Fernando Arduengo Naredo and Nieves del Carmen Arduengo v. Minister of Employment and Immigration

MULDOON J. (Reasons for Decisions): -- For no apparent reason, the title of this proceeding in the originating document was cluttered with unnecessary references and two styles of cause. The court, of its own motion and in accordance with the Rules (Forms 2 and 7.1 adapted) will order nunc pro tunc that the style of cause be simplified down to what appears above.

The applicant's apply, pursuant to section 18 of the Federal Court Act, and pursuant to a judge's order dated August 9, 1989, in file no. 89-T-646, granting leave to proceed, for orders described thus:

(1) a writ of certiorari quashing the deportation order made against the applicants pursuant to section 37(6) of The Immigration Act, (sic) 1985 as amended, S.C. 1988, C. 35, these orders having been issued by James Bissett for the Minister of Employment and Immigration on the 28th day of March, 1989, and served on the Applicants on July 5th, 1989;

(2) a writ of prohibition directed to the Respondent and her officials to prohibit the removal of the Applicants from Canada pursuant to the said deportation orders;

(3) a writ of mandamus directing the Minister and her officials to process the Applicants for landing pursuant to section 114(2) of The Immigration Act, (sic) 1985.

The grounds for the applicant's motion are expressed to be:

(1) that the Respondent Minister and her officials are estopped in law from deporting the Applicants in the face of a lawful exercise of a statutory power of discretion exercised in favour of the applicants to process them for landing in Canada pursuant to section 114(2) of The Immigration Act, (sic) R.S.C. 1985, c. 1-2.

(2) that the deportation orders issued against the Applicants should be stayed or prohibited on the grounds that the conduct of the Respondent Minister and her officials in issuing the orders and taking steps to remove the Applicants is an abuse of process in law.

(3) that section 37(6) of The Immigration Act, (sic) R.S.C. 1985, c, I-2 which permits the issuance of a deportation order against a person by Ministerial discretion fails to comply with the principles of fundamental justice within the context of section 7 of The Charter of Rights and Freedoms, (sic) 1982, and fails to provide equal protection and benefit of the law to the Applicants within the context of section 15 of The Charter of Rights and Freedoms, (sic) 1982, and as such, such deportation orders are not valid in law.

(4) and such further and other grounds as counsel may advise and this Honourable Court may permit.

Affidavits were filed for the applicants being respectively sworn by the female applicant and a law clerk. They were not cross-examined by the respondent's counsel.

In their motion record, the applicants at tab B, provide a recitation of facts which the respondent "accepts as substantially correct", except "with respect to paragraph 22". Here is that recitation:

1. The Applicants herein, Fernando Arduengo Naredo and Nieves Del Carmen Arduengo, are the subjects of Ministerial deportation orders, issued pursuant to section 37(6) of the Immigration Act, R.S.C. 1985 on and served on them on July 5th, 1989. Affidavit of N. Arduengo, Ex. "K"

2. Th Applicants arrived in Canada on February 2nd, 1978 from Chile via Miami, Florida. They made application shortly after their arrival in Canada under the policy guidelines in existence at the time to be recognized as Convention refugees in Canada. Their application rejected by the Minister of Manpower & Immigration. (sic) Affidavit of N. Arduengo, paras. 2

3. Subsequent to the provisions of the Immigration Act, 1976 coming into force on April 10th, 1976, the Applicants made application in the course of their immigration inquiries pursuant to section 45(1) of the Act, to be recognized in Canada as Convention refugees. Their inquiries were adjourned on June 15th, 1979 in order to permit them to be examined under oath. The Applications were jointly examined under oath on July 17th, 1979 by a senior immigration officer Mr. G.P. Garvin, the Registrar of the Refugee Status Advisory Committee, advised them by letter dated February 1st, 1980, that the Minister of Employment & had determined that they were NOT Convention refugees. Affidavit of N. Arduengo, paras. 3-5

4. The Applicants filed applications for redetermination to the Immigration Appeal Board by notice of application for redetermination dated March 31st, 1980. Their applications for redetermination were allowed to proceed to a full hearing of the Board, which were held jointly on October 1st, 3rd, and 14th, 1980. Affidavit of N. Arduengo, paras. 6-7

