Federal Court  Cour fédérale

Date: 20180112

Docket: IMM-2551-17

Citation: 2018 FC 30

Ottawa, Ontario, January 12, 2018

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

JAMIL OGIAMIEN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of the decision of the Immigration Division of the Immigration and Refugee Board of Canada [ID or the Board], dated May 22, 2017, which granted the Respondent's application to amend the name and country of citizenship on a deportation order issued against the Applicant.

II. BACKGROUND

[2] On February 6, 2002, the Board issued a conditional deportation order for "Jamil Osai Mahachi." The Deportation Order listed Mr. Mahachi's country of citizenship as Zimbabwe. Investigation by the Respondent later established that "Jamil Osai Mahachi" is actually the Applicant, Jamil Osai Ogiamien, and that his country of citizenship is Nigeria. The Deportation Order was issued on a conditional basis because the Applicant had initiated a refugee claim in 2001.

[3] On June 27, 2002, the Minister of Justice ordered that the Applicant be surrendered for extradition to the United States. The Applicant was subsequently extradited on July 11, 2002. A Certificate of Departure was partially completed and signed by a Canadian immigration officer, but the parties dispute whether it was provided to the Applicant.

[4] In July of 2005, Canada accepted a request from the United States to return the Applicant to Canada under the Reciprocal Arrangement. As part of accepting the request, Canadian immigration officials discussed whether the Applicant's extradition had resulted in the execution of his Departure Order.

[5] The Canadian Border Services Agency [CBSA] arrested the Applicant in March of 2014. The Applicant remained in detention until his *habeas corpus* application was granted by the Ontario Superior Court of Justice in 2016. As part of his *habeas corpus* application, the

Applicant testified that he first saw his Certificate of Departure in 2015 when it was provided to him as part of an access to information request in that year.

[6] The Respondent applied to the Board to amend the February 6, 2002 Deportation Order to reflect the Applicant's actual name and citizenship to facilitate the receipt of travel documents from the Nigerian government so that the Applicant could be removed under the Deportation Order.

III. DECISION UNDER REVIEW

[7] The ID granted the Respondent's application and amended the Deportation Order issued to the Applicant to reflect the name "Jamil Osai Ogiamien" and his country of citizenship as Nigeria.

[8] The Board was satisfied that documentary evidence provided by the Respondent established that the Applicant is the "Jamil Osai Mahachi" described by the Deportation Order and that he is a citizen of Nigeria. The ID noted that this finding was not disputed by the Applicant's counsel.

[9] The Board found that the grounds on which the Deportation Order was issued continue to remain in force under the current immigration scheme and that the Applicant continues to be inadmissible. Section 319 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPA* Regulations], continues the validity of a deportation order issued under the *Immigration Act*, RSC 1985, c I-2 [*Immigration Act*].

[10] Relying on *Chandler v Alberta Association of Architects*, [1989] 2 SCR 848, the Board held that reissuing the Deportation Order does not violate the doctrine of *functus officio* because the amendment corrects an error made in expressing the ID's manifest intention when making the order. The ID's manifest intention was to issue the Deportation Order against the Applicant and the error in expressing that intention was based on the information available at the time the Deportation Order was issued. The ID was satisfied that reissuing the Deportation Order was therefore appropriate.

[11] With respect to the Applicant's position that the Deportation Order was spent when he was extradited to the United States, the Board agreed with the Respondent that the CBSA is responsible for the enforcement of removal orders. Therefore, the ID held that it would be acting beyond its jurisdiction if it found that the Deportation Order is unenforceable.

[12] The Decision goes on to hold that, even if the ID had authority to decide that the Deportation Order was unenforceable, the Deportation Order was not enforced as defined in s 240(1) of the *IRPA* Regulations and therefore remains in force. Paragraph 240(1)(d) states that a removal order is enforced when the foreign national "is authorized to enter, other than for purposes of transit, their country of destination." The Board found that there was no evidence that the Applicant "was 'authorized to enter' the United States or conferred status there" and that evidence of the inconsistent views of immigration officials about whether the Deportation Order was spent cannot be determinative of the order's status.

[13] The ID did not expressly address the Applicant's suggestion that allowing the Respondent's application to amend the Deportation Order is an abuse of process. The Board stated, however, that amending the Deportation Order to reflect the correct information does not substantively alter the facts underlying the order or the decision to issue it. The ID also questioned the Applicant's interest in opposing an amendment in circumstances where it was his own deceit that created the need for the Deportation Order's amendment.

IV. ISSUES

[14] The Applicant submits that the following are at issue in this application:

1. Does the Court have authority to declare the Deportation Order void?
2. Was the Deportation Order enforceable when the Applicant was extradited from Canada?
3. Did the Applicant's extradition enforce the Deportation Order?
4. Was the Respondent's application to amend the Deportation Order and the Board's Decision to allow that amendment an abuse of process?

V. STANDARD OF REVIEW

[15] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review

analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[16] The Applicant submits that the question of whether the Deportation Order was already executed by his extradition is a true question of jurisdiction subject to a correctness review. The Applicant points to *Nagalingam v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 362 at para 16 [*Nagalingam*], where this Court held that a determination of whether or not the respondent Minister had the power to remove a person from Canada under a spent deportation order was a true question of jurisdiction. The Respondent agrees that issues of law should be reviewed under the correctness standard. Following *Nagalingam*, the question of whether the Deportation Order was executed will be reviewed on a correctness standard.

[17] The standard of review applied to the Board's determination of whether there has been an abuse of process is somewhat unsettled in this Court. The competing views were acknowledged by Justice Fothergill in *Shen v Canada (Citizenship and Immigration)*, 2016 FC 70 [*Shen*]:

> [29] In *B006 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1033 at paras 35-36, Justice Kane held that the standard of correctness applies to the RPD's articulation of the legal test for abuse of process, but its determination that there has been no abuse of process is subject to review by this Court against the standard of reasonableness. Abuse of process may also be characterized as an aspect of procedural fairness, which is reviewable against the standard of correctness (*Muhammad v Canada (Minister of Citizenship and Immigration)*, 2014 FC 448 at para 51, citing *Pavicevic v Canada (Attorney General)*, 2013 FC 997 at para 29 and *Herrera Acevedo v Canada (Minister of Citizenship & Immigration)*, 2010 FC 167 at para 10).

[18] Here the Board did not articulate any test for abuse of process or expressly address the Applicant's submission. I would therefore adopt the reasoning of Justice Fothergill and hold that the Board's determination of whether the application to amend the Deportation Order is an abuse of process is subject to review on a correctness standard. See *Shen*, above, at para 30.

