2001 FCA 235

A-744-00

Minister of Citizenship and Immigration (*Appellant*)

v.

Hewlette Harris (*Respondent*)

A-180-01

Minister of Citizenship and Immigration (*Appellant*)

v.

Linton Andrew Wishart (*Respondent*)

INDEXED AS: WISHART V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) (C.A.)
Court of Appeal, Décary, Noël and Sharlow JJ.A.— Ottawa, June 28 and July 11, 2001.

Citizenship and Immigration — Exclusion and removal — Inadmissible persons — Appeals from F.C.T.D. decisions allowing applications for judicial review of danger opinions issued pursuant to Immigration Act, s. 46.01(1)(e)(i) — Respondents, illegally in Canada, persons described in s. 19(1)(c) by virtue of criminal convictions — Minister rendering opinions under s. 46.01(1)(e)(i) each danger to public in Canada — S. 46.01(1)(e)(i) providing person who claims to be Convention refugee not eligible to have claim determined by Refugee Division if determined by adjudicator to be person described in s. 19(1)(c) and Minister of opinion person constituting danger to public in Canada — Respondents neither making nor intending to make Convention refugee claims — Motions Judge quashing danger opinions as made without statutory authority — Question certified: whether Minister having authority to render danger opinion before making of refugee claim — Appeals should be dismissed, as conceded by Crown, for failure to disclose, permit reply submissions on reports before Minister's delegate when rendered danger opinions: Bhagwandass v. Canada (MCI), [2001] 3 F.C. 3— Per Sharlow J.A.: Minister's authority under s. 46.01 not limited to persons who have made Convention refugee claim — Purpose of danger opinion under s. 46.01(1)(e)(i) to remove potential obstacle to speedy removal of person with criminal record sufficiently serious to bring him within s. 19(1)(c) — Such person may make specious refugee claim solely to delay removal — If Minister not permitted to commence danger opinion process until after refugee claim made, result would be inevitable, unjustifiable delay in removal process — Minister acting consistently with purpose of s. 46.01(1)(e)(i) in rendering danger opinions against respondents — Danger opinion cannot be quashed merely because made with intention of precluding making of refugee claim — Per Noël J.A.: Application of s. 46.01 triggered by determination person described in s. 19(1)(c) and danger opinion — S. 46.01 operating without regard to intention to claim refugee status — Only time requirement that s. 46.01 be applied before Refugee Division determining claim — That Minister issued danger opinion to deprive respondents of right to claim refugee status not invalidating opinion — Per Décary J.A.: S. 46.01 cannot be used outside context of refugee claim — To legally form danger opinion must be reasonable grounds to believe person will exercise right to claim refugee status.

This was an appeal from Trial Division decisions allowing applications for judicial review of danger opinions issued pursuant to *Immigration Act*, subparagraph 46.01(1)(*e*)(i).

The respondents were illegally in Canada. They were persons described in *Immigration Act*, paragraph 19(1)(*c*), having been convicted of criminal offences in Canada that could have been punished by a maximum term of imprisonment of 10 years or more. While they were serving the prison sentences imposed for those offences, a delegate of the Minister of Citizenship and Immigration rendered opinions under subparagraph 46.01(1)(*e*)(i) that they constituted a danger to the public in Canada. Subparagraph 46.01(1)(*e*)(i) provides that a person who claims to be a Convention refugee is not eligible to have the claim determined by the Refugee Division if the person has been determined by an adjudicator to be a person described in paragraph 19(1)(*c*) and the Minister is of the opinion that the person constitutes a danger to the public in Canada. Neither respondent has made or intends to make a refugee claim. On judicial review, both danger opinions were quashed on the basis that they were made without statutory authority. The following question was certified in both cases: may the Minister form the opinion that a person constitutes a danger to the public in Canada pursuant to *Immigration Act*, subsection 46.01 at any time before or after a Convention refugee claim is made by that person? Both Motions Judges answered the question in the negative. On appeal the question was limited to the scope of the Minister's authority to render a danger opinion before the making of a refugee claim, as such an opinion may certainly be rendered afterward.

Held, the appeals should be dismissed and the certified question answered in the affirmative.

Per Sharlow J.A.: The Crown conceded that both appeals should be dismissed on the basis of *Bhagwandass v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 3(C.A.) for the failure to disclose and permit reply submissions on the reports that were before the Minister's delegate when he rendered the opinions.

Subparagraph 46.01(1)(*e*)(i) does not put the liberty of the subject at stake. A danger opinion under subparagraph 46.01(1)(*e*)(i) does not authorize the incarceration of a person. The only legal effect of subparagraph 46.01(1)(*e*)(i) is to preclude the determination of a refugee claim. While danger opinions may be used at detention hearings, they do not bind decision-makers at such a hearing. Subparagraph 46.01(1)(*e*)(i) is not so ambiguous as to require the application of the principle of statutory interpretation requiring the adoption of the interpretation more favourable to the subject because the liberty of the subject is affected.