5. The Board determined that the Applicants were NOT Convention refugees. Review of this decision was sought under section 28 of the Federal Court Act. The federal Court of Appeal, by judgement dated December 18th, 1981, allowed the section 28 application, set aside the Board's decision and referred the matter back to the Board for a redetermination of the Convention refugee status of both Applications. The applications for redetermination of both Applicants were reopened before the Immigration Appeal Board by notice of the Respondent dated March 16th, 1962. Affidavit of N. Arduengo, paras. 8-10

6. The reopened redetermination applications were to be heard by the Immigration Appeal Board on July 13th, 1982. However, the Minister of Employment & Immigration at that time had announced a landing policy for Chileans who had been in Canada before a certain date. The Applicants were advised through their counsel after an interview with a senior immigration officer that the manager of the Toronto Enforcement Canada Immigration Centre had determined that they would receive Minister's Permits to be processed for landing in Canada upon withdrawal of their redetermination applications before the Immigration Appeal Board. As a result the Applicants through their counsel sent a letter dated June 22nd, 1982 to the Board withdrawing their redetermination applications. The withdrawals were required by the Immigration Commission as a condition of receiving the Minister's permits as promised. In seeking landing under the policy guidelines covering pre-visa Chileans, the Applicants, through their counsel and in their interview fully disclosed their circumstances including their involvement in the intelligence service of the Chilean police, in order that a proper decision could be made. Affidavit of N. Arduengo, para 11, Ex. "A" Affidavit of T. Jackman, paras. 3-4, Exs. B-C

7. The Immigration Commission revoked its decision to issue Minister's Permits to the Applicants, after they had withdrawn their redetermination applications before the Immigration Appeal Board. This decision to revoke was confirmed by the Minister's office after representations by the Applicant's counsel. The Minister's Departmental Assistant in his letter of November 8th, 1983 indicated that the Applicant's cases had been reviewed by the Minister personally and that their cases were not deserving of favourable consideration despite the policy for pre-visa Chileans because the Applicant's had been party to acts of torture and did not deserve the protection of a democratic institution. This, the Departmental Assistant indicated, reflected the principle and intent of Article 1 of the United Nations Convention Relating to the Status of Refugees and the Protocol. The Departmental Assistant indicated that the Applicant's inquiries would proceed and that should removal orders be issued the Applicants would be allowed time to arrange their affairs and to seek admission to a third country. Affidavit of N. Arduengo, para 12, Ex "B" Affidavit of T. Jackman, paras. 5-8, Exs.

8. As a result of the fact that the Commission revoked its decision to issue Minister's Permits, the Applicant, Fernando Arduengo Neredo's inquiry was scheduled to resume on

February 16th, 1984. The Applicants applied to the immigration Appeal Board to reopen their redetermination applications which had been withdrawn when they were advised that permits were to be issued to them. The Board allowed their motion to reopen by order dated June 25th, 1984 and signed June 27th, 1984. Affidavit of N. Arduengo, paras. 13-14

9. The Applicants appeared before the Board again on February 20, April 9 and April 11, 1985 on the reopened redetermination applications. The Board again dismissed their applications determining again that they were not Convention refugees by decision dated April 15th, 1985 and signed April 17th, 1985. Affidavit of N. Arduengo, para. 15

10. The Applicants applied to the Federal Court of Appeal pursuant to section 28 of the Federal Court Act to have the Board's decision reviewed and set aside. This application was never heard by the Court. It was withdrawn because the Minister of State for Immigration, the Reverend Walter McLean, agreed to process their applications for landing from within Canada on humanitarian and compassionate grounds. Affidavit of N. Arduengo, para. 16

11. After the Immigration Appeal Board dismissed the Applications' redetermination applications for the second time, the Applicant's counsel and several members of Parliament made representations to the Minister of State for Immigration, Walter McLean that he exercise his humanitarian and compassionate discretion to permit the Applicants to be landed from within Canada. The Minister of State for Immigration, Walter McLean, advised Mr. Michael Kilson, P.C., M.P. by letter dated April 15th, 1986 that he had decided that there were sufficient humanitarian and compassionate grounds to warrant the processing of the Applicants' applications for permanent residence as exceptions to the Immigration legislation. Affidavit of N. Arduengo, paras. 17-18, Exc"C" Affidavit of T. Jackman, para. 9, Ex.1

