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Violi v. Minister of Citizenship and Immigration 1965 S.C.R. 232

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ADMINISTRATIVE LAW

Violi v. Minister of Citizenship and Immigration, [1965] S.C.R. 232.

IMMIGRATION — DEPORTATION — HABEAS CORPUS — SUSPENSION OF DEPORTATION ORDER FOR SPECIFIED PERIOD — IMPLEMENTATION OF ORDER AFTER EXPIRY OF PROBATIONARY PERIOD — IMMIGRATION ACT, R.S.C. 1952, c. 325, ss. 31, 33, 39 — CANADIAN BILL OF RIGHTS, 1959-60 (Can.), c. 44.

In *Violi v. Minister of Citizenship and Immigration*,[1] the Supreme Court of Canada delivered an important and desirable decision concerning the scope of discretion vested in the Minister under the Immigration Act[2] and yet did so without discussing sections 33 and 39 of the Act or the Canadian Bill of Rights, all of which were directly relevant. The facts of the case can be most conveniently stated as follows:

(i) Rocco and Guiseppe Violi were admitted to Canada as immigrants in 1958.

(ii) Rocco and Guiseppe were convicted of criminal offences in 1960 and 1961 respectively.

(iii) Following each conviction, an inquiry was held by a Special Inquiry Officer pursuant to s. 19(2) of the Immigration Act.[3] In each case an order for deportation was issued, in Rocco's case on February 1, 1961 and in Guiseppe's case on October 16, 1962: appeals from these orders pursuant to s. 31 of the Immigration Act[4] were both dismissed, Rocco's on February 20, 1961 and Guiseppe's on November 19, 1962.

(iv) After the dismissal of their appeals, both men received letters from the Department informing them that the deportation proceedings had been "suspended"—for twelve months in Rocco's case and six months in Guiseppe's case. Rocco was informed that the suspension was "to give you a chance to demonstrate that you can rehabilitate yourself". He was also informed that "an unfavourable report could mean the carrying out of the deportation order". Guiseppe was told that "should a further unfavourable report be received, consideration will be given to proceeding immediately with your deportation". While both men were required to keep their local Immigration office informed of their whereabouts, it was only Guiseppe who received, on May 28, 1963 a letter informing him that it would be unnecessary for him to report further, other than for address purposes, and stating that his case had been reviewed.

(v) On April 1, 1964, each of the brothers received letters informing them that it had been decided to implement the deportation orders made in 1961 and 1962 and they were subsequently taken into

1 [1965] S.C.R. 232, 51 D.L.R. (2d) 506.
2 R.S.C. 1952, c. 325.
3 *Ibid.*
4 *Ibid.*

custody. Their brother, Paoli Violi, then filed a petition for the issuance of a writ of *habeas corpus* in respect of his two brothers who were detained in the Montreal Gaol. On the matter coming before the Supreme Court of Canada, it was held,[5] reversing the Quebec Court of Queen's Bench, Appeal Side,[6] that Rocco and Guiseppe Violi were illegally detained. This comment will discuss the *Violi* decision from four different aspects.

(i) *S. 33 of the Immigration Act*

Each court before which the *Violi* case came was faced with the task of reconciling the two subsections of section 33 of the Immigration Act:[7]

> 33. (1) Unless otherwise provided in this Act a deportation order shall be executed as soon as practicable.
> (2) No deportation order becomes invalid on the ground of any lapse of time between its making and execution.

This section appeared in a new form in the 1952 Act and has not been interpreted in any previous case. The Immigration Act, 1927[8] had required an alien to be deported "forthwith" after a deportation order was issued, or after an unsuccessful appeal from such an order.[9] The courts subsequently seized upon the word "forthwith" in the 1927 Act to make illegal the suspension of deportation orders for unreasonable lengths of time, thereby keeping an alien in custody[10] or under a threat of deportation[11] or thereby prohibiting him from acquiring a Canadian domicile.[12]