[19] When reviewing under the correctness standard, the Court will not show deference to the decision-maker's reasoning. Instead, the Court should undertake its own analysis and substitute its view if it disagrees with the decision-maker's determination. See *Dunsmuir*, above, at para 50.

VI. STATUTORY PROVISIONS

[20] The following provisions of *IRPA* are relevant in this application:

Serious criminality	**Grande criminalité**
36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	36 (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
…	…
Misrepresentation	**Fausses déclarations**
40 (1) A permanent resident or a foreign national is	40 (1) Emportent interdiction de territoire pour fausses

inadmissible for misrepresentation	déclarations les faits suivants :
(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
…	…
Referral or removal order	**Suivi**
44 (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.	44 (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.
…	…
Sole and exclusive jurisdiction	**Compétence exclusive**
162 (1) Each Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including	162 (1) Chacune des sections a compétence exclusive pour connaître des questions de droit et de fait — y compris en matière de compétence — dans le cadre des affaires dont elle est saisie.

questions of jurisdiction.

Procedure	**Fonctionnement**
(2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.	(2) Chacune des sections fonctionne, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et avec célérité.
…	…
Abuse of process	**Abus de procédure**
168 (2) A Division may refuse to allow an applicant to withdraw from a proceeding if it is of the opinion that the withdrawal would be an abuse of process under its rules.	168 (2) Chacune des sections peut refuser le retrait de l'affaire dont elle est saisie si elle constate qu'il y a abus de procédure, au sens des règles, de la part de l'intéressé.
…	…
Regulations	**Règlements**
201 The regulations may provide for measures regarding the transition between the former Act and this Act, including measures regarding classes of persons who will be subject in whole or in part to this Act or the former Act and measures regarding financial and enforcement matters.	201 Les règlements régissent les mesures visant la transition entre l'ancienne loi et la présente loi et portent notamment sur les catégories de personnes qui seront assujetties à tout ou partie de la présente loi ou de l'ancienne loi, ainsi que sur les mesures financières ou d'exécution.

[21] The following provisions of *IRPA*, in force on July 11, 2002, are relevant in this application:

In force — claimants	**Cas du demandeur d'asile**
49 (2) Despite subsection (1), a removal order made with	49 (2) Toutefois, celle visant le demandeur d'asile est

respect to a refugee protection claimant is conditional and comes into force on the latest of the following dates:	conditionnelle et prend effet :
…	…
(c) 15 days after notification that the claim is rejected by the Refugee Protection Division, if no appeal is made, or by the Refugee Appeal Division, if an appeal is made;	c) quinze jours après la notification du rejet de sa demande par la Section de la protection des réfugiés ou, en cas d'appel, par la Section d'appel des réfugiés;

[22] The following provisions of the *Immigration Act*, in force on June 27, 2002, are relevant in this application:

When conditional order becomes effective	**Moment où une mesure devient exécutoire**
32.1 (6) No conditional removal order made against a claimant is effective unless and until	32.1 (6) La mesure de renvoi conditionnel ne devient exécutoire que si se réalise l'une ou l'autre des conditions suivantes :
(a) the claimant withdraws the claim to be a Convention refugee;	a) le demandeur de statut renonce à sa revendication du statut de réfugié au sens de la Convention;
(a.1) the claimant is determined by a senior immigration officer not to be eligible to make a claim to be a Convention refugee and has been so notified;	a.1) sa revendication a été jugée irrecevable par l'agent principal, qui le lui a dûment notifié;
(b) the claimant is declared by the Refugee Division to have abandoned the claim to be a Convention refugee and has been so notified;	b) son désistement a été constaté par la section du statut, qui le lui a dûment notifié;
(c) the claimant is determined	c) la section du statut lui a

by the Refugee Division not to be a Convention refugee and has been so notified; or

(d) the claimant is determined pursuant to subsection 46.07(2) not to have a right under subsection 4(2.1) to remain in Canada and has been so notified.

…

When person ordered surrendered under *Extradition Act*

69.1 (14) If the person is ordered surrendered by the Minister of Justice under the *Extradition Act* and the offence for which the person was committed by the judge under section 29 of that Act is punishable under an Act of Parliament by a maximum term of imprisonment of 10 years or more, the order of surrender is deemed to be a decision by the Refugee Division that the person is not a Convention refugee because of paragraph (b) of Section F of its Article 1, except that no appeal or judicial review of the decision shall be permitted except to the extent that a judicial review of the order of surrender is provided for under the *Extradition Act*.

refusé le statut de réfugié au sens de la Convention et lui a dûment notifié le refus;

d) il a été déterminé conformément au paragraphe 46.07(2) que le demandeur de statut n'avait pas le droit que confère le paragraphe 4(2.1) de demeurer au Canada et le demandeur en a été avisé.

…

Extradition

69.1 (14) Si l'intéressé est, d'une part, visé par l'arrêté du ministre de la Justice pris aux termes de la *Loi sur l'extradition* et, d'autre part, incarcéré aux termes de l'article 29 de celle-ci pour une infraction punissable, aux termes d'une loi fédérale, d'un emprisonnement d'une durée de dix ans ou plus, l'arrêté vaut décision, par la section du statut, que l'intéressé n'est pas un réfugié au sens de la Convention en raison de l'alinéa b) de la section F de son article premier. Cette décision n'est pas susceptible d'appel ou de révision judiciaire quoique la révision de l'arrêté puisse se faire en conformité avec la *Loi sur l'extradition*.

[23] The following provisions of the *IRPA* Regulations are relevant in this application:

Subsection 44(2) of the Act — foreign nationals	**Application du paragraphe 44(2) de la Loi : étrangers**
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	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 :
(a) if the foreign national is inadmissible under paragraph 36(1)(a) or (2)(a) of the Act on grounds of serious criminality or criminality, a deportation order;	a) en cas d'interdiction de territoire de l'étranger pour grande criminalité ou criminalité au titre des alinéas 36(1)a) ou (2)a) de la Loi, l'expulsion;
…	…
When removal order is enforced	**Mesure de renvoi exécutée**
240 (1) A removal order against a foreign national, whether it is enforced by voluntary compliance or by the Minister, is enforced when the foreign national	240 (1) Que l'étranger se conforme volontairement à la mesure de renvoi ou que le ministre exécute celle-ci, la mesure de renvoi n'est exécutée que si l'étranger, à la fois :
(a) appears before an officer at a port of entry to verify their departure from Canada;	a) comparaît devant un agent au point d'entrée pour confirmer son départ du Canada;
(b) obtains a certificate of departure from the	b) a obtenu du ministère l'attestation de départ;

Department;

(c) departs from Canada; and

(d) is authorized to enter, other than for purposes of transit, their country of destination.

c) quitte le Canada;

d) est autorisé à entrer, à d'autres fins qu'un simple transit, dans son pays de destination.

