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CASE COMMENT: ICTENSEV v. THE MINISTER OF EMPLOYMENT AND IMMIGRATION

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An unfortunate series of events lead to the illegal detention of Ethem Ictensev. He was detained in jail for a period of more than two years until his release was ordered by a judge of the Supreme Court of Ontario.[1]

Ethem Ictensev is a citizen of Turkey, who arrived in Canada on August 1st, 1986. He claimed refugee status. A report was then written, pursuant to Section 20 of the *Immigration Act*[2], as Mr. Ictensev had arrived in Canada without the proper visa. He was told to report for his inquiry on September 9th, 1986. Until then, he was free to remain at large in the community, out of custody.

On September 9th, Ethem Ictensev came to his inquiry without counsel. A Turkish interpreter was present, as Mr. Ictensev spoke only limited English. The inquiry commenced but did not proceed. The adjudicator was not satisfied that Mr. Ictensev had been advised of his right to counsel prior to the hearing. In such circumstances, Section 27(3) of the *Immigration Regulations, 1978* requires the adjudicator to adjourn.[3]

After announcing her decision to adjourn, the adjudicator asked the case presenting officer, who represents the Minister of Employment and Immigration at such hearings, if she was content with Mr. Ictensev's continued release. The officer requested a recess before responding, and this request was granted.

During the recess, the case presenting officer questioned Mr. Ictensev about a number of things, including his experiences in Turkey. This occurred in spite of the fact that it had just been determined that Mr. Ictensev had not been advised of his right to counsel. The questioning

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1. *Ictensev v. The Minister of Employment and Immigation* (1988) 7 Imm.L.R. (2nd) 306 (S.C.O.) [hereinafter *Ictensev*].

2. R.S.C. 1985, c. I-2.

3. SOR/78-172.

took place in the absence of counsel.

After the recess, the case presenting officer stated that she was not content with Mr. Ictensev's continued release. She then proceeded to make a lengthy submission, which included information obtained from Mr. Ictensev, during the recess, to the effect that he should be detained.

After hearing the officer's submissions, the adjudicator advised Mr. Ictensev that she had to decide whether she ought to continue his release or order his detention. She then stated:

> "Now you still have not been advised of your right to be represented by counsel at this inquiry. You have the right to be represented by a counsel. Such a counsel can be a lawyer or any other person, and you don't have to say anything at this inquiry until you have an opportunity to consult a counsel. However, if you wish to address the issue of your detention or your release you may do so at this time. Is there anything you would like to say?"[3a]

Mr. Ictensev responded that he did not want to get a lawyer or counsel at the moment, but would like to answer right then. The adjudicator then advised Mr. Ictensev that she had some questions for him. She indicated that if he did not wish to respond to the questions without counsel, that was his right, but that she was very concerned about his being a danger to the public. She then proceeded to question Mr. Ictensev, which questioning covered seven pages of the transcript of the hearing.

At the conclusion of the adjudicator's questions, Mr. Ictensev stated, "after answering all these questions by myself now, do I have a right to get a counsellor?" The adjudicator replied, "you have a right to get a counsel at any stage of the proceedings, Mr. Ictensev. Please proceed, Mrs. N. (the case presenting officer)." The case presenting officer then proceeded to question Mr. Ictensev for five pages of the transcript.

In the end, Mr. Ictensev was ordered detained pursuant to s.103(3) of the *Immigration Act*.[4] Under this section, where an inquiry is to be held or continued with respect to a person, an adjudicator may make an order for the detention of the person where, in his opinion, the person poses a danger to the public or would not otherwise appear for the inquiry or continuation thereof. Mr. Ictensev was ordered detained for both reasons.

3a. Transcript of the Inquiry for Mr. Ictensev.

4. *Supra*, note 2.