12. The Applicants were issued Minister's Permits on April 15th, 1986. Their inquiries were formally resumed and concluded on the basis that they had lawful permission to be in Canada. They withdrew their section 28 applications which were pending before the Federal Court of Appeal because of the decision to process them for landing on humanitarian and compassionate grounds. Affadavit of N. Arduengo, para. 19

13. In May, 1986 an article appeared in the Globe & Mail concerning Rev. Walter McLean's decision, as the Minister of State for Immigration to accept the Applicants for landing in Canada on humanitarian and compassionate grounds. There was public criticism from some members and organizations within the Children community about this decision. Affidavit of N. Arduengo, para. 20

14. The Applicants were sent formal applications for permanent residence and called into the Toronto East Canada Immigration Centre on November 13th, 1986. At that time their applications for permanent residence were not proceeded upon as the officer advised them that their case was being reviewed again and any action on it was suspended for the time being. Affidavit of N. Arduengo, para. 21 Affidavit of T. Jackman, para. 10, 11, 16, Exs.R, S

15. The Applicants did not hear any thing further form the Minister of Employment & Immigration or her officials for the next two years. Their Minister's Permits were extended from time to time and they were advised that their cases were still being considered. Affidavit of N. Arduengo, para. 22 Affidavit of T. Jackman para. 13, 27, Ex.T

16. By letter dated December 28th, 1988 from the Acting Manager of the Toronto North Canada Immigration Centre, the Applications were advised that their Minister's Permits would not be extended on the Minister's own motion beyond January 24th, 1989, the date that they expired. They were advised to depart Canada by February 26th 1989 or proceedings under the Immigration Act would be commenced against them, although the nature of the proceedings to be taken were not specified in the letter. Affidavit of N. Arduengo, para. 23, Ex."D" Affidavit of T. Jackman, para. 18. Ex. U

17. Since receiving this notice, the Applicants' counsel has been corresponding with the Minister's Office. The Minister has twice in writing confirmed her decision to deport the

Applicants from Canada. Affidavit of N. Arduengo, para. 24, Exs "E" "F", "G" "H" para. 25, Exs. "I", "J" Affidavit of T. Jackman, para. 19, Ex. V

18. The Applicants were advised to report to the Toronto enforcement Canada Immigration Centre on July 5th, 1989. On that date they were handed orders of deportation issued against them. They were advised that travel arrangements had been made for them to be returned to Chile on July 25th, 1989. The Applicants have not been removed from Canada in view of the proceedings launched before this Honourable Court. Affidavit of N. Arduengo, para. 26, Ex.

19. The Applicants have two children, Fernando, born September 9, 1978, and Franky, born October 10th, 1980 both in Toronto. Their children have always lived in the Toronto area. Removal of the Applicants from Canada would disrupt the children's lives severely as they would be travelling to a country which they have not visited and in which a language which they cannot speak well is spoken. The Applicants believe that the children's lives would be endangered or, that through the Applicants' lives being endangered, they would suffer severe trauma in Chile. If they were left in Canada while their parents left, this would be traumatic for them, as they have never been separated from the Applicants. Affidavit of N. Arduengo, para. 29

20. The Applicant, Fernando Arduengo, is the production manager for Sheldon Kasman Ltd. His departure from Canada would disrupt his employer's operations which is a fairly large operation with numerous employees. As the owner travels frequently, he relies on the Applicant to manage the plant in his absence. Affidavit of N. Arduengo, para. 30

21. Since the Applicants were found not to be Convention refugees by the Immigration Appeal Board their case was publicized nationally in Canada and in Chile in May, 1986. The Chilean government is aware that they made refugee claims in Canada and that they cooperated with Amnesty international in providing information as to practices of the Chilean government which violate human rights. The Applicants left Chile because they had actions taken against them which were attempts to either seriously intimidate, harm or kill them. They fear that their lives will be endangered if they are returned to Chile. They fear the present regime in Chile, because their knowledge of the conduct of particular officials in the commission of human rights abuses, would result in their being perceived to be a threat to these officials. Affidavit of N. Arduengo, paras. 32-34 Affidavit of T. Jackman, para. 10, Ex. L

22. Reference was made in the press to an investigation done by the R.C.M.P. It advised the Immigration Commission that the Applicants' lives would be in danger if they were required to return to Chile. At their hearing before the Board, the Minister's representative maintained in his submissions that the Applicant's lives would not be in danger if returned to Chile, while the government's own investigation through the R.C.M.P. had confirmed that their lives would be in danger and such information had been transmitted to the Minister's officials. The Board accepted that the Applicants would not be endangered in returning to Chile Affidavit of N. Arduengo, para. 36, Ex. M. Affidavit of T. Jackman, para. 12, Ex. N. (emphases not in original text)

In regard to paragraph 22, the respondent asserts that there is no evidence in the record of an R.C.M. Police investigation into the question of the applicants' safety upon a return to Chile. She asserts that there is only speculation by the applicants founded on comments published in a certain newspaper article. In this regard the respondent cites paragraph 36 and exhibit "M" of the applicant Arduengo's Affidavit.