…

…

Mutual Legal Assistance in Criminal Matters Act

242 A person transferred under an order made under the *Mutual Legal Assistance in Criminal Matters Act* is not, for the purposes of paragraph 240(1)(d), a person who has been authorized to enter their country of destination.

Loi sur l'entraide juridique en matière criminelle

242 La personne transférée en vertu d'une ordonnance de transfèrement délivrée sous le régime de la *Loi sur l'entraide juridique en matière criminelle* n'est pas, pour l'application de l'alinéa 240(1)d), une personne autorisée à entrer dans son pays de destination.

…

…

Removal order

319 (1) Subject to subsection (2), a removal order made under the former Act that was unexecuted on the coming into force of this section continues in force and is subject to the provisions of the *Immigration and Refugee Protection Act*.

Mesure de renvoi

319 (1) Sous réserve du paragraphe (2), la mesure de renvoi prise sous le régime de l'ancienne loi qui n'avait pas encore été exécutée à la date d'entrée en vigueur du présent article continue d'avoir effet et est assujettie aux dispositions de la *Loi sur l'immigration et la protection des réfugiés*.

Stay of removal

(2) The execution of a removal order that had been stayed on the coming into force of this section under paragraphs 49(1)(c) to (f) of the former Act continues to be stayed

Sursis à l'exécution d'une mesure de renvoi

(2) Le sursis à l'exécution d'une mesure de renvoi opéré par les alinéas 49(1)c) à f) de l'ancienne loi et qui a effet à la date d'entrée en vigueur du présent article continue d'avoir

until the earliest of the events described in paragraphs 231(1)(a) to (e).

effet jusqu'au premier en date des événements visés aux alinéas 231(1)a) à e) du présent règlement.

Exception

Exception

(3) Subsection (2) does not apply if

(3) Le paragraphe (2) ne s'applique pas dans les cas suivants :

(a) the subject of the removal order was determined by the Convention Refugee Determination Division not to have a credible basis for their claim; or

a) la décision rendue par la Section du statut de réfugié fait état de l'absence d'un minimum de fondement de la demande d'asile;

(b) the subject of the removal order

b) l'intéressé fait l'objet :

(i) is subject to a removal order because they are inadmissible on grounds of serious criminality, or

(i) soit d'une mesure de renvoi du fait qu'il est interdit de territoire pour grande criminalité,

(ii) resides or sojourns in the United States or St. Pierre and Miquelon and is the subject of a report prepared under subsection 44(1) of the *Immigration and Refugee Protection Act* on their entry into Canada.

(ii) soit du rapport prévu au paragraphe 44(1) de la *Loi sur l'immigration et la protection des réfugiés* à son entrée au Canada et réside ou séjourne aux États-Unis ou à Saint-Pierre-et-Miquelon.

Conditional removal order

Mesure de renvoi conditionnelle

(4) A conditional removal order made under the former Act continues in force and is subject to subsection 49(2) of the *Immigration and Refugee Protection Act*.

(4) La mesure de renvoi conditionnelle prise sous le régime de l'ancienne loi continue d'avoir effet et est assujettie au paragraphe 49(2) de la *Loi sur l'immigration et la protection des réfugiés*.

…

…

Serious criminality	**Grande criminalité**
320 (3) A person is inadmissible under the *Immigration and Refugee Protection Act* on grounds of serious criminality if, on the coming into force of this section, the person had been determined to be a member of an inadmissible class described in paragraph 19(1)(c) or (c.1) of the former Act or had been determined to be inadmissible on the basis of paragraph 27(1)(a.1) of the former Act.	320 (3) La personne qui, à l'entrée en vigueur du présent article, avait été jugée appartenir à une catégorie visée à l'un des alinéas 19(1)c) et c.1) de l'ancienne loi ou être visée à l'alinéa 27(1)a.1) de cette loi est interdite de territoire pour grande criminalité sous le régime de la *Loi sur l'immigration et la protection des réfugiés*.
…	…
Misrepresentation	**Fausses déclarations**
320 (9) A person is inadmissible under the *Immigration and Refugee Protection Act* for misrepresentation if, on the coming into force of this section, the person had been determined to be inadmissible on the basis of paragraph 27(1)(e) or (2)(g) or (i) of the former Act.	320 (9) La personne qui, à l'entrée en vigueur du présent article, avait été jugée être visée à l'un des alinéas 27(1)e) et (2)g) et i) de l'ancienne loi est interdite de territoire pour fausses déclarations sous le régime de la *Loi sur l'immigration et la protection des réfugiés*.

[24] The following provisions of the *Extradition Act*, SC 1999, c 18 [*Extradition Act*], in force on June 27, 2002, are relevant in this application:

Surrender	**Arrêté d'extradition**
40 (1) The Minister may, within a period of 90 days after the date of a person's committal to await surrender, personally order that the person be surrendered to the	40 (1) Dans les quatre-vingt-dix jours qui suivent l'ordonnance d'incarcération, le ministre peut, par un arrêté signé de sa main, ordonner

extradition partner.	l'extradition vers le partenaire.
When refugee claim	**Consultation**
(2) Before making an order under subsection (1) with respect to a person who has claimed Convention refugee status under section 44 of the *Immigration Act*, the Minister shall consult with the minister responsible for that Act.	(2) Si l'intéressé revendique le statut de réfugié au sens de la Convention aux termes de l'article 44 de la *Loi sur l'immigration*, le ministre consulte le ministre responsable de l'application de cette loi avant de prendre l'arrêté.

[25] The following provision of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*], is relevant in this application:

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

VII. ARGUMENT

A. *Applicant*

(1) Authority to Declare the Deportation Order Void

[26] The Applicant submits that this Court has authority to declare the Deportation Order issued to him void, and that the Court should exercise its authority in this case. The Applicant says that the appropriate remedy is a declaration that the Applicant cannot be removed from Canada under the Deportation Order and an order of prohibition preventing the Respondent from using the Deportation Order to remove the Applicant. The Applicant says that this would prevent the Respondent from amending the Deportation Order.

[27] In *Nagalingam*, above, at para 102, the Court held that the appropriate remedy was a declaration that the applicant could not be removed from Canada under a spent deportation order and an order of prohibition preventing the respondent from using the order to remove the applicant. Authority for the Court's order was found in s 18(1) of the *Federal Courts Act* and the Supreme Court of Canada's statement that "[a] court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it": *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 46 [*Khadr*].