In respect of deportation orders from which an appeal was taken, the Immigration Act, 1946, dropped the requirement that they be executed "forthwith" and it was provided that the order "shall not become invalid on the ground of any lapse of time between its issuance and execution."[13] In the 1952 Act, these provisions were extended to all deportation orders in section 33, and in the *Violi* case the courts had the opportunity of explaining whether the pre-1946 decisions were still relevant and how to reconcile subsections (1) and (2) of section 33. On these matters, however, the Supreme Court had very little to say. For the majority, Martland J. said:

> I am not prepared to agree that the two deportation orders lapsed because of the delay which was stipulated in the letters written to Rocco and Guiseppe Violi. However, s-s. (1) does not contemplate that if a deporta-

5 Cartwright, Fauteux, Martland, Richie, Hall and Spence JJ.; Taschereau C.J.C., Abbott and Judson JJ. dissenting.

6 Bissonette, Rivard and Choquette JJ.; Montgomery and Hyde JJ. dissenting.

7 *Supra*, footnote 2.

8 R.S.C. 1927, c. 93.

9 Sections 19(2), 33(5), 42(3).

10 *Re Stachow*, [1932] 2 W.W.R. 698 (Man. K.B.).

11 *In re Ferenc*, [1938] 3 W.W.R. 626 (Man. K.B.).

12 By operation of section 2(e)(i) of the Immigration Act, 1927. *In re Immigration Act, in re Poll*, [1937] 3 W.W.R. 136 (Sask. K.B.). Doubt was cast on these pre-1946 cases by the Supreme Court of Canada in *De Marigny v. Langlais*, [1948] S.C.R. 155, at p. 155, *per* Kellock J.

13 Immigration Act, S.C. 1946, c. 54, s. 6. *In re Wong Jung*, [1948] 2 W.W.R. 351, 6 C.R. 268, 92 C.C.C. 130 (B.C. S.C.).

> tion order is to be enforced there shall not be undue delay. Subsection (2), in my opinion, means that lapse of time *per se* does not result in a deportation order becoming invalid. In the present case, however, there is more involved than mere lapse of time.[14]

We are left in the dark as to what circumstances, combined with delay, will vitiate a deportation order. Of course, if the officer or Minister acts *ultra vires* the Immigration Act,[15] that would be a circumstance which would of itself vitiate a deportation order and cannot be said to be a circumstance which converts a mere lapse of time in the implementation of a deportation order into a circumstance vitiating the order. The words of the majority judges give a general indication that the requirement of section 33(1) is not mandatory, that it is subservient to section 33(2),[16] and that its breach alone will not invalidate the order. The position of the minority appears to have been that a delay in the enforcement of an order cannot now be relevant to its continuing validity, and even if it were relevant, there was not an unreasonable delay in this case.[17]

In the result, the patent ambiguity of section 33 has not been resolved and will undoubtedly be the subject of litigation in the future.

(ii) *S. 31(4) of the Immigration Act*

The majority of the Supreme Court based their decision exclusively on a consideration of s. 31 of the Immigration Act.[18] In substance, this section gives to the immigrant against whom a deportation order has been made a right of appeal to the Minister of Citizenship and Immigration[19] who has "full power to consider all matters pertaining to the case under appeal",[20] to allow the appeal and substitute his own decision for that of the Special Inquiry Officer, or to dismiss the appeal. Under s. 31(4),

> The Minister may in any case review the decision of an Immigration Appeal Board and confirm or quash such decision or substitute his decision therefor as he deems just and proper and may, for these purposes direct that the execution of the deportation order concerned be stayed pending his review and decision and the decision of the Minister on appeals dealt with or reviewed by him or the decision of the majority of an Immigration Appeal Board on appeals, other than those reviewed by the Minister, is final.

The opinion of the majority was that while s. 31(4) permitted the Minister to make a decision couched in whatever terms he deemed fitting, once that decision had been made, it could not thereafter be

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14 *Supra*, footnote 1, at p. 241 (S.C.R.), 524 (D.L.R.).