It is clear from a reading of the transcript of the inquiry, on September 9, 1986, that the adjudicator was not satisfied with the interpreter's performance. For example, she expressed doubt as to whether he was translating accurately; had to request him to translate certain portions of the proceedings; had to remind him to translate exactly what she said and not as he wished; suggested that discrepancies in the evidence might be attributed to the interpreter; had to stop the inquiry to ask whether the interpreter was correctly interpreting; and had to ask the interpreter to use the exact language that Mr. Ictensev was using. Furthermore, the interpreter at times spoke in the third person when translating Mr. Ictensev's words, admitted that he had not translated one of the adjudicator's questions to Mr. Ictensev as asked, and occasionally could not hear what was said.

Under the provisions of the *Immigration Act*, an adjudicator was required to review Mr. Ictensev's detention every seven days. This was done, but on each occasion, the adjudicator referred to statements made by Mr. Ictensev on September 9th, 1986, and on such basis ordered his continued detention. At a number of these detention reviews, Mr. Ictensev was represented by counsel.

In the fall of 1988, an application for *habeus corpus ad subjiciendum with certiorari in aid* was brought in the Supreme Court of Ontario. It was argued that at this inquiry on September 9th, 1986, Mr. Ictensev's rights had been violated, pursuant to the *Charter of Rights*[5] and the *Immigration Act*, and that this initial proceeding had tainted all subsequent detention reviews. It was submitted that Mr. Ictensev's detention was illegal and he should therefore be released immediately. In his decision Mr. Justice McKeown accepted all of these arguments, and the application was successful. After more than two years of illegal detention, Mr. Ictensev was ordered released from jail.

The *Ictensev* decision itself is not lengthy. However, from a legal perspective, the decision is interesting for two reasons: one's right to an interpreter, and one's right to counsel.

Both the *Charter* and the *Canadian Bill of Rights*[6] deal with the right to the assistance of an interpreter. Section 14 of the *Charter* states that "a party or witness in any proceedings who does not understand or speak

5. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 (hereinafter the *Charter*).

6. S.C. 1960, c. 44 (R.S.C. 1970, Appendix III).

the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter".[7] Section 2(g) of the *Canadian Bill of Rights* is similarly worded.[8] Furthermore, section 27(2)(c) of the *Immigration Regulations, 1978* requires adjudicators to satisfy themselves that the person concerned is able to understand and communicate in the language in which the inquiry is being held.[9] Where the adjudicator is not satisfied, the inquiry should be adjourned to enable the case presenting officer to obtain the services of an interpreter.[10] Where an interpreter is required, he or she must swear an oath to translate accurately to the best of his or her ability all the questions asked, answers given and statements made at the inquiry.[11]

The leading case concerning one's right to the assistance of an interpreter is a 1974 Supreme Court of Canada decision, *R.* v. *Reale.*[12] Throughout his trial for noncapital murder, Mr. Reale had the services of an interpreter. Interpretation was provided for the final jury addresses of both Crown and defence counsel. However, when it came to his charge to the jury, the trial judge dispensed with the interpreter because he felt that interpretation at this stage might distract the jury. The majority of the Supreme Court found that this ruling resulted in a violation of Section 2(g) of the *Canadian Bill of Rights.*[13] Further, Section 577(1) (now Section 650) of the *Criminal Code* provides that "an accused other than a corporation shall be present in court during the course of his trial".[14] According to *Reale*, without an interpreter assisting him at "every" stage of the proceeding, the accused person in a criminal proceeding is effectively not present, which is his right.[15]

The Court of Appeal, in its reasoning in *Reale*, related one's right to an interpreter to the concept of equality.[16]

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7. *Supra*, note 5.
8. *Supra*, note 6.
9. *Supra*, note 3.
10. *Ibid.* at s.27(3).
11. *Ibid.* at s.28(b).
12. (1975), 22 C.C.C.(2d) 571 (S.C.C.) [hereinafter *Reale*].
13. *Supra*, note 6.
14. R.S.C.-1985 c. C-46.
15. *Supra*, note 12.
16. (1974), 13 C.C.C. (2d) 345 (Ont.C.A.).