It may fairly be said that subsection 46.01 applies only to persons who have claimed refugee status, because its effect is to preclude the determination of certain refugee claims. But the Minister's authority to render a danger opinion under this provision is not limited to persons who have made such a claim. Nor does the Minister act improperly in rendering a danger opinion under this provision as a pre-emptive measure against a person who could make a refugee claim, but has not yet done so.

The purpose of the danger opinion under subparagraph 46.01(1)(*e*)(i) is to remove a potential obstacle to the speedy removal of dangerous criminals from Canada. A person with a criminal record that is sufficiently serious to bring him within paragraph 19(1)(*c*) or subparagraph 19(1)(*c*.1)(i) may make a specious refugee claim solely for the purpose of delaying removal. If the Minister is not permitted to commence the danger opinion process until after the refugee claim is made, the result would be an inevitable and unjustifiable delay in the removal process. Under the procedure followed herein, the danger opinion process was started with no refugee claim having been made or threatened. If the process had not resulted in danger opinions having been rendered, no prejudice would have resulted. But danger opinions were rendered and would have precluded consideration of any refugee claim, removing one possibility for an unjustified delay in the removal process. That is precisely the process contemplated by subparagraph 46.01(1)(*e*)(i). The Minister was acting consistently with the purpose of subparagraph 46.01(1)(*e*)(i) in rendering danger opinions against the respondents. A danger opinion cannot be quashed merely because it was made with the

intention of precluding a refugee claim from being made.

Per Noël J.A.: The application of subsection 46.01 is triggered when (1) an adjudicator determines that the person concerned is a person described in paragraph 19(1)(*c*) or subparagraphs 19(1)(*c*.1), and (2) the Minister forms the opinion that he or she constitutes a danger to the public in Canada. Once these two statutory conditions are met, the person concerned ceases to be eligible to have a Convention refugee claim determined by the Refugee Division. The effect of subsection 46.01(1) is immediate, and it operates without regard to the person's intention to make or not to make a refugee claim. The only time requirement is that where a Convention refugee claim is made, subsection 46.01(1) must be brought into play before the Refugee Division has determined the claim. The fact that the Minister issued a danger opinion with a view to depriving a person of the right to have a Convention refugee claim determined by the Refugee Division does not invalidate the opinion. It is not improper for the Minister to have in mind the effect which the law attaches to the issuance of a danger opinion provided that it is *bona fide*, i.e. it is based on the existence of facts which allow the Minister to objectively form the opinion that the person concerned is a danger to the public in Canada. A *bona fide* danger opinion has the effect which subsection 46.01(1) attaches to it regardless of whether a Convention refugee claim has been made by the person concerned at the time of its issuance.

Per Décary J.A. (concurring in the result): The Minister may form an opinion that a person constitutes a danger to the public in Canada pursuant to subsection 46.01 before a Convention refugee claim is made by that person but only when it relates to a person whom there are reasonable grounds to believe is a potential Convention refugee claimant.

There are four specific provisions in the *Immigration Act* enabling the Minister to form a danger opinion. An opinion formed within one context cannot be used in another. Section 46.01 cannot be used by the Minister outside the context of a refugee claim. Had Parliament intended danger opinions to be formed in a preventive manner, irrespective of a given context, it would have so stated.

The purpose of section 46.01 is to ensure that a refugee claim by a person who is a dangerous criminal will be summarily disposed of at the very beginning of the process. A danger opinion may be sought under section 46.01 prior to the formal notification by a person of an intention to claim refugee status, when there are reasonable grounds to believe that the person intends to claim refugee status. But the danger opinion may not be sought as against any person who is illegally in Canada and against whom no removal order has been made, on the general assumption that all such persons will claim refugee status when faced with removal from Canada.

In order to legally form a danger opinion under section 46.01 the Minister must be satisfied: (a) that there are reasonable grounds to believe that the person will exercise the right under section 44 to claim refugee status; and (b) that the person constitutes a danger to the public in Canada. To ignore the first condition is to interpret section 46.01 out of context and to give the Minister the extraordinary power of targeting whoever she wants who is not legally in Canada for purposes unconnected to refugee claims.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Immigration Act, R.S.C., 1985, c. I-2, ss. 19(1)(*c*) (as am. by S.C. 1992, c. 49, s. 11), (*c*.1) (as am. *idem*; 1995, c. 15, s. 2), 44(1) (as am. by S.C. 1992, c. 49, s. 35), (2) (as am. *idem*), (3) (as am. *idem*), (4) (as am. *idem*), 45 (as am. *idem*; 1995, c. 15, s. 8), 46.01(1) (as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 14; S.C. 1992, c. 49, s. 36; 1995, c. 15, s. 9), 53 (as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 17; S.C. 1992, c. 49, s. 43; 1995, c. 15, s. 12), 70(5) (as am. *idem*, s. 13), 77(3.01) (as enacted *idem*, s. 15).