15 As the majority held he had acted in this case. See part (ii) *infra*.

16 In the Quebec Court of Queen's Bench, Appeal Side, Montgomery J., who was the sole judge to rely upon the delay in the enforcement of the orders as a ground for their invalidity, held that s. 33(1) was mandatory and that the effect of s. 33(2) was to place "upon the immigrant the burden of establishing that the delay in his case constituted a violation of s-s. (1)". (1965), 51 D.L.R. (2d) 506, at p. 511. The majority of the Court, however, said that the Court could not review the discretion of the Minister with respect to such delays. *Ibid.*, at p. 517.

17 *Supra*, footnote 1, at pp. 235-236.

18 *Supra*, footnote 2.

19 Section 31(2).

20 Section 31(3).

varied or reconsidered. Furthermore, by establishing a probationary period in the letters to the Violis, the Minister had made his decision in review under s. 31(4) and had no power further to review the matter unless there was a breach of probation during the probationary period. Referring to the letters sent to the Violis after the Minister's dismissal of their appeals, the majority said:

> Having exercised his power of review, under s. 31(4), his decision is, by the terms of that subsection, final. This decision was to grant to each of the persons involved a probationary period. The probationary periods expired and no step was then taken to enforce the orders. The Minister did not, thereafter, have power to make a further review and to decide to extend the probationary period for an additional time. . . .
>
> In my opinion, having made the decision which he did in each case, on his review of the decisions of the Immigration Appeal Boards, in the absence of any event occurring during the probationary period which would have justified his so doing, the Minister did not thereafter have the statutory authority to enforce the deportation orders.[21]

In the majority's opinion, the effective decision took place at the time of the dismissal of the appeal by the Minister.[22] There being no reprehensible conduct before the end of the probationary period, the deportation order could not be enforced either during the probationary period or afterwards. Nor, it seems, could the order be enforced after the probationary period ended for mis-conduct by the immigrant during the period.

This basis for their decision relieved the majority of making the distinction drawn by the minority. The minority differentiated between a decision by the Minister to quash the Special Inquiry Officer's decision, subject to a probationary period during which the deportation order could be revitalized if there was misconduct on the part of the accused, and a decision by the Minister to dismiss the immigrant's appeal subject to reconsideration after the probationary period. The minority clearly were of the opinion that the Minister's decision in the present case was of the latter nature and that it was within the Minister's power to reconsider the matter outside the stated probation period.[23] The majority view appears to be that, whatever the nature of the Minister's decision, having set the probation period, he could not reconsider the length of the period nor the substantive reasons for deportation.[24]

On the one hand the decision in the present case can be seen as an important limitation on the appellate discretion of the Minister of Citizenship and Immigration under the Immigration Act. An immigrant is now in a position to force the Minister to make an irrevocable decision on his case, which, combined with the immigrant's right to bring *mandamus* proceedings to require the Minister to consider his

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21 *Supra*, footnote 1, at p. 242 (S.C.R.), 525 (D.L.R.).

22 Thus the letter to Guiseppe Violi, informing him that he need not report to the Immigration office any longer, was of no legal significance, the effective decision having been made on the Minister's dismissal of the immigrant's appeal, when the probationary period was set.

23 *Supra*, footnote 1, at p. 235 (S.C.R.), 518-519 (D.L.R.).

24 *Supra*, footnote 21.

appeal,[25] substantially eliminates the danger of deportation orders being suspended indefinitely over the heads of immigrants residing in this country.

On the other hand, the Department of Citizenship and Immigration has many means of circumventing the decision in the present case.

(1) Apparently, all the Minister need do is rebut the presumption that the letter announcing the decision of the Minister to the immigrant was an official communication evidencing an actual decision by the Minister. He may do so by giving evidence in the *habeas corpus* proceedings that he did not in fact make a decision quashing the deportation order or suspending it for a probationary period, but rather failed to make any positive decision until later when the deportation order was implemented. The majority of the Supreme Court said:

> I think we are entitled to presume that these were properly authorized communications, in the absence of any evidence to the contrary, and the only authority for them is the exercise by the Minister of his power to review the decision of an Immigration Appeal Board under s. 31(4).[26]