In paragraphs 6 and 8 above, the applicants' solicitors expressed that the applicants were "promised" a Minister's permit, in effect, by a senior immigration officer, and "that permits were to be issued to them". The notes attached as exhibits to the law clerk's affidavit do not objectively affirm that any assured guarantee was ever offered. Now, it is noteworthy to realize that the applicants had bee rejected time and again by both previous and subsequent ministers as well as the former Immigration Appeal Board. The one Ministerial recession from that uniform determination of rejection was that effected by the Hon. Walter F. McLean, P.C., M.P., Minister of State for Immigration, on April 15, 1986.

That favourable decision was expressed to be founded on "sufficient humanitarian and compassionate grounds (then) present to warrant extraordinary consideration". Extraordinary, indeed, for the other Ministers and tribunals in according full consideration of the applicants' situation, decided that humanitarian and compassionate consideration is exactly what they did and do not deserve. Thus, the Minister who reversed the decisions of his predecessors and overrode tribunal decision had his unique decision, in turn, reversed by his successor. Why then, must the whole system move and distort itself to accommodate that aberrant Ministerial decision of April 15, 1986?

In paragraph 20 of the female applicant's affidavit (no affidavit having been tendered by the male applicant) she swears not only that "There was public criticism from some members and organizations within the Chilean community about this decision" but also "about our counsel's role in the decision making process". The source of the latter complaint can be traced to the material before the Court, which unfortunately is not presented in strictly chronological order.

Exhibit "I" to the female applicant's affidavit, a letter dated February 9, 1989, to the applicants' counsel from the Hon. Barbara McDougall, then Minister of Employment and Immigration, Was referred to in oral argument regarding whether or not Mr. McLean had been misled in according Minister's permits to the applicants. In Exhibit "I" Ms. Mcdougall wrote:

As you (applicants' counsel) rightly indicated, a previous Minister of State for Immigration, the Honourable Walter McLean, once decided that procedures should be taken with a view to processing the Arduengos' applicant for landing from within Canada. Just as it was his prerogative to make that decision, so too was it his prerogative to reverse it. From information you had provided, it had been his impression that the Arduengos had the support of the Chilean community in Canada. This apparent support was among the factors he considered in arriving at his initial decision. Since this information proved to be erroneous, he subsequently chose to reverse his decision. News of the reversal was conveyed to Mr. And Mrs. Arduengo by staff at the Canada Immigration Centre (CIC) on November 13, 1986. You were later apprised of the decision during the course of a telephone conversation you had with the CIC Manage.

Since that time there has been no further move to extend favourable consideration to the Arduengos, nor do I see any reason to do so now. As you have been told by my staff, and as was outlined to the Arduengos in a letter dated December 28, 1988, from the CIC, their presence in Canada is no longer welcome. As has already been indicated to them, they are to leave Canada on or before February 28, 1989. Failure to do so could result in enforcement action against them.

An earlier exhibit, "G" bears a later date, February 22, 1989, and it is a copy of the applicants' counsel's response to the Minister wherein she attempts to explain to the Minister, Ms. McDougall, how counsel really did not intend to mislead the Minister's predecessor, Mr. McLean. Counsel now says, in exhibit "G" and at the hearing, that although she resorted to and appeared to report the alleged opinion of the "Chilean left" in Canada she later asserted that "if you review the letter (not exhibited) sent to Mr. McLean at that time, it is very clear that I talked to three people back in 1979. I told Mr. McLean that I did not feel that the Chilean Left would judge the Arduengos harshly. This was my personal opinion in 1986 and I never led Mr. McLean to believe otherwise." Counsel's letter to the Minister of February 22, 1989 continues in part:

I am not the Children community. I never pretended in that letter that I had discussed the matter with all member of the Chilean community or had their agreement that they supported the Arduengos nor did I give any impression at all in that letter that they would, in fact, "support" the Arduengos.

