Osgoode Hall Law Journal

Volume 16, Number 3 (November 1978)

Article 14

Ministerial Permits and Due Process: Minister of Manpower and Immigration v. Hardayal

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MINISTERIAL PERMITS AND DUE PROCESS: *MINISTER OF MANPOWER AND IMMIGRATION* v. *HARDAYAL*

By JOHN HUCKER*

Since 1972, no provision has existed in Canadian immigration law for a person originally admitted to Canada as a non-immigrant to adjust his status within Canada to that of a landed immigrant.[1] Cases continually arise, however, where a visitor to Canada decides that he would like to stay permanently in this country. A procedure has therefore been developed under which the person concerned may be "landed" by means of the passing of a special Order-in-Council.[2] This is a cumbersome procedure that can take several months to complete, and it is used most frequently when the person's application is sponsored by a spouse who is herself or himself a Canadian citizen or permanent resident.

Mr. Latchman Hardayal entered Canada as a non-immigrant. On June 2, 1975 he applied at the Canada Immigration Centre in Kitchener, Ontario, to become a landed immigrant. His application was sponsored by his Canadian-born wife. Upon receipt of the application, a Minister's permit was issued to Mr. Hardayal, authorizing him to remain for a period of twelve months. In the normal course of events, this would have tided Mr. Hardayal over until the Order-in-Council procedure had been completed. The marriage between the Hardayals apparently encountered difficulties, however, and the parties ceased living together. On March 25, 1976, Mr. Hardayal received a letter from the Officer-in-Charge of the Kitchener Immigration Centre to the following effect:

> Dear Mr. Hardayal:
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> Whereas pursuant to subsection (1) of Section 8 of the Immigration Act, a permit was issued on June 11, 1975, authorizing you to remain in Canada until 10th June, 1976.
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> Take notice that pursuant to subsection (3) of Section 8 of the said Act, I hereby cancel the said permit, I having been authorized by the Minister of Manpower and Immigration pursuant to Section 2 and Section 67 of the Act to cancel such Permits.[3]

Together with this notice of cancellation came a second communication notifying Mr. Hardayal that, since he and his wife were no longer living as a married couple, the Department had terminated the processing of the applica-

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[1] On November 6, 1972, S.O.R./62-36, as amended by S.O.R./67-434, was revoked by S.O.R./72-443. See J. Hucker, *Synopsis of Canadian Immigration Law* (1975), 3 Syracuse J. Int'l L. & Comm. 47 at 50.

[2] See Hucker, *supra* note 1, at 58-60.

[3] *Minister of Manpower and Immigration* v. *Hardayal* (1977), 75 D.L.R. (3d) 465 at 467 (S.C.C.).

tion for landing. Shortly thereafter, Mr. Hardayal filed an application before the Federal Court of Appeal seeking an order setting aside the cancellation of the Minister's permit.[4] The main argument used by Mr. Hardayal in support of his application was that he had been given no reason for the cancellation beyond the reference to the fact of marriage breakdown, nor had he received an opportunity to make representations to the Minister prior to this step being taken.

In a majority decision,[5] the Federal Court of Appeal granted the application. In his reasons for judgment, Mr. Justice Urie distinguished between the *issuing* of a permit, which was admittedly a purely administrative function, and the *cancellation*, which he found to be a decision that required certain quasi-judicial safeguards. Focusing first on section 8 of the *Immigration Act*,[6] the provision that deals with permits, the Court acknowledged that there was nothing in the section itself that expressly or impliedly suggested that a hearing of some kind should be involved in any part of the decision-making process, but continued:

> That, however, does not end the matter since it may be that where, as here, it is proposed that a permit which expressly grants to the holder certain rights from which other benefits naturally flow, is to be cancelled, the statute may imply that there be such a "hearing" because fairness requires that the permit holder not be deprived of those rights and benefits without an opportunity to make submissions.[7]

The Federal Court neatly sidestepped the Supreme Court of Canada decision in *Howarth* v. *National Parole Board*,[8] where it had been unsuccessfully argued that the granting or revocation of parole should be accompanied by minimum procedural safeguards of a quasi-judicial nature. Concluding that "a paroled inmate remains an inmate," Urie J. went on to draw a distinction:

> An alien with a Minister's permit, on the other hand, acquires a new status under s.s. 7(2) of the *Immigration Act*, the status of a non-immigrant for the period limited by the permit. This status carries with it very substantial advantages, including freedom from the possibility of deportation while the permit remains valid, advantages which the permit holder has a reasonable expectation of retaining during the period designated in the permit. . . .
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> . . . A cancellation which will deprive him of these expectations without permitting him to make representations in respect of the proposed cancellation (the reason given for which may be based on erroneous information) seems to me to lack the element of fairness. It follows then that the failure to give the applicant in this case a reasonable opportunity to make representations constitutes a denial of a principle of natural justice, and, accordingly, the s. 28 application should be granted. . . .[9]

The judgment of the Federal Court of Appeal in *Hardayal* no doubt landed as a bombshell in the Department of Manpower and Immigration, where several thousand Minister's permits are issued each year to a variety

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[4] *Re Hardayal and Minister of Manpower and Immigraiton*, [1976] 2 F.C.R. 746, 67 D.L.R. (3d) 738.

[5] *Per* Urie and Ryan JJ.; MacKay D.J. dissenting.

[6] R.S.C. 1970, c. I-2.

[7] *Supra* note 4, at 750 (F.C.R.), 741 (D.L.R.).

[8] [1976] 1 S.C.R. 453, (1974), 50 D.L.R. (3d) 349.

[9] *Supra* note 4, at 752 (F.C.R.), 743 (D.L.R.).

of persons with one feature in common—these people cannot otherwise enter Canada under the provisions of the *Immigration Act*.[10] Permits have been used to authorize the temporary admission of persons with criminal records, those who are legally barred for medical reasons, as well as prospective immigrants whose examination overseas (including any necessary security checks) have not been completed, but whose movements from their countries of origin may need to be expedited—political opponents of the present regime in Chile are an example of the latter category.

Following the decision of the Federal Court of Appeal, the Department sought leave to appeal from the Supreme Court of Canada. In support of its contention that the present case involved a question of law of national importance which should be resolved by the Court, the Department filed an affidavit signed by its Deputy Minister, Alan E. Gotlieb, informing the Court that 4,000 Minister's permits had been issued in the year 1975, 900 of them in circumstances similar to those pertaining to Mr. Hardayal.[11] The affidavit asserted that the issuance of Minister's permits introduced an element of flexibility and humanitarianism into the administration of immigration law, and implied that the Federal Court's decision had turned the Minister's permit into a two-edged sword. Rather than face possible challenges that could block prompt cancellation, the Immigration Department might in many instances prefer not to issue permits in the first place. The result would be to harm rather than to assist persons who would otherwise have their entry or stay in Canada facilitated.

With this information before it, the Supreme Court granted leave, and ultimately upheld the appeal of the Department in a unanimous opinion delivered by Mr. Justice Spence. Both parties having agreed that the *issuing* of a permit was a purely administrative act, the Court soon concluded that the decision of the Minister to *cancel* a permit was also an order of an administrative nature within the meaning of section 28 of the *Federal Court Act*.[12] The sole issue left to be determined was whether, in the language of section 28(1), the Minister's decision to cancel was one that was "required by law to be made on a judicial or quasi-judicial basis." In ruling that it was not, Spence J. observed:

> Having regard for the detailed directions as to permitting entry of immigrants and as to the refusal to permit entry, or the deportation of those who have entered Canada, set out in the many provisions of the *Immigration Act*, I am strongly of the view that the Minister's power under s. 8 of the *Immigration Act* to grant, to extend, or cancel a permit with no direction as to the method which is to be used in the exercise of the power and, for the present purposes, no limitation on the persons who may be the subject of such permits, was intended to be purely administrative and not to be carried out in any judicial or *quasi*-judicial manner, and that, in fact, to require such permit, to be granted, extended or cancelled only in the exercise of a judicial or *quasi*-judicial function would defeat Parliament's purpose in granting the power to the Minister. As I have said, the evidence indicates that the power is only used in exceptional circumstances and chiefly for humanitarian purposes. Such power was, in the opinion of Parliament, necessary

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[10] See generally, Hucker, *supra* note 1, at 58-63.

[11] *Supra* note 3, at 469.

[12] R.S.C. 1970, (2d Supp.) c. 10.