(2) The Minister or Special Inquiry Officer has power to reopen the inquiry and receive further testimony or evidence, and reverse the decision previously made.[27]

(3) The Minister may order a new inquiry and issue a new warrant for the immigrant's arrest. A new deportation order may be made after such inquiry[28] on, it seems, the same evidence that was tendered at the inquiry leading to the first deportation order.[29]

(4) The Minister may, in his letter announcing the dismissal of the immigrant's appeal, state that the implementation of the deportation order will be deferred, but not state the duration of the probationary period. Although there is no express power in the Immigra-

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[25] *The Queen v. Leong Ba Chai*, [1954] S.C.R. 10, at pp. 14-15.

[26] *Supra*, footnote 1, at p. 241 (S.C.R.), 524 (D.L.R.). The minority disagreed. In their opinion, the letters to the Violis were not sufficient evidence of a decision to quash the deportation orders, subject to a probationary period. The dismissal of the Violis' appeals was not negatived by the imposition of probationary periods, since that was merely a deferral of the execution of a valid and subsisting deportation order, a deferral which the Minister had power to order under s. 31(4).

[27] Immigration Act, s. 29. *Quaere* whether an inquiry can be re-opened after an appeal has been taken to the Minister and dealt with by him under s. 31. The decision of the Minister on such an appeal is "final" according to s. 31(4) and the majority in the instant case held that the Minister does not have power further to review the matter. Does that exclude the right of the Minister, or Special Inquiry Officer, or majority of an Immigration Appeal Board to reopen an inquiry to hear further evidence or testimony? It would seem that the purpose of s. 31(4) is to exclude review by the courts, or by the Minister of an appealed decision on the evidence and testimony given at the inquiry and is not relevant to the reopening of an inquiry to deal with new evidence or testimony. Note, however, that a deportation proceeding may not be reopened on a previous deportation order that has been quashed by the court and so ceased to be a deportation order: *Samejima v. The King*, [1932] S.C.R. 640.

[28] Immigration Act, sections 15, 17, 19.

[29] *Samejima v. The King, supra*, footnote 27.

tion Act[30] to suspend the operation of a deportation order, it was the express opinion of the minority,[31] not rejected by the majority, that the Minister has such a power.[32]

(iii) *S. 39 of the Immigration Act*

S. 39 of the Immigration Act[33] contains a privative clause excluding the jurisdiction of the court

> . . . to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister, Deputy Minister, Director, Immigration Appeal Board, Special Inquiry Officer had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any person, upon any grounds whatsoever, unless such person is a Canadian citizen or has Canadian domicile.

The Courts, however, were quick to seize upon the words "given under the authority and in accordance with the provisions of this Act" to permit an investigation of any violation of the terms of the Act. In *Samejima v. The King*,[34] Duff J. said:

> In particular the phrase "in accordance with the provisions of this Act" cannot be neglected; their meaning is plain. The "order" returned as justifying the detention must be "in accordance with the provisions of this Act". It must not, that is to say, be essentially an order made in disregard of some substantive conditions laid down by the Act.[35]

Since *Samejima v. The King*, the Court has felt free to investigate and rule on all manner of legal errors committed in deportation proceedings.[36] More recently a Quebec court held that, notwithstanding s. 39 of the Immigration Act,[37] it had jurisdiction to investigate deportation proceedings to ensure that no civil rights conferred upon an immigrant by the Canadian Bill of Rights[38] had been violated.[39]

The opinion had previously been expressed, however, that s. 39 was effective to preclude the investigation by a court of a deportation order alleged to be invalid due to tardiness of implementation.[40] This was also the view taken by the majority in the Quebec Court of Queen's Bench, Appeal Side,[41] and by the minority in the Supreme Court where Abbott J. said:

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30 *Supra*, footnote 2.
31 *Supra*, footnote 1, at p. 235 (S.C.R.), 519 (D.L.R.).
32 Subject to those considerations raised in part (i) of this comment.
33 *Supra*, footnote 2.
34 *Supra*, footnote 27.
35 *Ibid.*, at p. 641.
36 For example, on a question (a) whether a legitimated child is a "child" within the meaning of the Immigration Act, R.S.C. 1927, c. 93, s. 38: *The Queen v. Leong Ba Chai, supra*, footnote 25; (b) whether persons born in Trinidad of Asian ancestry were "Asians" within the meaning of Regulation 20(2) passed under the Immigration Act, R.S.C. 1952, c. 325, s. 6(1)(g): *Narine-Singh v. Attorney-General of Canada*, [1955] S.C.R. 395.
37 *Supra*, footnote 2.
38 S.C. 1960, c. 44, Part I.
39 *Fouche v. Landry*, [1960] Que. B.R. 337 (Que. S.C.).
40 *In re Eng Jack Wan*, [1949] 1 W.W.R. 1133, 93 C.C.C. 283, 8 C.R. 164 (B.C.).
41 *Supra*, footnote 16, at p. 517.

> In the final analysis the Minister is the only person authorized under the Act to quash such an order. The courts have no power to do so.[42]

S. 39 was not referred to by the judges in the majority in the Supreme Court, presumably because their decision that the Minister had acted without statutory authority in reviewing the deportation orders after he had dismissed the appeals stripped the Minister of any protection under s. 39.

(iv) *The Canadian Bill of Rights*

No mention was made of the Canadian Bill of Rights[43] in the opinions delivered in the Supreme Court despite the fact that it was referred to in the decisions rendered in the court below and was squarely raised by the facts. In *Re Rebrin*,[44] the Supreme Court of Canada had previously considered the applicability of the Bill of Rights to proceedings under the Immigration Act, but in that case the appellant was unable to submit any evidence indicating that her rights had been infringed contrary to the Bill of Rights. The court did not specifically decide whether the Bill of Rights was applicable to deportation proceedings.[45] More recently in Quebec it has been held that the Immigration Act must be read subject to the Bill of Rights and that a court has a right to investigate the deportation proceedings to determine whether the provisions of the Bill of Rights have been complied with.[46] And in the *Violi* case itself, in the Quebec Queen's Bench, Appeal Side, Hyde J. held that if the Department of Citizenship and Immigration suspended deportation orders conditional during good behaviour and such orders were invoked without an opportunity for the immigrant concerned to know in what respect he had misbehaved since the issuance of the deportation orders, the Department would be acting in breach of s. 2(a) of the Bill of Rights.[47]

It is true that proceedings under the Immigration Act[48] have generally been classified as administrative[49] and that there are cases in which it is stated that the Canadian Bill of Rights is inapplicable

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[42] *Supra*, footnote 1, at p. 235 (S.C.R.), 519 (D.L.R.).

[43] *Supra*, footnote 38.

[44] (1961), 34 C.R. 412 (S.C.C.).

[45] *In re Frazer*, [1963] 1 C.C.C. 139 (N.S. C.A.) it was expressly left open whether the Immigration Act was subject to the Bill of Rights, it being the opinion of the Court that the Bill of Rights could not apply to a deportation order issued before (but implemented after) the coming into force of the Bill of Rights.

[46] *Fouche v. Landry*, *supra*, footnote 39.

[47] S. 2 ". . . no law of Canada shall be construed or applied so as to (a) authorize or effect the arbitrary detention, imprisonment or exile of any person."

[48] *Supra*, footnote 2.

[49] *Re Robinson*, [1948] O.R. 487 (Ont. H.C.); *Masella v. Langlais*, [1955] S.C.R. 263; *per* Abbott J.; *Ex parte Hirsch*, [1960] O.R. 554 (Ont. C.A.).

to administrative procedure.[50] It is suggested, however, that the Bill of Rights itself refutes the contention that it is inapplicable to administrative and more particularly deportation orders. S.2(d) of the Bill states that the right to counsel, protection against self-incrimination and other "constitutional" safeguards shall be afforded to persons appearing before a "court, tribunal, commission, Board or other authority." S. 2(a) states that "no law of Canada shall be construed or applied so as to (a) authorize or effect the arbitrary . . . exile of any person". If the word "exile" is to be restricted to the banishment of Canadian citizens only,[51] the rights conferred by the Immigration Act on Canadian domiciliaries will be limited,[52] the well established rule that the immigrant has the same right as anyone else to question, by *habeas corpus* proceedings, the validity of his detention under the Immigration Act,[53] will be overturned,[54] and the "equal protection" clause of the Canadian Bill of Rights itself will be violated.[55]