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

CASES JUDICIALLY CONSIDERED

APPLIED:

Bhagwandass v. Canada (Minister of Citizenship and Immigration), [2001] 3 F.C. 3 (2001), 199 D.L.R. (4th) 519; 268 N.R. 337 (C.A).

CONSIDERED:

Marcotte v. Deputy Attorney General of Canada et al., [1976] 1 S.C.R. 108; (1974), 51 D.L.R. (3d) 259; 19 C.C.C. (2d) 257; 3 N.R. 613; *R. v. McIntosh*, [1995] 1 S.C.R. 686; (1995), 21 O.R. (3d) 797; 95 C.C.C. (3d) 481; 36 C.R. (4th) 171; 178 N.R. 161; 79 O.A.C. 81.

REFERRED TO:

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 243 N.R. 22; *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 646 (1997), 147 D.L.R. (4th) 93; 212 N.R. 63 (C.A.).

APPEAL from Trial Division decisions (*Wishart v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 111(T.D.); *Harris v. Canada (Minister of Citizenship and Immigration)* (2000), 9 Imm. L.R. (3d) 271 (F.C.T.D.)) allowing applications for judicial review of danger opinions issued pursuant to *Immigration Act*, subparagraph 46.01(1)(*e*)(i) and certifying the question: whether the Minister may form the opinion that a person constitutes a danger to the public in Canada pursuant to subsection 46.01 at any time before a Convention refugee claim is made by that person. Appeals dismissed and the certified question answered in the affirmative.

APPEARANCES:

Kevin Lunney for appellant.

Munyonzwe Hamalengwa for respondents.

SOLICITORS OF RECORD:

Deputy Attorney General of Canada for appellant.

Munyonzwe Hamalengwa, Toronto, for respondents.

The following are the reasons for judgment rendered in English by

[1] DÉCARY J.A.: I agree with my colleague, Madam Justice Sharlow, that the Minister may form an opinion that a person constitutes a danger to the public in Canada pursuant to subsection 46.01(1) of the *Immigration Act* [R.S.C., 1985, c. I-2 (as enacted by R.S.C., 1985 (4th Supp.), c. 28, s. 14; S.C. 1992, c. 49, s. 36; 1995, c. 15, s. 9)] before a Convention [*United Nations Convention Relating to the Status of Refugees*,

July 28, 1951, [1969] Can. T.S. No. 6] refugee claim is made by that person. But I wish to add a caveat: the Minister may only form such an early opinion, for the purpose of that subsection, when it relates to a person there are reasonable grounds to believe is a potential Convention refugee claimant.

[2] The correct approach, in my respectful view, is that adopted by Mr. Justice MacKay at paragraphs 23 and 26 of his reasons in *Wishart v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 111 (T.D.):

> Under the *Immigration Act*, the Minister may issue danger opinions, but only under limited circumstances. While the time when this may be done is not restricted under the statute, the danger opinion is to be considered in circumstances where the concern about danger to the public is *bona fide*. Parliament surely did not intend otherwise. To form the opinion for the purpose of foreclosing an opportunity, otherwise open under the Act, to claim refugee status, in my opinion, is not within the discretion vested in the Minister under the Act. The Minister's use of the danger opinion here, to prevent Mr. Wishart from making a refugee claim, effectively deprived him of an opportunity which was his under the Act. In my view, that was an error of jurisdiction.
>
> …
>
> Mr. Wishart has been in Canada illegally since 1983. Although immigration officials commenced the procedure to remove him from Canada by issuing a section 27 report to initiate an immigration inquiry, I note that since he was in Canada illegally, no danger opinion was necessary for a removal order to be issued against him. If in those circumstances, Parliament leaves opportunity for him to claim refugee status, which he had not yet done, that opportunity is not to be eliminated by a danger opinion that is made primarily for that purpose.

[3] Subsection 44(1) [as am. by S.C. 1992, c. 49, s. 35] of the *Immigration Act* recognizes the right of every person in Canada, other than a person against whom a removal order has been made, to make a Convention refugee claim and to seek the determination of that claim. The procedure set out in sections 44 to 46.01 [subsections 44(1)-(4) (as am. *idem*); section 45 (as am. *idem*; 1995, c. 15, s. 8)] of the Act is the following: the person claiming to be a Convention refugee notifies an immigration officer (subsection 44(1)), who in turn refers the claim to a senior immigration officer (subsection 44(2)), who in turn determines whether the person is eligible (subsection 44(4) and section 45). The "eligibility" criteria are set out in section 46.01 and include the "danger opinion" with which these appeals are concerned. Under the process set out in the Act, in order for a person to be determined not eligible, a refugee claim must first have been made.

[4] The relevant sections read as follows:

> **44.** (1) Any person who is in Canada, other than a person against whom a removal order has been made but not executed, unless an appeal from that order has been allowed, and who claims to be a Convention refugee may seek a determination of the claim by notifying an immigration officer.
>
> (2) An immigration officer who is notified pursuant to subsection (1) shall forthwith refer

the claim to a senior immigration officer.