[28] The Applicant says that the test from *Khadr* has been met in the present case as the Court has jurisdiction over the issue, the question is real, and the Applicant has a real interest in raising

the issue. The ID's inability to grant prohibition against its own orders does not prevent the Court making such an order. To hold otherwise would eliminate the Applicant's ability to challenge an improper exercise of the Respondent's power to enforce removal orders. See *Nagalingam*, above, at paras 97-98. The Minister sought amendment of the Deportation Order to facilitate the Applicant's removal to Nigeria. The Applicant has a real interest in this issue and the Ontario Superior Court of Justice recognized that determination of the Deportation Order's validity was a genuine issue in the Applicant's *habeas corpus* application. See *R v Ogiamien*, 2016 ONSC 4126 at para 82.

(2) Enforceability of the Deportation Order at the Time of the Applicant's Extradition

[29] The Applicant submits that the Deportation Order was enforceable when the Applicant was extradited to the United States.

[30] The Applicant says that the Respondent's argument that the Deportation Order was not enforceable when the Applicant was extradited on July 11, 2002 is based on an incorrect interpretation of which legislation was in effect at the time. The Applicant points out that *IRPA* came into force on June 28, 2002 and was therefore not in effect on June 27, 2002 when he was ordered surrendered to the United States. The relevant legislation in effect on June 27, 2002 was ss 32.1(6) and 69.1(14) of the former *Immigration Act*. The Applicant says that the combined effect of these provisions was to deem his refugee claim refused on June 27, 2002 when the Minister of Justice ordered the Applicant surrendered. The Deportation Order was therefore enforceable on June 27, 2002.

[31] The Respondent's argument relies on s 49(2)(c) of *IRPA*, which creates a fifteen day delay in the enforceability of a deportation order after a deemed rejection. But the Applicant submits that no comparable provision existed in the *Immigration Act* that was in force on June 27, 2002. Section 319 of the *IRPA* Regulations stipulates that unexecuted removal orders became subject to *IRPA*, but the Applicant says that this did not change the enforceability of his already enforceable Deportation Order.

[32] The Applicant notes that although s 69.14(1) of the *Immigration Act* operated to deem his refugee claim rejected on June 27, 2002, a procedural error resulted in the Immigration and Refugee Board proceeding with his claim until it was declared abandoned after he was extradited to the United States. The Applicant says that the Respondent has relied on an incorrect entry in the Field Operations Support System [FOSS] database to establish the relevant date for determining when the Deportation Order became enforceable. The Applicant submits that the Respondent cannot rely on its own procedural mistakes. The signing of a Certificate of Departure while the Applicant was in custody on July 11, 2002 demonstrates that the Respondent previously considered the Deportation Order enforceable.

[33] The Applicant says that the Respondent's actions mean that the Respondent is now also estopped on equitable grounds from arguing that the Deportation Order was not enforceable on July 11, 2002. The Applicant acknowledges that the doctrines of legitimate expectations and estoppel by representation do not preclude exercise of a statutory duty. See e.g. *Granger v Canada (Employment & Immigration Commission)*, [1986] 3 FCR 70 (CA) [*Granger*]. The Applicant submits, however, that this is not the case where the statutory duty in question—here

the execution of the Deportation Order—has already been exercised and cannot be exercised again.

[34] To establish a legitimate expectation, an applicant must demonstrate "the existence of a clear, unambiguous and unqualified past practice on the part of the administrative decision-maker in question": *Samad v Canada (Citizenship and Immigration)*, 2011 FC 324 at para 14. The Applicant submits that completion of a Certificate of Departure and service of his Deportation Order are clear, unambiguous and unqualified practices that confirm his removal. Therefore, the doctrines of legitimate expectations and estoppel by representation are engaged.

(3) The Effect of Extradition on the Applicant's Deportation Order

[35] The Applicant submits that his extradition enforced the Deportation Order.

[36] The cases relied on by the Respondent which establish that extradition is not a deportation are distinguishable because they only decide that extradition is a different process from deportation and do not clarify the effect of extradition on a deportation order. *Waldman v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1326 [*Waldman*] held that an individual subject to extradition is not entitled to a risk assessment. In *Németh v Canada (Justice)*, 2010 SCC 56 [*Németh*], the Supreme Court of Canada held that extradition is not "removal" under *IRPA*. But neither case addressed whether the effect of extradition is to execute a deportation order where the statutory requirements for deportation have been met.

[37] The Decision notes the "inconsistent views of immigration officials" about whether the Deportation Order had been spent, but does not address the basis for those inconsistent views. The Applicant says that the July 26, 2005 letter from an official in Citizenship and Immigration Canada to the United States Embassy mistakenly assumes that the Applicant's extradition means that he was also not removed under the Deportation Order and does not address why the test for removal is not met. In comparison, when the CBSA was forwarded the letter before the Applicant's return to Canada, a CBSA officer determined that as the Applicant's "removal was confirmed when he was extradited he no longer has an effective removal order."

[38] The Applicant submits that his Deportation Order was enforced because all of the elements of s 240(1) of the *IRPA* Regulations were met when he was extradited on July 11, 2002. Since the Applicant had an enforceable deportation order on June 27, 2002, s 319 of the *IRPA* Regulations stipulates that it was subject to the provisions of *IRPA* on June 28, 2002 when it came into force. Section 240(1) determines when a removal order against a foreign national is enforced. A Certificate of Departure confirming his removal was completed as required by paragraph (b). The Applicant was in the custody of Canadian immigration officers when he was extradited and the officers verified his departure. This satisfied paragraph (a). The Applicant departed from Canada on July 11, 2002 and therefore satisfied paragraph (c).

[39] Regarding paragraph (d) of s 240(1) of the *IRPA* Regulations, the Applicant says that his parole to the United States means that he was "authorized to enter" his country of destination. The Applicant points out that s 242 of the *IRPA* Regulations provides a specific exception to s 240(1)(d) for "[a] person transferred under an order made under the *Mutual Legal Assistance in*

Criminal Matters Act." A similar exception for persons transferred under the *Extradition Act* does not exist.

[40] The Applicant also says his extradition was carried out with the permission of the Respondent. Subsection 40(2) of the *Extradition Act* required the Minister of Justice to consult with the Minister responsible for the *Immigration Act* before ordering the Applicant's surrender for extradition on June 27, 2002. As noted, the Applicant was also in the custody of immigration officials at the time of his extradition and a Certificate of Departure was completed.

[41] The Applicant agrees that immigration officials failed to follow correct procedures upon his return to Canada in 2005. But these failings are irrelevant to the determination of whether his Deportation Order was enforced on July 11, 2002 and whether his extradition means that the requirements of s 240(1) of the *IRPA* Regulations have been met.