Given the divergence of views, and given that counsel does admit that she "told Mr. McLean that (she) did not feel that the Chilean Left would judge the Arduengos harshly", it is a pity that the letter in question is not exhibited.

The only clue as to whether counsel misled Mr. McLean or not, is not necessarily from a reliable source. Exhibit "L" to Terri Jackman's affidavit is a copy of an article which appeared in Analisis,

dated the week of the 15 to the 21 of July, 1986. Analisis is a magazine published in Chile, which according to the deponent receive fairly wide distribution nationally in that country. In a translated article headed "Ex-DICAR Agents Seek Refuge in Canada" it is somewhat fully explained, (as is coyly and barely noted in paragraphs 33 and 34 of the applicant's affidavit) that the applicants were respectively a volunteer auxiliary and a paid member of "la Direccion de Inteligencia de Carabineres", er DICAR under the Pinochet regime in Chile. That article refers to the applicants' counsel's letter which is not exhibited but which is said to have misled the previous Minister. Pertinent passages of the translation in Terri Jackman's exhibit "L" run:

The Minister of Immigration, Walter McLean, unlike his predecesser, finally decided on March 20 to accept the Naredo-San Martins. His assistant, Francoise Guenette, said that many factors were considered prior to his revoking this decision.

One of the most important factors was that the couple had cooperated with Amnesty International when one of Amnesty's representatives flew in from London, England, to interview them. The other factor was their two children, born in Canada. "Before sending a family back to a place where they may be persecuted, the situation has to be considered seriously," stated Guenette. The assistant further acknowledged that Minister McLean was influenced by a letter sent by the couple's lawyer, Barbara Jackman, on March 18, two days prior to his signing the authorization for the couple to immigrate.

THE LETTERS IN QUESTION

In the letter, Jackman explained to McLean how she became the couple's lawyer. "When they came to me, I interviewed them extensively. They did not justify the government's actions. I found them credible. You have not had the opportunity to speak to them in person as I have."

Jackman believed that the ex-agents "were sick about the actions of the government. Their fear of leaving DICAR was overcome by the discontent they felt working there." She confirmed with McLean that the couple had spent an entire weekend speaking with a representative of Amnesty International who flew in from London just to speak to them.

Jackman stated that she had contacted some active Chilean leftists in Toronto to discuss the case without revealing the identity of the clients. "All of them agreed that I had to represent them and they shared my point of view that they were victims of the system in Chile."

According to the Canadian press, Ms. Jackman worked with the Chilean community in Toronto in matters of human rights and had represented many Chilean refugees.

The Toronto Chilean Society, in an extensive statement, responded to the lawyer regarding the consultation about the case by stating "as far as we know, no member of this Organization had been consulted in relation to the Naredo-Arduengo case."

What truly appears to be the sticking point as between the government and the applicants is their criminal conduct, in terms of Canada's view of criminal conduct, while they were willing members of DICAR in Chile. It was disclosed in their counsel's letter to a former Minister, Hon. Lloyed Axworthy on December 29, 1982. A copy of that letter is exhibit "A" to the female applicant's affidavit. In its pertinent passages it runs as follows:

I believe that Mr. and Mrs. Arduengo are free of any serious criminal objections to their admission in Canada both were members of DICAR which is the investigative branch of the Chilean police. Mrs. Arduengo became involved at an early age. She joined the police force basically because she was fascinated with the police uniforms and was interested in being a traffic police officer. She was first put in the communication section of the police force and later transferred to the DICAR, the security branch. She did not have any choice about this transfer.

She was upset with the position that was assigned to her after being involved in it for a while. It affected her mental health and she requested that she be permitted to resign. This permission was granted. Mrs. Arduengo was a camouflage expert and basically her position within the DICAR was to create disguises for people. She was present on several occasions when people

were being interrogated and tortured, however she stated throughout her examinations and her hearing before the Board that she had not been required to participate in any acts of torture. She was extremely upset about these incidents and this is the primary reason why she requested permission to resign.