(3) Where a person who is the subject of an inquiry claims in accordance with subsection (1) to be a Convention refugee, the adjudicator shall determine whether the person may be permitted to come into or remain in Canada, as the case may be, and shall take the appropriate action under subsection 32(1), (3) or (4) or section 32.1, as the case may be, in respect of the person.

(4) Where a claim to be a Convention refugee by a person who is the subject of an inquiry is referred to a senior immigration officer and the senior immigration officer determines, before the conclusion of the inquiry, that the person is not eligible to have the claim determined by the Refugee Division, the adjudicator shall take the appropriate action under section 32 in respect of the person.

…

45. (1) Where a person's claim to be a Convention refugee is referred to a senior immigration officer, the senior immigration officer shall

(*a*) subject to subsection (2), determine whether the person is eligible to have the claim determined by the Refugee Division;

…

46.01 (1) A person who claims to be a Convention refugee is not eligible to have the claim determined by the Refugee Division if the person

…

(*e*) has been determined by an adjudicator to be

(i) a person described in paragraph 19(1)(*c*) or subparagraph 19(1)(*c*.1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada,

(ii) a person described in paragraph 19(1)(*e*), (*f*), (*g*), (*j*), (*k*) or (*l*) and the Minister is of the opinion that it would be contrary to the public interest to have the claim determined under this Act;

(iii) a person described in subparagraph 27(1)(*a*.1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada, or

(iv) a person described in paragraph 27(1)(*d*) who has been convicted of an offence under any Act of Parliament for which a term of imprisonment of ten years or more may be imposed and the Minister is of the opinion that the person constitutes a danger to the public in Canada.

[5] Counsel for the Minister conceded—and rightly so, in my view—that there was no general provision in the *Immigration Act* enabling the Minister to form a danger opinion in whatever circumstances she may choose. He recognized that there were four specific enabling provisions in the Act (i.e. sections 46.01, 53 [as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 17; S.C. 1992, c. 49, s. 43; 1995, c. 15, s. 12], subsections 70(5)

[as am. *idem*, s. 13] and 77(3.01) [as enacted *idem*, s. 15]) and that an opinion formed within one context could not be used in another.

[6] Section 46.01, therefore, cannot be used by the Minister outside the context of a refugee claim. A danger opinion formed under section 46.01 can no more be insulated from the refugee process than danger opinions formed under section 53 and subsections 70(5) and 77(3.01) can be insulated from their own context. Had Parliament intended danger opinions to be formed in a preventive manner, irrespective of a given context, it would have done so.

[7] By the very terms of subsection 44(1), the opportunity to claim refugee status is given to any person who is in Canada other than a person against whom a removal order has been made but not executed. In the case of *Wishart*, as noted by MacKay J. at paragraph 26 of his reasons, a removal order could have been issued by the Minister, but none was, with the result that Wishart was not precluded by subsection 44(1) from making a refugee claim. Had Parliament intended to preclude any person against whom a danger opinion had been formed from even making a refugee claim, words to that effect would have been added to subsection 44(1). The Minister cannot use the power given to him by section 46.01 to achieve a result not contemplated by subsection 44(1). This was, I think, the reasoning of MacKay J. That reasoning accords with the wording of the *Immigration Act*.

[8] The purpose of section 46.01 is not, as alleged by the Minister, to prevent a person from making a refugee claim. Rather, the purpose is to ensure that a refugee claim, when made or intended to be made by a person who is a dangerous criminal, will be summarily disposed of at the very beginning of the process.

[9] I am prepared to find that a danger opinion may be sought under section 46.01 prior to the formal notification by a person of one's decision to claim refugee status, when there are reasonable grounds to believe that the person intends to claim refugee status. But I am not prepared to find that the danger opinion may be sought as against any person who is illegally in Canada and against whom no removal order has been made, on the general assumption that all such persons will claim refugee status when exposed to removal from Canada.

[10] I fully appreciate that a danger opinion is a most useful tool in taking away, to use the words of Sharlow J.A. in paragraph 28 of her reasons in *Bhagwandass v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 3 (C.A.), "one potential obstacle to the speedy removal of dangerous criminals from Canada". But it is a tool which Parliament did not want the Minister to use at random, independently from, in the case of subparagraph 46.01(1)(*e*)(i), an existing or potential refugee claim. The point in time when that tool may be used is aptly described in those words found in the notice sent by Citizenship and Immigration Canada: "if you have made or intend to make a refugee claim" (Appeal Book, at page 58).

[11] Reference was made at the hearing by counsel for the Minister to a possible discrepancy between the English and French texts of subsection 46.01(1). It was

suggested that the English text refers to the refugee claimant and is not as wide as the French text which refers to the refugee claim. I disagree. The French text refers to "*la revendication*" and not to "*une revendication*" and the "*revendication*" which is contemplated is that of "*l'intéressé*", i.e. that of the refugee claimant. In any event, section 46.01, when read in the context of section 44, necessarily refers to a specific refugee claim and not to refugee claims in general.