(4) Abuse of Process

[42] The Applicant further submits that the Respondent's application to amend an already executed deportation order was an abuse of process and that the Board erred in granting the application.

[43] Subsection 162(1) of *IRPA* grants each Division of the Board exclusive jurisdiction to determine questions of law and fact in proceedings brought before that Division under *IRPA*. Subsection 162(2) requires that proceedings be dealt with "as informally and quickly as the circumstances and the considerations of fairness and natural justice permit." Subsection 168(2)

allows the ID to make a finding of abuse of process in certain circumstances. The test for abuse of process is whether "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted": *Canada (Citizenship and Immigration) v Parekh*, 2010 FC 692 at para 24, quoting *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 120 [*Blencoe*].

[44] The Applicant says that the ID had ample evidence to establish that the Deportation Order had been executed. The Certificate of Departure was completed and signed on July 11, 2002 confirming that the requirements of *IRPA* were met. Senior CBSA officers later stated that extradition had confirmed the Applicant's removal. Despite these confirmations the Respondent applied to amend the Deportation Order as part of facilitating the Applicant's removal to Nigeria on the same Deportation Order. *Nagalingam*, above, at para 111, rejected the argument that it would be an abuse of process for the Respondent to seek a new deportation order when a previous order was spent. This was the proper route for the Respondent to take and the Applicant submits that the decision not to is an abuse of process.

B. *Respondent*

(1) Jurisdiction to Grant the Remedy the Applicant Seeks

[45] The Respondent agrees that s 18(1) of the *Federal Courts Act* gives this Court jurisdiction to grant declaratory relief and writs of prohibition.

[46] The Respondent says, however, that a declaration that the Applicant's Deportation Order is void is too broad as the Applicant did not challenge the order's validity when it was made in 2002. The argument that the Deportation Order is spent is similar to the situation in *Nagalingam* and, should the Court grant judicial review in this application, the Respondent submits that the proper remedy is a declaration that the Deportation Order is executed and spent. See *Nagalingam*, above, at paras 99-100.

(2) Enforceability of the Deportation Order at the Time of the Applicant's Extradition

[47] The Respondent submits that the Applicant's Deportation Order was not enforceable when he was extradited to the United States on July 11, 2002 because the Applicant had not received notice of the deemed refusal of his refugee claim.

[48] The Respondent agrees with the Applicant that, pursuant to s 69.1(14) of the *Immigration Act*, the effect of the order on June 27, 2002 surrendering him for extradition was to deem the Applicant not to be a Convention refugee. But the Respondent says that this did not render the Deportation Order enforceable because s 32.1(6)(c) of the *Immigration Act* required that the Applicant receive notice that his refugee claim had been refused. To comply with this requirement, the Convention Refugee Determination Division's [CRDD] protocol was to send claimants deemed not to be Convention refugees a notice letter pursuant to s 69.1(14). The Applicant never received such a letter.

[49] The Respondent submits that the Applicant's theory that his Deportation Order was enforceable on June 27, 2002 ignores the notification requirement of s 32.1(6)(c) of the

Immigration Act. This violates the principle of statutory interpretation that every word of a statute must be given meaning. See *Communities Economic Development Fund v Canadian Pickles Corp,* [1991] 3 SCR 388 at 408 [*Canadian Pickles*]; *Krayzel Corp v Equitable Trust Co*, 2016 SCC 18 at para 48, Côté J, dissenting. The Respondent says that a negative inference should be drawn from the Applicant's lack of submissions on the evidence presented of the CRDD's notification policy.

[50] Because the Applicant had not received notice of his refugee claim's deemed denial, his Deportation Order remained conditional on June 28, 2002 when *IRPA* and its Regulations came into effect. Conditional deportation orders became subject to the provisions of *IRPA* and the Regulations under Regulation 319. Under *IRPA*, the Applicant was still entitled to notice of his negative refugee claim before his Deportation Order became enforceable, but s 49(2)(c) added a fifteen day period after notice before the order became enforceable.

(3) The Applicant's Deportation Order was not Enforced

[51] In the alternative, should the Court hold that the notification requirement of s 32.1(6)(c) of the *Immigration Act* can be ignored, the Respondent submits that the Applicant's Deportation Order was not enforced because the Applicant's extradition did not meet the requirements in s 240(1) of the *IRPA* Regulations.

[52] The Respondent notes that "[s]tatutes cannot be undone by subordinate legislation": *Afzal v Canada (Citizenship and Immigration)*, 2014 FC 1028 at para 23. Therefore, even if the

requirements of s 240(1) of the *IRPA* Regulations were met, the Applicant's lack of notification still rendered his conditional Deportation Order unenforceable.

[53] Paragraph 240(1)(b) of the *IRPA* Regulations makes obtaining a certificate of departure a requirement of a removal order's enforcement. The Applicant testified during his *habeas corpus* application that he first obtained a copy of his incomplete certificate of departure in May 2015. The Respondent says that the Applicant's submission that a Certificate of Departure was "issued" ignores the requirement that he "obtain" a copy of the certificate. The Respondent submits that the Applicant's interpretation is not supported by legal authority and offends the rule that each word of a statute must be given meaning.

[54] The Respondent acknowledges that the Applicant was provided with his Deportation Order on July 11, 2002 but submits that this is irrelevant to determining whether the requirement of s 240(1)(b) of the *IRPA* Regulations was met. A deportation order is distinct from a certificate of departure and s 240(1)(b) required the Applicant to obtain a certificate of departure. Therefore, even if the Applicant was subject to an enforceable deportation order on July 11, 2002, his extradition did not enforce that order.

[55] The Respondent submits that the jurisprudence considering s 240(1)(c) of the *IRPA* Regulations supports the interpretation that the Applicant's Deportation Order was not enforced. In *Waldman*, the applicant argued that his extradition was a *de facto* deportation and that he was therefore entitled to a risk assessment under *IRPA*. The Court rejected this argument because to qualify as enforcement of a removal order "the departure from Canada must occur in

consequence of the execution of the removal order itself": *Waldman*, above, at para 21. In *Németh*, above, at para 26, the Supreme Court of Canada held that "the term 'removed' has a specialized meaning in the *IRPA* and… it does not include removal by extradition." The Respondent says that, following the reasoning of these decisions, the Applicant's extradition does not satisfy the departure requirement under s 240(1)(c) of the *IRPA* Regulations.

