 67(2) gives the Board the power to do anything necessary to provide a full and proper hearing and the power to require attendance and testimony from a person with respect to all matters within that person's knowledge relative to the subject matter of the hearing.

Furthermore, the Board is authorized under s. 68(4) and in any proceeding before it, to take notice of any generally recognized facts, information or opinion within its specialized knowledge, so long as it notifies the Minister and the applicant of its intent to do so and affords a reasonable opportunity to make representations with respect thereto. Therefore, if the information sought by the Board is relevant to the determination that it is statutorily mandated to make and the applicant has been given an opportunity to adduce any evidence relevant to the Board's concerns, its decision to resume the hearing is within its jurisdiction and does not breach the rules of natural justice. The respondent submits that in order to provide the applicant with a full and proper hearing, the Board may request the Refugee Hearing Officer to make submissions on the issue of changed circumstances in the applicant's country of nationality even if the applicant chooses not to address the Board's concerns.

Counsel argues, therefore, that the Board did not exceed its jurisdiction in that it did not make its decision in bad faith or by misinterpreting its jurisdiction under the Immigration Act. The Board did not decline to exercise jurisdiction, breach the rules of natural justice or violate the applicant's rights under s. 7 of the Charter in making the decision. There is no evidence that the Board exercised its discretion to reconvene the hearing arbitrarily, illegally or in a manner which was not bona fide or based-on irrelevant considerations. The consequences of political change in a refugee claimant's country of nationality is not only relevant but is precisely the question that the Board is required by statute to determine relative to the individual claimant.

ANALYSIS

In the absence of any specific statutory provision permitting the Board to reconvene a hearing, I am not prepared to find that it has the authority to do so, particularly in the circumstances of this case. If the political climate in a country changes to the extent that it adversely affects the status of a refugee, the Minister may make an application to the Board pursuant to section 69.2(l) of the Immigration Act to determine whether the person has ceased to be a Convention refugee. Presumably, the Minister would only seek such a determination after monitoring the effects of any political changes in the subject country.

Here, the Board has taken it upon itself to reconvene the applicant's hearing to hear evidence on the impact of the removal of Noriega from power in Panama. At the outset of the hearing the Presiding Member stated the purpose as follows:

This panel is here today to receive evidence on the situation in your country of nationality, and to hear how the new political condition in your country relate [sic] to your fear of persecution,

should you be returned to Panama. Clearly, this creates an unfair if not impossible onus for the applicant to discharge as she will in all likelihood be unable to adduce any direct evidence supporting a claim to fear of persecution from the new regime. She may very well have no knowledge of the impact of Noriegals removal from power in Panama.

Comments by Marceau J.A. in Longia v. Minister of Employment and Immigration (1990) 10 Imm. L.R. (2d) 312 support my conclusion that the Board erred in reconvening this applicant's hearing. In that case the Court considered whether the Immigration Appeal Board has jurisdiction to reopen, rehear or reconsider a claim to Convention refugee status after having determined and denied the claim. Marceau J.A. reiterated the point made in previous cases that a Board does not have inherent or continuing jurisdiction to reopen an application for redetermination of refugee status which has already been disposed of solely in order to hear evidence of new facts. In response to the suggestion that the refugee determination process is an ongoing process, he commented at page 316:
The political refugees have now a right to be recognized as such, and the role of the Board is to adjudicate upon that right. I disagree with the view that the determination of the Board in that respect would be an ongoing process. The well founded fear of persecution alleged by the refugee has to be ascertained, for it to be given effect according to law, at the moment his claim is adjudicated. It is true, of course, that facts may change and political events may occur which may lead to the conclusion that a fear which was not well founded has become now reasonable. But it is not by reopening the hearing of the first claim that this can be verified, it is only by allowing a second claim and proceeding to consider it.
Here, had the political situation in Panama worsened to the extent that the applicant had new evidence to support her claim to Convention refugee status after the hearing concluded but before the decision was taken by the Board, the Act does not provide a mechanism by which she could have the hearing reconvened. Similarly, the Minister cannot seek to reconvene a hearing to present new evidence opposing the applicant's claim. His remedy is to invoke section 69.2(l) if the Board concludes that the applicant is a Convention refugee. It, therefore, seems manifestly unfair to permit the Board to reconvene a hearing to consider new evidence of a change in a country's political regime which occurred after the initial hearing.
Finally, I am concerned that if the Board can take this step without the request or consent from the parties in this case, does it assume the obligation to do so in all similar situations? How is it to determine which changes are sufficient to warrant such intervention, and above all, how can it be reconciled with the requirement in section 68(2) that Boards deal with all proceedings as informally and expeditiously as the fairness permit and decision as soon as circumstances and the considerations of section 69.1(9) that they render their possible after completion of the hearing.
Accordingly, for reasons given orally from the Bench in Toronto, Ontario, on December 17, 1991, 1 ordered that the decision of the Board to reconvene the applicant's refugee hearing to hear evidence of changes in conditions in Panama be quashed and the Board be directed to render a decision based on the evidence before it on November 29, 1989. Costs to the applicant.
Footnote 1
Section 11 of the Immigration Appeal Board Act as amended provides:
S. 11(l)Subject to subsections (2) and (3), a person against whom an order of deportation is made under the Immigration Act may appeal to the Board on any ground of appeal that involves a question of law or fact or mixed law and fact, if, at the time that the order of deportation is made against him, he is

(c) a person who claims he is a refugee protected by the Convention; or

(2)Where an appeal is made to the Board pursuant to subsection (1) and the right of appeal is based on a claim described in paragraph (1)(c) or (d), the notice of appeal to the Board shall contain or be accompanied by a declaration under oath setting out
(a)the nature of the claim;

(b)a statement in reasonable detail of the facts on which the claim is based;

(c)a summary in reasonable detail of the information and evidence intended to be offered in support of the claim upon the hearing of the appeal; and

(d)such other representations as the appellant deems relevant to the claim.

(3)Notwithstanding any provision of this Act, where the Board receives a notice of appeal and the appeal is based on a claim described in paragraph (1) (c) or (d), a quorum of the Board shall forthwith consider the declaration referred to in subsection (2) and, if on the basis of such consideration the Board is of the opinion that there are reasonable grounds to believe that the claim could, upon the hearing of the appeal, be established, it shall allow the appeal to proceed, and in any other case it shall refuse to allow the appeal to proceed and shall thereupon direct that the order of deportation be executed as soon as practicable.
Footnote 2
Sections 11, 12 and 22 read as follows:
S. 11.A person against whom an order of deportation has been made under the Immigration Act may appeal to the Board on any ground of appeal that involves a question of law or fact or mixed law and fact.

S. 12.The Minister may appeal to the Board on any ground of appeal that involves a question of law or fact, or mixed law and fact, from a decision by a Special Inquiry officer, that a person in respect of whom a hearing has been held is not within a prohibited class or is not subject to deportation.

S. 22.Subject to this Act and except as provided in the Immigration Act, the Board has sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction, that may arise in relation to the making of an order of deportation or the making of an application for the admission to Canada of a relative pursuant to regulations made under the Immigration Act.