[12] In the end, it is my view that in order to legally form a danger opinion under section 46.01 of the *Immigration Act* before a refugee claim is made, the Minister must be satisfied (a) that there are reasonable grounds to believe that a person will exercise his right, under section 44, to claim refugee status and (b) that the person constitutes a danger to the public in Canada. To ignore the first condition is, in my respectful view, to interpret section 46.01 out of context and to give the Minister the extraordinary power of targeting whoever she wants who is not legally in Canada for purposes unconnected to refugee claims.

[13] On the facts of the case, in *Wishart*, MacKay J. came to the conclusion that the Minister formed a danger opinion for an improper purpose, "namely, to prevent the applicant from making a refugee claim" (paragraph 27 of his reasons). This is a finding which was open to him in the circumstances and with which I see no reason to interfere.

[14] I would dismiss the appeals and answer the questions in the affirmative, albeit for reasons other than those expressed by Sharlow J.A.

* * *

The following are the reasons for order rendered in English by

[15] NOËL J.A.: I agree with the reasons of Sharlow J.A. and would dispose of both appeals as she suggests. With respect to her proposed answer to the certified question, I wish to add the following brief comment.

[16] What is required to trigger the application of subsection 46.01(1) is first that an adjudicator determine that the person concerned is a person described in paragraph 19(1)(*c*) [as am. by S.C. 1992, c. 49, s. 11] or subparagraph 19(1)(*c.*1)(i) [as am. *idem*; 1995, c. 15, s. 2] and second that the Minister form the opinion that he or she constitutes a danger to the public in Canada. Once these two statutory conditions are met, the person concerned ceases to be eligible to have a Convention refugee claim determined by the Refugee Division. That is the effect of subsection 46.01(1).

[17] As the Motions Judge in the *Wishart* case pointed out at paragraph 23 of his reasons, a danger opinion can only be issued where the public safety concern is *bona fide*. However, from the moment when such an opinion is issued *bona fide*, in circumstances where the person concerned has been determined to be a person described in paragraph 19(1)(*c*) or subparagraph 19(1)(*c*.1)(i), the application of subsection 46.01(1) is triggered with the result that the loss of eligibility to the refugee determination process occurs as of that time.

[18] The effect of subsection 46.01(1) is thus immediate and the provision operates without regard to the person's intention to make or not to make a refugee claim or whether he or she has, will or will not make such a claim. The only time requirement embodied in subsection 46.01(1) is that where a Convention refugee claim is made, the provision must be brought into play before the Refugee Division has determined the claim.

[19] The fact that the Minister has issued a danger opinion with a view of depriving a person of the right to have a Convention refugee claim determined by the Refugee Division does not invalidate the opinion. It is not improper for the Minister to have in mind the effect which the law attaches to the issuance of a danger opinion provided of course that it is *bona fide*, i.e. it is based on the existence of a fact or facts of a type or character which allow the Minister or his delegate to objectively form the opinion that the person concerned is a danger to the public in Canada.

[20] In short, a danger opinion, if issued *bona fide*, has the effect which subsection 46.01(1) attaches to it regardless of whether a Convention refugee claim has been made by the person concerned at the time of its issuance.

[21] I too would answer the certified question in the affirmative.

* * *

The following are the reasons for judgment rendered in English by

[22] SHARLOW J.A.: The respondents Hewlette Harris and Linton Andrew Wishart are illegally in Canada. They are persons described in paragraph 19(1)(*c*) of the *Immigration Act*, R.S.C., 1985, c. I-2, having been convicted of criminal offences in Canada that could have been punished by a maximum term of imprisonment of 10 years or more. While they were serving the prison sentences imposed for those offences, a delegate of the Minister of Citizenship and Immigration rendered opinions under subparagraph 46.01(1)(*e*)(i) of the *Immigration Act* that they constitute a danger to the public in Canada. Subparagraph 46.01(1)(*e*)(i) reads as follows:

> **46.01** (1) A person who claims to be a Convention refugee is not eligible to have the claim determined by the Refugee Division if the person
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> …
>
> (*e*) has been determined by an adjudicator to be
>
> (i) a person described in paragraph 19(1)(*c*) or subparagraph 19(1)(*c.*1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada.

[23] The danger opinions would have precluded the determination of a refugee claim made by Mr. Harris or Mr. Wishart, if one had been made. No such claim had been made when the danger opinions were rendered. None has been made to this day. Mr.

Harris and Mr. Wishart have both stated that they have no intention of making a refugee claim. Those statements cannot, of course, bar them from doing so.