[56] The Respondent further submits that administrative errors in the processing of the Applicant's extradition do not override the legislative requirements for enforcement of the Deportation Order or estop the Respondent from arguing that the Deportation Order was not enforceable on July 11, 2002. In the income tax context, the Supreme Court of Canada has held that "the Minister cannot be bound by an approval given when the conditions prescribed by the law were not met": *Minister of National Revenue v Inland Industries Limited* (1971), [1974] SCR 514 at 523. This principle was relied on in *Al-Ghamdi v Canada (Foreign Affairs and International Trade)*, 2007 FC 559 at para 31 [*Al-Ghamdi*], where Justice Shore stated, in the context of a citizenship dispute, that "[a]n administrative error cannot change requirements prescribed in law." See also *Pavicevic v Canada (Attorney General)*, 2013 FC 997 at para 41 [*Pavicevic*]. The Respondent says that the Applicant's partially completed Certificate of Departure was initiated in error and that neither this, or service of the conditional Departure Order, can override the operation of the law. The same is true regarding whether the Applicant was required to obtain an Authorization to Return to Canada in 2005. Differing administrative opinions on this question and whose custody the Applicant was released into on the day of his extradition, do not change the requirements under either the *Immigration Act* or *IRPA*.

(4) Abuse of Process

[57] The Respondent submits that the application to the ID to amend the Applicant's Deportation Order was not an abuse of process regardless of whether the order is considered enforced or spent. The Respondent says that the threshold for establishing abuse of process is high and only made out in the "clearest of cases": *Blencoe*, above, at para 120, citing *R v Power*, [1994] 1 SCR 601 at 616. The Applicant's disagreement with the Minister's position that the Deportation Order was not spent does not establish that the Minister's conduct was unfair, oppressive or contrary to the interests of justice. Further, before the ID, the Respondent also took the position that the order's being spent is not a bar to its amendment by the ID.

[58] The Respondent notes that the ID's ability to consider abuse of process arguments was described as "very limited" in *Ismaili v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 427 at para 24. This was in the context of abuse of process for delay, but the Respondent says the principle is applicable in this case as well.

VIII. ANALYSIS

[59] Essentially, the Applicant argues that the conditional Deportation Order issued on February 6, 2002 is spent because it was executed on July 11, 2002 when he was extradited to the United States. As a consequence, he says that the ID did not have the jurisdiction to amend that spent Deportation Order as it purported to do in the Decision of May 22, 2017 which is the subject of this judicial review application.

[60] To a considerable extent, the issue of whether the Deportation Order was enforced (and hence spent) when the Applicant was extradited on July 11, 2002 is a matter of statutory interpretation to which the standard rules apply. Of particular importance for this application are:

(a) The principle that every word of a statute must be given meaning and that a construction that would leave any part of the statute without effect should normally be rejected (*Canadian Pickles*, above, at 408); and

(b) The modern principle that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at para 23).

[61] Both parties agree that the Applicant was legally surrendered and extradited to the United States on July 11, 2002. The Applicant says, however, that on the facts of this case, the effect of the extradition was to enforce the Deportation Order because it meant that the conditions for the enforcement of the Deportation Order were met at that time. The Respondent says, however, that the Applicant's extradition did not result in the enforcement of the Deportation Order, so that the Deportation Order remains in effect and has been legally amended by the ID in the Decision under review.

A. *Enforceability*

[62] The Respondent's principal argument is that the Deportation Order could not be enforced by the July 11, 2002 extradition to the United States because the Deportation Order had not, under the governing statutory provisions and regulations, become enforceable at that time.

[63] The Respondent agrees with the Applicant that, on June 27, 2002, when the Applicant was ordered to be surrendered for extradition, s 69.1(14) of the *Immigration Act* (then in force),

rendered the order of surrender a deemed negative decision of the CRDD, so that the Applicant was not a Convention refugee. But the Respondent says that this doesn't mean that the Deportation Order became enforceable on June 27, 2002.This is because s 32.1(6)(c) of the *Immigration Act* stipulates that no conditional removal order against a claimant is effective unless and until "the claimant is determined by the Refugee Division not to be a Convention refugee," – which had occurred in this case under the deeming effect of s 69.1(4) of the *Immigration Act* – and the claimant "has been so notified," – which the Respondent says did not occur in this case.

[64] In detail, the Respondent's argument on this issue is as follows:

> 14. To ensure compliance with s. 32.1(6)(c), the CRDD had a protocol in place in June 2002 with respect to providing notice. The CRDD was instructed to follow the procedure laid out in the Tribunal Process Memorandum (TPM). Specifically, the TPM required the CRDD to notify claimants such as the Applicant that their claim for refugee protection was rejected pursuant to paragraph (b) of Section F of Article 1 of the *Convention* once their Order of Surrender was issued.
>
> 15. Pursuant to the TPM, once the Applicant's claim was deemed rejected by operation of s. 69.1(14) of the *Immigration Act*, the Registrar of the CRDD was required to notify the Applicant of the negative decision by sending him a notification letter. The template for this letter is set out in the TPM as Letter No. 2. After receiving this letter, a conditional deportation order would then become enforceable by operation of s. 32.1(6)(c) of the *Immigration Act*.
>
> 16. At no point in time did the Applicant receive a notice letter from the CRDD advising him that his refugee claim was deemed refused.
>
> 17. The Applicant's theory that his deportation order became enforceable on June 27, 2002 is only viable if the notification requirement explicitly written into s. 32(1)(6)(c) is ignored. However, to ignore this requirement would contravene the basic

> principle of statutory interpretation that every word must be given a meaning.
>
> [Citations omitted.]

[65] The Applicant resists these arguments as follows:

> 39. The combined effect of these two provisions is that when the Applicant was ordered surrendered under the *Extradition Act* on June 27, 2002, which the Applicant had consented to when he signed a Consent to Surrender (section 71 of the *Extradition Act*) on June 7, 2002, pursuant to s. 69[.1](14) the refugee claim was deemed to have been refused and therefore, pursuant to section 32.1, the deportation order became enforceable that same day, June 27, 2002, and not 15 days later, as argued on leave by the Respondent.
>
> 40. In its arguments on leave, the Respondent attempted to import a provision from the *IRPA* — specifically, the 15-day delay of enforceability after a deemed rejection that is found in section 49(2)(c) of the *IRPA* — but the *IRPA* did not come into effect until one day later, on June 28, 2002. No such provision exists in the *Immigration Act*, which was the legislation still in effect on June 27, 2002, the day the Applicant was surrendered under the *Extradition Act*. Therefore, pursuant to the combined operation of sections 69[.1](14) and 32.1(6) of the *Immigration Act*, there was an enforceable removal order as of June 27, 2002.
>
> 41. On June 28, 2002, unexecuted removal orders became subject to the *IRPA* pursuant to s. 319 of the *Regulations*. However, the coming into effect of the *IRPA* and *Regulations* does not change the enforceability of this already enforceable removal order.

