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Article 6

Espaillat-Rodriguez v. The Queen [1964] S.C.R. 3

T. E. J. McDonnell

Espaillat-Rodriguez v. The Queen [1964] *S.C.R.* 3.

T. E. J. McDONNELL*

IMMIGRATION — NECESSITY FOR MEDICAL EXAMINATION AND VISA WHEN APPLICANT ALREADY IN CANADA.

> Oh what could you do in a case like that,
> What could you do but jump on your hat;
> Or on your toothbrush,
> Or your mother-in-law,
> Or anything that's helpless.
>
> Sandburg, *A horse named Bill.*

It has long been a presumption of the revenue law that there is no equity in a taxing statute, and the recent decision of the majority of the Supreme Court of Canada in *Espaillat-Rodriguez v. The Queen*[1] indicates that there may be no equity in the *Immigration Act*[2] either. The case involved the rather special situation of an alien legally in Canada on a diplomatic passport who was later desirous of taking up permanent residence in Canada after leaving the employ of his embassy.

The appellant, a citizen of the Dominican Republic, had legally entered Canada in November, 1961. In January, 1962, he exchanged his diplomatic passport for an ordinary passport. At the same time, he lost his non-immigrant status, and, pursuant to s. 7(3) of the *Immigration Act* he reported to an immigration officer and applied to become a permanent resident of Canada. After a hearing before a Special Inquiry Officer under ss. 27 and 28 of the Act, an order of deportation was made against him on the ground that he was a person not entitled to come into Canada as of right,[3] and was a member of the prohibited class described in s. 5(t) of the Act (a general catch-all provision excluding persons who do not otherwise comply with the Act or Regulations) because (a) he was not in possession of a valid and subsisting immigrant visa issued by a visa officer as required by s. 28(1) of the *Immigration Regulations,* Part I, and (b) his passport did not bear a medical certificate duly signed by a medical officer, nor was he in possession of a medical certificate in the form prescribed by the Minister as required by s. 29(1) of the Regulations.

It was not disputed that the appellant was in excellent physical condition, but the Department took the position that the lack of a certificate and immigrant visa brought him within the class of prohibited persons, as set out in the Act. An immigrant visa is merely the signature of a visa officer (defined by Regulation 2(h) to be an immigration officer stationed *outside Canada,* and authorized to issue visas) and thus the effect of the order was to require the appellant to leave

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*Mr. McDonnell is a third year student at Osgoode Hall Law School.

1 [1964] S.C.R. 3.

2 R.S.C. 1952, c. 325.

3 S. 28(2) provides that only persons who are Canadian citizens or who have a Canadian domicile are entitled to come into Canada as of right.

Canada in order to get back in again. As Ferguson J. observed in the trial decision of *Ex Parte Mannira,* which dealt with an almost identical situation:

> "If the applicant was otherwise entitled to remain in Canada the inquiry took on a Gilbertian flavour — indeed, it became a farce in ordering the applicant deported because he didn't have that which he was applying so earnestly to get from the persons empowered to give it to him.[4]

In *Espaillat,* an appeal to the Immigration Appeal Board, under s. 31 of the Act, was dismissed and the decision was subsequently confirmed by the Minister. The appellant then brought proceedings by way of *certiorari* to quash the deportation order on the ground of lack of jurisdiction. The application was refused by the High Court, and an appeal to the Court of Appeal was dismissed without reasons, following the *Mannira* case. The appellant then appealed to the Supreme Court of Canada.

It may be convenient to note certain provisions of the Act and Regulations at this point:

Section 7(3) of the Act provides that where a person who entered Canada as a non-immigrant ceases to be a non-immigrant, he shall present himself to the nearest immigration officer for an examination and shall, "for the purposes of the examination and all other purposes under this Act be deemed to be a person *seeking admission to Canada.*"

Section 61 authorizes the Governor-in-Council to make regulations concerning the "terms, conditions and requirements with respect to the possession of . . . passports, visas, or other documents pertaining to admission".

Regulation 28(1) is such a regulation, and provides that no immigrant shall be granted landing in Canada without an immigrant visa issued to him by a visa officer.

Regulation 29 provides that no immigrant shall be granted landing in Canada without a medical certificate.

Section 39 is a privative clause and provides that no order of the Board shall be subject to review by the courts.

The appellant argued that the deportation order was *ultra vires* the Special Inquiry Officer, either because Regulation 28 was not applicable in this case, since it was intended to apply only to persons seeking admission from *outside* Canada, or because it constituted an improper delegation to specified immigration officials, since it purported to vest in them an absolute discretion to grant or refuse an immigration visa. In addition, he argued that the order was *ultra vires* because Regulation 29, in requiring that no immigrant should be granted a landing in Canada without a medical certificate, necessarily contemplated that the immigrant be given an opportunity to

[4] (1959) 17 D.L.R. (2d) 482 (Ont. C.A.).

appear before a medical officer who might grant or refuse a medical certificate in accordance with the regulations and a deportation order made on the basis of an absence of a medical certificate, when no opportunity was given to afford one, was invalid. In fact, no opportunity had been given to the appellant to appear before a medical officer, although he requested that he be allowed to do so.