[24] The danger opinions rendered against Mr. Harris and Mr. Wishart were the subject of separate applications for judicial review in the Trial Division of this Court: *Harris v. Canada (Minister of Citizenship and Immigration)* (2000), 9 Imm. L.R. (3d) 271 (F.C.T.D.); and *Wishart v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 111 (T.D.).

[25] The applications were heard by different Motions Judges. Both danger opinions were quashed on the basis that they were made without statutory authority. The following question was certified in both cases:

> May the Minister form the opinion that a person constitutes a danger to the public in Canada pursuant to subsection 46.01(1) of the *Immigration Act* at any time before or after a Convention refugee claim is made by that person?

[26] Both Motions Judges answered this question in the negative. For the reasons below, I have concluded that this question must be answered in the affirmative. It does not follow, however, that these appeals should be allowed.

[27] At the hearing, counsel for the Crown conceded that both appeals should be dismissed on the basis of *Bhagwandass v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 3 (C.A.). However, he submitted that the certified question ought nevertheless to be answered because it is a question of general importance for the administration of the *Immigration Act*. He also submitted that the question should be limited to the scope of the Minister's authority to render a danger opinion before the making of a refugee claim, as there is no doubt that such an opinion may be rendered afterward. Those submissions were accepted. At the conclusion of the hearing of the appeals, the appeals were dismissed, with reasons for judgment and a response to the certified question to follow.

[28] The relevant facts are not in dispute and are summarized below.

Hewlette Harris

[29] Mr. Harris was born in Guyana in 1951 and came to Canada in 1983. On August 24, 1998, he was convicted of two counts of possession of a narcotic for the purpose of trafficking and possession of a restricted weapon. He was sentenced to six years concurrent for each of the drug offences and two years concurrent for the weapons offence.

[30] On December 3, 1998, an immigration officer based in the office of Citizenship and Immigration Canada in Kingston, Ontario prepared a report recommending that a danger opinion be sought with respect to Mr. Harris. The manager of that office agreed. By letter of the same date, Mr. Harris was advised of the intention to seek a danger opinion based on the information in the documents listed in the letter, copies of which were provided. Mr. Harris was invited to make submissions, which he did.

[31] The Kingston immigration officer prepared a report to the Minister dated January 11, 1999 which concluded with a recommendation that the Minister be requested to render a danger opinion. On January 12, 1999, the manager of the Kingston office indicated by his signature that he agreed with that recommendation.

[32] In a report dated March 3, 1999, a reviewing officer in the Ottawa office of Citizenship and Immigration Canada considered the material relating to Mr. Harris and prepared a report summarizing the information. At the end of the report, she indicated that she did not agree with the recommendation to seek a danger opinion. On May 4, 1999, a senior analyst signed the same report but indicated that he agreed with the recommendation to seek a danger opinion. The report of the reviewing officer, endorsed with those conflicting opinions, was submitted to the Minister's delegate. As was then the practice, neither the report of the immigration officer nor the report of the reviewing officer was provided to Mr. Harris for review and comment.

[33] On May 5, 1999, the Minister's delegate indicated that he was of the opinion that Mr. Harris constitutes a danger to the public. No reasons were provided for the opinion at the time it was rendered. However, once the application for leave and for judicial review was commenced, Mr. Harris was provided with a copy of all of the material that was before the Minister's delegate, including the reports referred to above.

[34] On November 12, 1999, an application for leave and for judicial review was filed to challenge the danger opinion. Leave was subsequently granted. In a judgment dated November 22, 2000, the Motions Judge allowed the application for judicial review and quashed the danger opinion. The basis of the decision is stated in paragraph 13 of her reasons:

> There is no apparent explanation for the decision of the Minister's delegate to issue an opinion pursuant to section 46.01(1) when on the face of that legislative provision, it applies only to persons who have claimed Convention refugee status.

Linton Andrew Wishart

[35] Mr. Wishart was born in Guyana in 1952 and has been illegally in Canada since 1983. On June 12, 1997, he was convicted of conspiracy to commit an indictable offence, namely, trafficking in a narcotic. He was sentenced on June 27, 1997 to seven years' imprisonment.

[36] On September 16, 1997, an immigration officer from the Kingston office of Citizenship and Immigration Canada sent a report to the manager of that office stating the facts relating to his criminal convictions and certain other matters. The report concludes with these comments:

> In view of the foregoing, a Direction for Inquiry is recommended. It is also suggested that we seek the Minister's Opinion in respect to 46.01(1)(e)(i), to prevent him from making a refugee claim at inquiry.

[37] Mr. Wishart was advised by letter of the intention to seek a danger opinion based on the information in the documents listed in the letter, copies of which were provided. He was invited to make submissions, which he did.

[38] A report prepared by the Kingston immigration officer and reviewed by the manager was submitted to the Ottawa office of Citizenship and Immigration Canada, along with Mr. Wishart's submissions. The report concluded with a recommendation by both the immigration officer and the manager that the Minister be asked for a danger opinion.