[66] The Applicant does not, however, explain how the deemed refugee refusal enacted by s 69.1(14) renders the Deportation Order enforceable without the notification requirements stipulated by s 32.1(6)(c) of the *Immigration Act*. The Respondent's argument is that, at no point in time did the Applicant receive a notice letter from the CRDD advising him that his refugee claim was deemed refused.

[67] The Applicant does not say that the notice requirement under s 32.1(6)(c) of the *Immigration Act* can be dispensed with. Hence, he needs to demonstrate how that notice requirement was satisfied on the facts of this case. The Applicant attempts to do this in several ways.

[68] First of all, he says that the Respondent considered the Deportation Order as enforceable when an officer confirmed the Applicant's removal from Canada on July 11, 2002 through a signed Certificate of Departure while the Applicant was in the Respondent's custody, and the Applicant was served with the Deportation Order on the same day.

[69] The evidence before me does not show that the Applicant obtained or was provided with a copy of the Certificate of Departure when he was extradited, at which point *IRPA* had come into force. Paragraph 240(1)(b) of the *IRPA* Regulations requires the Applicant to "obtain" a certificate of departure from the department to satisfy enforcement of the deportation order. The Applicant, according to his evidence at his *habeas corpus* hearing, says that he did not obtain a copy of a certificate of departure until May 2015.

[70] The Respondent agrees with the Applicant that the Applicant was served with his Deportation Order on July 11, 2002. But this does not satisfy s 240(1)(b) of *IRPA* that was in effect when the Applicant was extradited on July 11, 2002, and it does not override s 32.1(6)(c) of the *Immigration Act* or s 49(2) of *IRPA*, both of which require notification that the claim has been rejected (either deemed or otherwise) by the Refugee Protection Division.

[71] The Applicant says that:

> the completion of a Certificate of Departure and the serving of one's Deportation Order are clear, unambiguous and unqualified practices and representations of fact with respect to the confirmation of one's removal, such that the equitable doctrines of legitimate expectation and estoppel by representation apply.

[72] The Applicant appears to be arguing that, even if the statutorily-imposed conditions of enforceability are not met, equity should grant him the relief he seeks in this case. The Applicant can have no legitimate expectation or estoppel rights that override the express wording of a statute. The Court has no power to disregard the clear intent of Parliament. See *Granger*, above, at paras 8-9, aff'd [1989] 1 SCR 141.

[73] At bottom, the Applicant is saying that his extradition to the United States amounted, in fact and in law, to deportation. However, this Court has made it clear that extradition and deportation are two very different processes and cannot be treated as co-extensive. In *Waldman*, for example, the Court had the following to say on point:

> [21] Section 240 of the *Immigration and Refugee Protection Regulation*s ("*IRPA Regulations*") deals with when a removal order is enforced. It is enforced, for instance, under subsection (c) when the foreign national "departs from Canada." But section 240 clearly contemplates, in my opinion, that the departure from Canada must occur in consequence of the execution of the removal order itself because the section refers to the enforcement of the removal order either voluntarily by the foreign national or by the Minister of Immigration.
>
> [22] If the extradition order [is] enforced against the Applicant in this case, it will be enforced by the Minister of Justice and it will place the Applicant outside of Canada. Being outside of Canada may well give rise to consequences under *IRPA* in relation to how the Applicant might return. But the Applicant will have been placed outside of Canada not because he has voluntarily left, and not because the Minister of Immigration has enforced a removal

> order against him; he will be outside of Canada because the Minister of Justice has extradited him.

[74] The Supreme Court of Canada had also made the distinction clear. In *Németh*, for example, in dealing with "removal" under *IRPA*, the Supreme Court made the following point that is equally applicable to the present case:

> [24] I return, then, to the contention that s. 115, and particularly the phrase "shall not be removed from Canada", prohibits extradition of a refugee. The submission is that the plain meaning of the words includes removal by extradition, that this interpretation is necessary to implement Canada's obligations under the Refugee Convention; and that the judgment of the Court in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, supports this view. The respondent, on the other hand, submits that "removal" is a term of art under the *IRPA* and applies only to removal orders made under that Act.
>
> [25] For the following reasons, I agree with the respondent.
>
> (a) *Ordinary Meaning*
>
> [26] The appellants emphasize the ordinary meaning of the words "removed from Canada" in s. 115(1) and that extradition is a form of "removal". I agree, of course, that the ordinary meaning of these words is broad enough to include removal by any means including extradition. However, according to the often repeated "modern principle" of statutory interpretation, the words used in the *IRPA* must be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd.(Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26. When this is done, it becomes clear in my view that the term "removed" has a specialized meaning in the *IRPA* and that it does not include removal by extradition.

[75] The Applicant also points to various administrative errors that occurred in this case, but these errors cannot be used to override the operation of the applicable statutory provisions and the requirements of the governing legislation.

[76] The Applicant concedes that he was extradited and that, as a general rule, extradition does not amount to deportation. He argues, however, that extradition can amount to deportation if, on the facts of the case, extradition satisfies the conditions of removal.

[77] His case is that the conditions for deportation were satisfied because, in accordance with s 240(1) of the *IRPA* Regulations, he:

(a) appeared before an immigration officer at a port of entry and his departure from Canada was verified;

(b) obtained a Certificate of Departure from the department;

(c) departed from Canada; and

(d) was authorized to enter, other than for purposes of transit, the United States which was his country of destination under the extradition process.

[78] He says that, in satisfying s 240(1)(b), he was not required to receive a physical copy of the Certificate of Departure. He concedes that the Certificate of Departure in this case does not contain his photograph or his signature, but says that these are not required for a valid certificate and that it is the officer's signature that completes and legalizes the certificate.

[79] It is true that the Certificate of Departure provides as follows:

> This certificate, once signed by an Immigration officer below in Part C, confirms that the person concerned has satisfied the officer that the requirements of the removal have been met in accordance

> with the *Immigration and Refugee Protection Regulations* and the removal order was enforced on the date of confirmation.

[80] The Applicant points out that his *habeas corpus* testimony about when he finally received a copy of the Certificate of Departure is not relevant here because the Certificate of Departure confirms, under signature of the officer concerned, that all the requirements for removal had been met in accordance with the *IRPA* Regulations and that the removal order was enforced and confirmed on July 11, 2002.