> to give flexibility to the administration of the immigration policy, and I cannot conclude that Parliament intended that the exercise of the power be subject to any such right of a fair hearing as was advanced by the respondent in this case.[18]

The unanimous decision of the Supreme Court showed the unwillingness of that body to impose additional procedural requirements upon the statutory scheme of the *Immigration Act*. The result will be small comfort to anyone who saw in *Hardayal* the possibility of piercing the Immigration Department's bureaucratic veil. However, particularly in the light of its earlier decision in *Prata*,[14] the approach adopted was entirely predictable. In that case, the Supreme Court, again in a unanimous judgment, had upheld the right of the Minister of Manpower and Immigration and the Solicitor General to file a certificate under section 21 of the *Immigration Appeal Board Act*,[15] thereby precluding the Immigration Appeal Board from exercising its discretionary, humanitarian jurisdiction[16] in favour of the appellant. The latter argued unsuccessfully that by denying him an opportunity to be heard and to answer any allegations contained in the confidential police reports, upon which the section 21 certificate was based, the Ministers had offended the principles of natural justice.[17]

The *Hardayal* decision also signalled that Canada's highest judicial body is not prepared to follow the path opened by the English Court of Appeal in a similar immigration context. In *Schmidt* v. *Secretary of State for Home Affairs*,[18] Lord Denning M.R. had held that an individual whose permit to remain in England was revoked before its time limit expired was entitled to an opportunity to make representations. Such an opportunity was needed to protect the applicant's "legitimate expectation" that he would be allowed to stay for the permitted time.

Even if the reasoning of the Master of the Rolls is accepted, it is strongly arguable on the particular facts of *Hardayal* that the respondent's expectation was that he would be allowed to remain in Canada as a permit holder only while his application for landing was being processed. Since this application was itself dependent upon a marital relationship that had subsequently broken down, it could hardly have come as a total surprise to Mr. Hardayal when his interim status was terminated. As already noted, permits are issued in a variety of situations for differing periods, sometimes for only a few days or weeks. Ordinarily there would seem to be no reason why an individual should not be alerted to the fact that his permit is to be cancelled; presumably such an occurrence is fairly rare. However, this does not necessarily mean that a "hearing" in any formal sense is warranted. Since by definition the individual so affected is inadmissible to Canada, he would not appear to be

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[13] *Supra* note 3, at 471.

[14] *Prata* v. *Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376, (1975), 52 D.L.R. (3d) 383.

[15] R.S.C. 1970, c. I-3.

[16] *Id.*, s. 15.

[17] See Comment (1975), 53 Can. B. Rev. 810.

[18] [1969] 2 Ch. 149. Cited with approval by Urie J. in *Re Hardayal, supra* note 4, at 741-42 (F.C.R.).

in a particularly strong position to argue for this additional safeguard. I do not mean to suggest that official arbitrariness should be countenanced or hidden from scrutiny, but merely that an increased formalism in decision making is not necessarily the best answer.

In part, the *Hardayal* case can be seen as an effort to call the Immigration Department to account for the exercise of its undoubtedly significant powers. During the debates in Parliament and elsewhere on the *Immigration Act 1976*[19] (proclaimed in force April 10, 1978), a frequently-voiced theme was concern over the perceived arbitrariness of immigration procedures.[20] In many respects, the new Act goes beyond its predecessor in defining and circumscribing the powers of officials, but one searches the legislation in vain to ascertain how, and under what circumstances, one may apply for a Minister's permit: the authority of the Minister and his officials in this regard is left undefined.[21] Similarly, there is no indication of the circumstances, if any, under which one can apply from within Canada to become a permanent resident. Since it is unlikely that a total ban on applications for landing will be implemented, one must assume that procedures—albeit of a purely administrative nature—will continue in effect. However, the aura of mystery surrounding this murky area of the law remains, thereby encouraging suspicion—whether justified or not—about the criteria upon which the Minister or his officials base their decisions.

It is suggested that the *Hardayal* case is not particularly significant in terms of the legal issues presented. Confronted with a clear statutory scheme, together with an explanation of its rationale and an implied warning that judicial remodelling could have untoward effects, the Supreme Court opted for caution. Commentators who suggest that the classification of functions into administrative or quasi-judicial should not be the sole test in deciding whether natural justice concepts are applicable[22] will probably be vindicated with the passage of time. However, *Minister of Manpower and Immigration* v. *Hardayal* was, on its facts, an unlikely candidate to prompt the discarding of prevailing orthodoxy.

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[19] S.C. 1976, c. 52.

[20] Can. H. of C. Standing Committee on Labour, Manpower and Immigration, *Proceedings*, No. 32 (June 7, 1977) respecting Bill C-24. The Committee's hearings spanned a considerable time period. Particularly interesting were submissions by the Committee from Parkdale Community Legal Services.

[21] *Supra* note 19, s. 19.

[22] For example, D. Mullan, *Fairness: the New Natural Justice?* (1975), 25 U. of T. L.J. 281.