[39] In a report dated December 8, 1997, a reviewing officer prepared a report summarizing the material relating to Mr. Wishart, including his submission. At the end of the report, she indicated that she agreed with the recommendation to seek a danger opinion. On December 9, 1997, a senior analyst indicated his concurrence with that recommendation. The report of the reviewing officer, endorsed with those opinions, was submitted to the Minister's delegate. Again, as was then the practice, neither the report of the immigration officer nor the report of the reviewing officer was provided to Mr. Wishart for review and comment.

[40] On December 9, 1997, the Minister's delegate indicated that he was of the opinion that Mr. Wishart constitutes a danger to the public. No reasons were provided for the opinion at the time it was rendered. However, once the application for leave and for judicial review was commenced, Mr. Wishart was provided with a copy of all of the material that was before the Minister's delegate, including the reports referred to above.

[41] On December 20, 1999, an application for leave and for judicial review was filed to challenge the danger opinion. Leave was subsequently granted. In a judgment dated March 13, 2001, the Motions Judge allowed the application for judicial review and quashed the danger opinion. The basis of his decision is stated as follows in paragraph 23 of his reasons:

> Under the *Immigration Act*, the Minister may issue danger opinions, but only under limited circumstances. While the time when this may be done is not restricted under the statute, the danger opinion is to be considered in circumstances where the concern about danger to the public is *bona fide*. Parliament surely did not intend otherwise. To form the opinion for the purpose of foreclosing an opportunity, otherwise open under the Act, to claim refugee status, in my opinion, is not within the discretion vested in the Minister under the Act. The Minister's use of the danger opinion here, to prevent Mr. Wishart from making a refugee claim, effectively deprived him of an opportunity which was his under the Act. In my view, that was an error of jurisdiction.

Issues on appeal

[42] The principal issue in both appeals is the scope of the Minister's authority to render an opinion under subsection 46.01(1) that a person constitutes a danger to the public in Canada. For ease of reference, I reproduce the relevant parts of subsection 46.01(1):

> **46.01** (1) A person who claims to be a Convention refugee is not eligible to have the

claim determined by the Refugee Division if the person

…

(*e*) has been determined by an adjudicator to be

(i) a person described in paragraph 19(1)(*c*) or subparagraph 19(1)(*c.*1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada.

[43] It is argued for Mr. Harris and Mr. Wishart that the correct interpretation of subparagraph 46.01(1)(*e*)(i) is that the Minister has no authority to render a danger opinion under that provision except against persons who have claimed refugee status. It is conceded that the provision does not say that expressly. The argument is that the language is sufficiently ambiguous that it ought to be interpreted in favour of Mr. Harris and Mr. Wishart. In support of that argument, counsel relies on the following statement from *Marcotte v. Deputy Attorney General of Canada et al.*, [1976] 1 S.C.R. 108, *per* Dickson J. (for the majority) [at page 115]:

> It is unnecessary to emphasize the importance of clarity and certainty when freedom is at stake. No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced. If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication.

and this statement from *R. v. McIntosh*, [1995] 1 S.C.R. 686, *per* Lamer C.J. (for the majority) [at page 702]:

> It is a principle of statutory interpretation that where two interpretations of a provision which affects the liberty of a subject are available, one of which is more favourable to an accused, then the court should adopt this favourable interpretation.

[44] It is argued for the Minister that subparagraph 46.01(1)(*e*)(i) of the *Immigration Act* is not a provision that puts the liberty of a subject at stake. I agree with him on that point. A danger opinion under subparagraph 46.01(1)(*e*)(i) does not authorize the incarceration of a person. The only legal effect of that provision, assuming the other statutory conditions are met, is to preclude the determination of a refugee claim. It may be, as counsel for Mr. Harris and Mr. Wishart says, that danger opinions are sometimes used by the Crown as evidence in immigration detention hearings. However, a danger opinion does not bind the decision maker in such a hearing. It is at most only evidence that may be weighed with all the other evidence relevant to detention. In any event, I do not find subparagraph 46.01(1)(*e*)(i) so ambiguous as to require the application of the principle of statutory interpretation referred to in those cases.

[45] It may fairly be said that subsection 46.01(1) applies only to persons who have claimed refugee status, because its effect is to preclude the determination of certain refugee claims. In my view, however, it does not follow that the Minister's authority to render a danger opinion under this provision is limited to persons who have made such

a claim. Nor does it follow that the Minister is acting improperly when rendering a danger opinion under this provision as a pre-emptive step against a person who could make a refugee claim but has yet not done so.

[46] Subsection 46.01(1) is one of four provisions in the *Immigration Act* that authorize the Minister to render an opinion that a person is dangerous to the public in Canada. The others are section 53, subsection 70(5) and subsection 77(3.01). The legal effect of a danger opinion depends upon the provision under which it is rendered. For example, a danger opinion under subsection 46.01(1), the provision in issue in these appeals, precludes a determination of a refugee claim if the other conditions in subsection 46.01(1) are met. A danger opinion rendered under section 53 permits, among other things, *refoulement* of a Convention refugee in certain circumstances. A danger opinion rendered under subsection 70(5) or subsection 77(3.01) precludes certain appeals to the Appeal Division of the Immigration and Refugee Board.