The Court of Appeal wrote:

> "An accused who is unable to understand what is being said during an essential part of the trial by reason of his inability to understand the language in which the trial is conducted can scarcely be said to stand on the same footing or in an equal position with respect to the application of the criminal law as others who are subject to its process."[17]

Similarly, reading Section 14 of the *Charter* in conjunction with Section 15, one can say that without the full assistance of an interpreter, persons requiring such assistance are not equal before the law with those for whom such assistance is not required.[18]

In *Weber* v. *Minister of Manpower and Immigration*, the Federal Court of Appeal held that "since the rights of an individual are ... at issue, the reasoning in the *Reale* case (was) applicable in an (immigration) inquiry."[19] In *Weber*, the evidence of one of the witnesses called by the person concerned had not been translated to such person. To rectify this error, the special inquiry officer (adjudicator) provided a summary of the evidence, which was duly translated. This evidence, clearly, was irrelevant to the allegation being made against the person concerned and presumably would have had no effect whatsoever on the decision made at the inquiry. In a review of the decision, the Federal Court of Appeal held that the "failure to interpret *verbatim* the testimony of a witness called on her behalf, deprived the Applicant of her fundamental right to know what was being said in an essential part of the Inquiry" (emphasis added).[20] Moreover, the special inquiry officer's attempt to correct this failure by summarizing the evidence did not cure theherror. "The Applicant," said the Court, "was entitled to know *exactly* what was said ..."[21]

Weber goes far in establishing the extent of one's right to the assistance of an interpreter. In *Faiva* v. *The Minister of Employment and Immigration*, the Federal Court of Appeal goes even further in demonstrating how almost absolute this right is, in the context of an immigration

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17. *Supra*, note 16 at 348-9.

18. *Supra*, note 5.

19. (1977), 13 N.R. 495 at 500 (Fed.C.A.) [hereinafter *Weber*].

20. *Ibid.* at 500.

21. *Ibid.*

hearing.[22] In this case, the applicant was from Tonga, and spoke the Tongan language. The inquiry was adjourned so that a Tongan interpreter could be found. However, none could be found. After a number of adjournments, the case presenting officer informed the adjudicator that every possible effort to find an interpreter who could speak Tongan had been made but they had been unsuccessful. The adjudicator was faced with a dilemma. He had a responsibility to conduct the inquiry, but he also was required to provide the person concerned with an interpreter.

In the end, the adjudicator decided to "relax somewhat the requirements concerning a person concerned's ability to understand and communicate," and proceeded with the inquiry in English.[23] He found that Mr. Faiva had remained in Canada after he had ceased to be a visitor, and ordered his removal. In his decision, the adjudicator stated that "I am satisfied from your testimony that your command of the English language is and has been sufficient for you to effectively communicate at this inquiry and to understand the questions put to you and all other matters at this inquiry."[24] In spite of this, the Federal Court of Appeal overturned the decision. The Court held that the adjudicator's "duty to conduct an inquiry was subject to the requirement that an interpreter be provided.... If an interpreter was required, which was clearly (the adjudicator's) opinion, and could not be provided, he no longer had a duty to proceed with the inquiry. He did not have the right to do so."[25]

Mr. Justice McKeown cited *Faiva* in deciding *Ictensev*. However he went one step further by stating "once the adjudicator decided that the interpreter was unsatisfactory, she should have adjourned the inquiry."[26] Furthermore, the right to the assistance of an interpreter means the right to the assistance of a *competent* interpreter. Mr. Justice McKeown states that s.14 of the *Charter* can only be interpreted as meaning a qualified interpreter."[27] This may seem trite, but such judi-

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22. (1983), 47 N.R. 225 (Fed.C.A.) [hereinafter *Faiva*].

23. *Supra*, note 22 at 228.

24. *Ibid.*

25. *Ibid.*

26. *Ictensev, supra,* note 1 at 1.

27. *Ibid.*

cial statements are clearly helpful in situations where one has the slightest doubt about the ability of an interpreter. One's right to have every word spoken at a hearing translated accurately and competently is well supported by Canadian case law.