The judgment of the majority of the court was delivered by Abbott J., speaking for Taschereau C.J. and Judson and Hall JJ.. The learned judge dismissed the appeal and affirmed the order of deportation. He felt that Section 7(3) covered the situation and that the appellant had no higher rights than a would-be immigrant presenting himself at a port of entry for admission as a permanent resident of Canada. He recognized that the Regulations contemplated that persons seeking permanent admission should be examined abroad, in the homeland of the prospective immigrant, and observed, without comment, that "no doubt there are sound reasons for such a requirement".[5] In addition, he pointed out that immigration officers at points of entry in Canada are given no authority to grant such a visa.

Judson J. stated that Regulation 28 was valid, without giving reasons. He merely observed that "it [the power to grant visas] must be entrusted to someone and the duty of such officers is to ascertain whether or not an applicant for permanent landing in Canada comes within one of the prohibited classes".[6] He concluded by observing that since the order had been made under the authority of, and in compliance with, the provisions of the Act, the court had no jurisdiction to interfere with the order, because of Section 39.

Cartwright J. would have allowed the appeal on the ground that Regulation 28 was inapplicable in this case. In his opinion, the purpose of the Act as a whole was to regulate the admission to Canada of persons who were neither Canadian citizens nor possessed of Canadian domicile. By Sections 20(1) and 27 of the Act they were entitled to a hearing, and if they could prove that they were not within a prohibited class, they had a right to be admitted by a Special Inquiry Officer. Regulation 28 was meant to apply to prospective immigrants in foreign countries, and did not create an additional prohibited class; rather "it envisage[d] a preliminary inquiry as to whether the appellant [fell] within any of the prohibited classes already created."[7] In other words, it was a procedural rather than a substantive provision and thus was inapplicable to an applicant already lawfully in Canada. The learned judge observed that to require such a person to return to his own country for an examination would

5 *Supra*, footnote 1, at 8.
6 *Id.*, at 17.
7 *Cf. Attorney-General for Canada v. Brent*, [1964] S.C.R. 318, where it was held that a Regulation delegating power to a Special Inquiry Officer to decide who should be allowed to enter Canada was *ultra vires* as an improper delegation of discretion.

be contrary to the maxim *lex neminem coget ad vana seu inutilia.* (The law compels no one to do useless things.) Thus the general words with which s. 7(3) concludes (*i.e.,* that when a person in Canada ceases to be a non-immigrant, he shall "for the purposes of the examination and all other purposes under this Act, be deemed to be a person seeking admission to Canada) could not be applied literally to a person already lawfully in Canada. He also pointed out that a literal application of the section would render the inquiry, in cases arising under Section 7(3), a mere formality that could only result in the applicant being deported to his own country to be examined there. Since the Act provides that an applicant is entitled to a hearing, Section 7(3) should not be interpreted in a way which would effectively take away this right.

Regulation 29 was construed in a similar way. Since the applicant had not been given an opportunity to submit himself to a medical examination, he had been denied the type of hearing to which under the Act and the common law he was entitled. The Special Inquiry Officer should have proceeded to inquire and decide if the appellant was in fact a member of any prohibited class and should have given him an opportunity to obtain a medical certificate. Since this was not done, the deportation order was not made in accordance with the provisions of the Act, and therefore should be quashed. Since the deportation order had not been made in accordance with the Act the privative clause was not applicable, and the court had jurisdiction to quash the order.

It will be noted that the argument that Regulation 28 is procedural depends, *inter alia,* on the conclusion that the Special Inquiry Officer is under a duty to grant an immigrant visa to any applicant who proves he is not within a prohibited class, as a matter of right. In an *obiter dictum,* Cartwright J. expressed the view that if Regulation 28 were not construed as casting such a duty on the Special Inquiry Officer, then it was *ultra vires,* since it would leave it to the uncontrolled discretion of that officer to grant or withhold the visa as he saw fit.[8]

At first glance, the conclusion reached by Cartwright J. seems more appealing than that reached by the majority, but it is submitted that nonetheless the majority decision is correct. While it is true that the situation in this case is one which arises very infrequently and consequently may not have been contemplated expressly by Parliament, the judgment of Cartwright J., it is submitted with respect, does not go far enough to justify changing the result arrived at by the majority. The key to the decision is a determination of the over-all purpose of the Act. Cartwright J. felt that an applicant was entitled as a matter of right, on proving that he was not a member of a prohibited class, to be admitted to Canada *by a Special Inquiry*

[8] *Supra,* footnote 7.

Officer. In light of the *Brent*[9] decision, this must be so as regards the Special Inquiry Officer, but it leaves unanswered the question of the status of an applicant for landing in Canada *generally*, under the Act. In other words, the position of the Special Inquiry Officer aside, the question is whether any one is entitled to enter Canada *as of right* if he complies with the provisions of the Act. It is submitted that the answer must be in the negative. A reading of the Act as a whole leads one to the conclusion that the Minister is given an overriding discretion to determine who is and who is not a suitable immigrant.[10] In the instant case, the appellant's position was reviewed on two separate occasions by the Minister, and both times his application was refused. Very little was said about this aspect of the case in either of the judgments, and there was no indication that the Minister had acted in bad faith in refusing the application. Consequently, even if Cartwright J. was correct in holding that the deportation order was *ultra vires* the Special Inquiry Officer, his judgment does not get around the difficulty that the deportation order was confirmed by the Minister in a valid exercise of his discretion, and consequently was in accordance with the provisions of the Act. Such being the case, the privative clause was applicable and the court had no jurisdiction to quash the order.