[81] The Respondent's answer to this is that regulations cannot trump the underlying legislation and that, on the facts of the present case, the Deportation Order was not in force when extradition occurred on July 11, 2002. This is because, under s 32.1(6)(c) of the *Immigration Act* the Deportation Order could not become enforceable unless and until the Applicant received notice that the Refugee Protection Division had determined he was not a Convention refugee, and this did not occur. And, once *IRPA* came in effect on June 28, 2002, the day subsequent to the Minister signing the Order of Surrender, *IRPA* provided under s 49(2)(c) that the removal order would not come into force until 15 days after "notification" that the Applicant's refugee claim had been rejected by the Refugee Protection Division. So this means, at the earliest, that in this case the removal order could not become enforceable until July 12, 2002, which is one day after the extradition took place. The means that the extradition could not have been an enforcement of the removal order. In *Al-Ghamdi*, the Court said:

> [31] An administrative error cannot change requirements prescribed in law. In *Canada (Minister of National Revenue - M.N.R.) v. Inland Industries Ltd.*, [1974] S.C.R. 514, Justice Louis-Philippe Pigeon, found:

> …However, it seems clear to me that the Minister cannot be bound by an approval given when the conditions prescribed by the law were not met.
>
> (Reference is also made to *Granger v. Canada (Minister of Employment and Immigration Commission)*, [1989] 1 S.C.R. 141.)

[82] The Applicant says that the Deportation Order became enforceable on June 27, 2002 as a result of the combined operation of ss 69.1(14) and 32.1 of the *Immigration Act*:

> 39. The combined effect of these two provisions is that when the Applicant was ordered surrendered under the *Extradition Act* on June 27, 2002, which the Applicant had consented to when he signed a Consent to Surrender (section 71 of the *Extradition Act*) on June 7, 2002, pursuant to s. 69[.1](14) the refugee claim was deemed to have been refused and therefore, pursuant to section 32.1, the deportation order became enforceable that same day, June 27, 2002, and not 15 days later, as argued on leave by the Respondent.

[83] The Applicant does not, however, specify which subsection of s 32.1 he relies upon, but it seems obvious that it must be s 32.1(6)(c) which required not only a determination by the Refugee Protection Division that he is not a Convention refugee but also notification to that effect. The Applicant has not explained how it is possible to avoid the notification requirement, or how and when notification under s 32.1(6)(c) took place on the facts of this case.

[84] Nor does the Applicant challenge the account given by Ms. Carol Hammond in her affidavit of the publicly transparent notification protocol in place at the material time and the prescribed letter that was in place to provide notice, and which the Applicant did not receive, at the material time.

[85] The Applicant has made no real attempt to demonstrate to the Court how the notification requirement can be ignored in his case. He relies on s 240(1) of the *IRPA* Regulations, but even if he could demonstrate that he somehow "obtained" a certificate at departure from the department under s 240(1)(b), this could not override the requirement under the governing legislation that notice is required before a conditional removal order becomes effective. The Applicant relies upon the Certificate of Departure to establish that he satisfied the conditions for effecting his removal but he does not explain how the *IRPA* Regulations under s 240(1) can be used to satisfy the governing legislation. I think a useful parallel can be drawn here to Justice Strickland's conclusions in *Pavicevic*:

> [41] As regards to citizenship, the right to a hold a Canadian passport arises from citizenship which can only be granted in accordance with the Citizenship Act (*Solis v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 407 (QL); *Al-Ghamdi v Canada (Foreign Affairs and International Trade)*, 2007 FC 539 at para 29 [*Al-Ghamdi*]). In this case, when Passport Canada issued the prior passports, it did so based on its mistaken belief that the Applicant was, based on his place of birth, a Canadian citizen. However, "the Minister cannot be bound by an approval given when conditions prescribed by the law were not met" (*Inland Industries*, above; *Al-Ghamdi*, above at para 31). Therefore, issuing a passport in the past does not create citizenship nor does it bind Passport Canada to issue future passports or preclude it from revoking a passport if the underlying legislative requirements are not met.
>
> [Emphasis added.]

[86] In addition, s 240(1) of the *IRPA* Regulations does not assist the Applicant in this case because he did not "obtain" a certificate of departure from the department. The fact that a Certificate of Departure has been issued does not mean it was "obtained" by the Applicant. It is notable that the Applicant did not sign the Certificate of Departure and his photograph is not attached, which suggests that he was not physically present when it was signed by the officer.

The Applicant knew that he was being extradited to the United States and that he was not being removed under the Deportation Order. Under *Németh*, the Court had the following to say:

> [24] I return, then, to the contention that s. 115, and particularly the phrase "shall not be removed from Canada", prohibits extradition of a refugee. The submission is that the plain meaning of the words includes removal by extradition, that this interpretation is necessary to implement Canada's obligations under the Refugee Convention; and that the judgment of the Court in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, supports this view. The respondent, on the other hand, submits that "removal" is a term of art under the *IRPA* and applies only to removal orders made under that Act.
>
> …
>
> [27] Section 115 must be considered in the context of the other provisions of the statute which also deal with the subject of removal. Division 5 of Part I of the *IRPA* addresses "Loss of Status and Removal". The term "removal" is used in connection with the term "removal order" which is a specific order authorized by the *IRPA* in particular circumstances set out in detail therein: see, e.g., ss. 44(2), 45(d) and 48. "Removed" and "removal", therefore, are words used in relation to particular procedures under the *IRPA*. This view is reinforced by the *Immigration and Refugee Protection Regulations*, SOR/2002-277. Section 53 of the *IRPA* provides that the regulations made under the *IRPA* may include provisions respecting "the circumstances in which a removal order shall be made or confirmed against a permanent resident or a foreign national": s. 53(b). Part 13 of the Regulations, addresses removal. Section 223 specifies that there are three types of removal orders: departure orders, exclusion orders and deportation orders. Surrender orders under the [*Extradition Act*] are not included. The linking of removal to these three types of orders further reinforces the view that the words "removed" and "removal" refer to particular processes under the *IRPA*.
>
> …
>
> [31] To conclude on this point, my view is that when s. 115 is read in context, it is clear that the words "removed from Canada" in s. 115(1) refer to the removal processes under the *IRPA*, not to surrender for extradition under the [*Extradition Act*]. There is, therefore, no conflict between the two statutes.

[87] The Applicant has not filed an affidavit with this application, so there is no evidence before me to explain why he did not sign the Certificate of Departure or that he was ever under the impression that his extradition to the United States meant that his deportation was being effected at the same time. The Applicant's case before me is based upon a purely technical approach to the *Immigration Act*, *IRPA* and the *IRPA* Regulations. There is no evidence that he has any expectation that extradition also meant deportation on these facts. As a matter of statutory interpretation, I think the application must fail.

B. *Abuse of Process*

[88] As the Applicant's abuse of process argument is premised on his Deportation Order already having been enforced, and I have determined that it was not, his abuse of process argument must also fail.

IX. Certification

[89] The parties have not proposed any question for certification and the Court sees no issue that requires certification.

JUDGMENT IN IMM-2551-17

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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