One final word with respect to interpretation: all of the rights associated with interpretation into English or French apply equally to those whose need for an interpreter is the result of a hearing impairment. In the recent case of *Murphy* v. *Dodd*,[28] the Court of Appeal overturned an injunction against a deaf woman on the grounds that the notice of proceedings had not properly been interpreted to Ms. Dodd. Query whether a similar ruling would be made where the respondent/defendant requires an interpreter because of his or her lack of fluency in English or French?

A number of issues arose in *Ictensev* concerning Mr. Ictensev's right to counsel. Section 10(b) of the *Charter* provides that "everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right."[29] Was Mr. Ictensev detained? Clearly, he had not been arrested when the adjudicator announced that she had to "decide whether (she) ought to continue (his) release or ... order (his) detention."[29a] Support for the notion that Mr. Ictensev was "detained" at this point can be found in *R.* v. *Therens*, a decision of the Supreme Court of Canada.[30] In that decision, Mr. Justice Le Dain considered the meaning of detention. He writes:

> "[Section] 10 of the *Charter* is directed to a restraint of liberty other than arrest in which a person might reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee."[31]

Mr. Justice Le Dain continues:

> "There can be no doubt that there must be some form of compulsion or coercion to constitute an interference with liberty or freedom of action that amounts to a detention within the meaning

28. (11 July 1989), No. 1566/89 (S.C.O.).

29. *Supra*, note 5.

29a *Supra*, note 3a.

30. (1985) 18 D.L.R. (4th) 655 (S.C.C.) [hereinafter *Therens*].

31. *Ibid.* at 678.

> of s.10 of the *Charter*. The issue, as I see it, is whether that compulsion need be of a physical character, or whether it may also be a compulsion of a psychological or mental nature which inhibits the will as effectively as the application, or threat of application, of physical force. The issue is whether a person who is the subject of a demand or direction by a police officer or other agent of the State may reasonably regard himself or herself as free to refuse to comply."[32]

In considering whether it would be reasonable for a person to regard himself or herself as free to refuse to comply, the Mr. Justice Le Dain allowed that one's perception of such freedom would be of greater relevance than the precise legal limits of the State's authority to detain, of which most citizens would not be aware.

> "The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist."[33]

In the context of an immigration inquiry, where the person concerned is probably a newcomer to Canada, may speak little English and is generally in a state of some anxiety, such a definition of detention is extremely important. Like Mr. Ictensev, most persons in such a situation will feel compelled to remain at the inquiry. It is unlikely that many will believe that they can simply leave the proceedings whenever they wish.

As a rule, immigration officers deny recent arrivals to Canada access to counsel when such persons are being questioned at the point of entry. Again, one's ability in English or French as well as one's level of anxiety would contribute to one's mental state at this time. Statements made to immigration officers in such circumstances are invariably recorded, and may be used against the person concerned at a later date. *Therens* and *Ictensev* certainly support the view that at this stage, those persons held by immigration authorities should be made aware of their right to counsel. Furthermore, according to the Supreme

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32. *Supra*, note 30 at 678.

33. *Ibid.* at 680.

Court of Canada in *R.* v. *Manninen*, detainees must be provided with a reasonable opportunity to retain and instruct counsel without delay.[34] Simply advising one of his or her rights at this point is not enough to satisfy the provisions of Section 10(b) of the *Charter*.[35]

Finally, a waiver of one's right to counsel should not be treated lightly, as it was in *Ictensev*. In the words of Madame Justice Wilson in *R.* v. *Clarkson*:[36]

> "[T]his court (Supreme Court of Canada) stated with respect to the waiver of statutory procedural guarantees in *R. v. Korponary*, [1982 1 S.C.R. 41;... at p. 49, that any waiver '... is dependent upon it being *clear and unequivocal that the person is waiving the procedural safeguard and is doing so with the full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process.*' " (emphasis in original)

Too often, the duty of those in authority to advise someone of his or her right to counsel is merely given lip service. To his detriment, that happened to Mr. Ictensev.

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34. (1987), 76 N.R. 198 at 206 (S.C.C.).

35. *Supra*, note 5.

36 (1986). 66 N.R. 114 at 126 (S.C.C.).