While there may be a need for a certain amount of discretion vested in those officers carrying out Department policy under the Immigration Act,[56] surely the rights afforded the immigrant under the Act,[57] the impact which such an order would have on the rights of the individual concerned,[58] the restrictive position the courts have taken with respect to s. 39 of the Act[59]—removing any discretion of the Department in matters of law—and the terms of the Canadian

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50 *Ex parte McCaud*, [1965] 1 C.C.C. 168 (S.C.C.). Application for *habeas corpus* contesting the right of a Parole Board to revoke the applicant's parole under the Parole Act, S.C. 1958, c. 38, which provides in s. 8(d) that "this Board may . . . revoke parole at its discretion". *Held*: as the granting or revoking of parole is an administrative matter and is not in any way a judicial determination, the Bill of Rights did not apply. See also *Guay v. Lafleur*, [1965] S.C.R. 12, 51 D.L.R. (2d) 226, where the Bill of Rights was held to be inapplicable to proceedings in an income tax inquiry which can result in no decision or adjudication and is therefore administrative.

51 The connotation of "exile" is forced removal from one's *own* country: Webster's New Collegiate Dictionary (1956) defines "exile" as "forced, or sometimes voluntary removal from one's country".

52 Immigration Act, sections 3, 4, 39.

53 *Supra*, footnote 2.

54 *Vaaro v. The King*, [1933] S.C.R. 36, 59 C.C.C. 1, [1933] 1 D.L.R. 359; subject, of course, to the Immigration Act itself.

55 The Canadian Bill of Rights, *supra*, footnote 38, s. 1. "It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights, and fundamental freedoms, namely, . . . (b) the right of the individual to equality before the law and the protection of the law." *Quaere*, whether s. 39 of the Immigration Act, considered in part (iv) of this casenote, offends against s. 1(b) of the Canadian Bill of Rights?

56 *Supra*, footnote 2.

57 The right to be present (and represented by counsel) at an inquiry ordered before possible deportation: s. 27; right to appeal to the Minister or Immigration Appeal Board: s. 30; the burden of proof is apparently on the Department when the immigrant is already in Canada: s. 27(4).

58 In this connection, note *Ridge v. Baldwin*, [1964] A.C. 40 in which the House of Lords appears to have adopted the degree to which a decision could affect the rights of the individual concerned as the test to determine whether such a decision is judicial in so far as requiring the adjudicator to adhere to the rules of natural justice. Also, in *Guay v. Lafleur*, *supra*, footnote 50, the Supreme Court of Canada appears to have been influenced by the fact that no decision affecting the rights of the taxpayer is given by the inquiry officer in arriving at the conclusion that an income tax inquiry is an administrative proceeding.

59 See *supra*, part (iii) of this comment.

Bill of Rights itself, all lend credence to the view that the discretion accorded these officials is to be restricted, perhaps not within the absolute terms of the Bill of Rights, but within some limited area determined by a balancing of the purposes of the Immigration Act[60] and the Bill of Rights.[61] However, if the Supreme Court is of the opinion that the subjection of an immigrant to the threat of a suspended deportation order for a long period of time and its eventual implementation against him without him being given an opportunity to know in what respects he has misbehaved since the deportation order was suspended does not constitute a violation of his rights to "life, liberty, security and the right not to be deprived thereof except by due process of law",[62] his right "to be informed promptly of the reason for his . . . detention",[63] or his right to a "fair hearing",[64] nor effects his "arbitrary detention, imprisonment or exile",[65] it is nevertheless submitted that the issue is not so clear as to warrant the complete avoidance of the Canadian Bill of Rights in a case in which its application was squarely raised by the facts.

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