[47] It is common ground that the Minister cannot consider rendering a danger opinion against a person without an appropriate factual foundation. In the case of a danger opinion under subparagraph 46.01(1)(*e*)(i), the factual foundation normally would consist of evidence of a criminal conviction that would bring the person within paragraph 19(1)(*c*) or subparagraph 19(1)(*c.*1)(i). That factual foundation exists in both cases under appeal.

[48] It is also common ground, indeed I would say it is trite law, that the Minister's authority to render a danger opinion can be exercised only for the purpose for which it is given. For example, the Minister cannot rely on a danger opinion rendered under subsection 70(5) as the basis for an argument that a refugee claim should not be determined. Thus far there is no controversy.

[49] The parties do not agree on the purpose of the danger opinion under subparagraph 46.01(1)(*e*)(i). However, this Court has already stated that the purpose of subparagraph 46.01(1)(*e*)(i) is to take away one potential obstacle to the speedy removal of dangerous criminals from Canada: *Bhagwandass* (*supra*). In my view, the purpose of a danger opinion under subparagraph 46.01(1)(*e*)(i) is the same.

[50] A person with a criminal record that is sufficiently serious to bring him within paragraph 19(1)(*c*) or subparagraph 19(1)(*c.*1)(i) may have a basis for a refugee claim. On the other hand, such a person may make a specious refugee claim solely for the purpose of delaying removal. If the person warrants a danger opinion but the Minister is not permitted to commence the danger opinion process under subparagraph 46.01(1)(*e*)(i) until after the refugee claim is made, the result would be an inevitable and unjustifiable delay in the removal process.

[51] Consider the case of a person who is illegally in Canada, who meets the criteria in paragraph 19(1)(*c*), and who by any objective measure is a danger to the public in Canada. That person is subject to removal but may make a refugee claim immediately before the removal process is completed. The removal process would be stopped pending the refugee determination process. The danger opinion process under

subparagraph 46.01(1)(*e*)(i) would proceed concurrently with the refugee determination process. The removal process could not continue unless a danger opinion is rendered before the refugee determination process is complete. If the refugee claim is accepted before a decision is made on the danger opinion, the Minister would be obliged to commence the danger opinion process anew under section 53. In either case, if a danger opinion is ultimately rendered, the making of the refugee claim will have served no purpose except to delay removal.

[52] Under the procedure followed in these cases, the danger opinion process was started with no refugee claim having been made or threatened. If the process had not resulted in a danger opinion being rendered, no prejudice would have resulted. As it happened, danger opinions were rendered and would have precluded consideration of any refugee claim, removing one possibility for an unjustified delay in the removal process. In my view, that is precisely the process contemplated by subparagraph 46.01(1)(*e*)(i).

[53] I conclude that the Minister was acting consistently with the purpose of subparagraph 46.01(1)(*e*)(i) in rendering the danger opinions against Mr. Harris and Mr. Wishart when they had not asserted a refugee claim and had not indicated any intention doing so. It follows that a danger opinion cannot be quashed merely because it was made with the intention of precluding a refugee claim from being made.

Other matters

[54] Both danger opinions were challenged on a number of other grounds, one being the failure to disclose and permit reply submissions on the reports that were before the Minister's delegate when he rendered the opinions: *Bhagwandass* (*supra*). The Crown has conceded that this would have been an alternative basis for quashing the danger opinions, and for that reason the appeals should be dismissed.

[55] It is noted that the danger opinions were also challenged on the basis of the failure of the Minister's delegate to provide reasons. In light of the debates that could arise from *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; and *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 646 (C.A.), I express no opinion on whether or not the Minister or Minister's delegate must provide reasons for rendering a danger opinion.

[56] However, I will make this comment. The decision under consideration in *Baker* was rendered without formal reasons. The Court held that reasons were required but found that in the circumstances of that case, the notes in the decision maker's file would suffice. If it is finally determined that reasons are required for a danger opinion, there may be situations where the reasons are sufficiently disclosed in the record, perhaps in the report of the reviewing officer or the report of the immigration officer, or a combination of the two. That may be so for the *Wishart* case, for example. In the *Harris* case, however, the report prepared by the reviewing officer closed with an indication that she thought that a danger opinion was not warranted. The Minister's delegate reached a contrary conclusion, but the record does not say why he did so. It seems to

me impossible to conclude that the report of the reviewing officer relating to Mr. Harris states the reasons for the decision of the Minister's delegate to render a danger opinion.

[57] Finally, it should be noted that both applications for judicial review also challenged the reasonableness of the danger opinions. Neither Motions Judge commented on that question. In my view it would not be appropriate for this Court to do so.