Mr. Arduengo became involved in a somewhat unusual manner. He permitted someone from the DICAR to use car and assisted the person. It was because of this incident that he became co-opted into working for the DICAR, not on a full-time basis but on an irregular basis. He mainly remained with the DICAR because he was afraid to pull out he ultimately left the force because it had been discovered that he had failed to record properly documentation concerning a person who had been arrested. Mr. Arduengo did not want to put the information concerning this detained person into the central filing system because he knew it would affect the person's employment chances in the future. This resulted in his being removed from the DICAR. Mr. Arduengo also admitted that he was present during interrogations and torture but that he himself was not required to torture anyone. He, on one occasion, created problems for himself by insisting that Mrs. Arduengo be permitted to leave the interrogation room because he did not want her to witness what was going on and he could see that it was seriously affecting her.

Both Mr. and Mrs. Arduengo felt sick about their involvement with the DICAR in Chile. Both of them suffered emotional problems as a result. While they did work for the DICAR, both of them became extremely disenchanted and unable to continue their work. It took them some time to be able to leave, but this is understandable because of the nature of the DICAR and the military structure in Chile. The military government maintains its power through intimidation and fear created in the general population. Mr. and Mrs. Arduengo shared the same fear as everyone else in Chile. It was this fear that lead them to remain for as long as they did within the DICAR. They were afraid of suffering repercusions (sic) should they leave. Once they did leave the DICAR they were in fact in danger and this is why they came to Canada.

Mr. and Mrs. Arduengo were not high-level officials within the military government. They were at the bottom of the hierarchy and were basically obeying orders. They continued to obey orders until such time as they could no longer handle it. Neither was directly in a position where he or she was required to use force or torture any person.

As their counsel explained it their conduct was criminal. Also the newspaper articles whose copies were chosen to constitute exhibit "M" referred to in paragraph 32 of the female applicant's affidavit, allege that the male applicant "witnessed" ten murders, later reduced by him to two. In paragraph 32 of her affidavit the female applicant not only does not deny the information alleged in exhibit "M", but she refers to it as "information about our case" and "our situation was widely publicized" including Analisis "a magazine published in Chile with national distribution". Such information about the applicant's situation appeared in the Globe and Mail on Monday, May 5, 1986, in an article written by Victor Malarek. This is what is annexed to the applicant's affidavit:

Mr. Arduengo, who said he was on unpaid, civilian member of DICAR from 1975 to 1977, admitted at the IAB (Immigration Appeal Board) hearing in 1978 to being present at as many as 10 murders. In a hearing last year, he changed his story, saying he had been present at two.

According to the conclusions of an immigration board report dated April 11, 1985, Mr. Arduengo took part in "at least two dozen incidents of torture which he says were always commenced by the use of electric devices."

"Sometimes these interrogations were augmented by placing a suspect's head under water or butting lighted cigarets on the subject's body.

The report notes that Mr. Arduengo "says that his whole team of four persons, including himself, participated in each of the incidents of torture, although he himself at no time applied force to any of the detainees but merely acted as a guard or as a witness to statements made by detainees."

Mr. Arduengo said she joined DICAR as an uniformed constable in 1975. Less than a year later, she was transferred to the intelligence unit, where she worked under the alias Sylvia Alvarex until she resigned in April, 1977.

The immigration board report said her duties "consisted of participation in detentions, surveillances and interrogations of detainees. She was issued a revolver and handcuffs and often brandished the revolver while effecting an arrest.

"Her most important and most frequently performed duty was clandestine surveillance," the report noted. She said "she never actually participated in the physical infliction of pain.

At their first hearing before the immigration board, Mr. Arduengo said he had been present in operations in which people were killed.

In response to a question about how many operations he had been on that led to deaths, he replied: "You could say about 10 of them, more or less."

During a new hearing last year, which was ordered after an appeal to the Federal Court of Canada, he told the board that he had witnessed two deaths, stressing that he never took part in the killings.

The applicants and their counsel raise something akin to the "Nuremberg defence" in adopting this posture: "We did not personally murder or torture anyone; we merely arrested or helped to arrest persons whose murder or ritual torture, or the murder or ritual torture of similarly placed persons, we merely stood by and watched as members of the State secret police." One may aptly describe the torture inflicted as constituting a ritual because according to statements attributed to the male applicant, in exhibit "M", such torture always began in the same manner by the painful and terrifying "use of electric devices. Sometimes augmented by placing a suspect's head under water or butting lighted cigarets (sic) on the subject's body."

For ease of reference one may refer to Martin's Annual Criminal Code, Canada Law Book, Toronto. The 1977 edition of that useful consolidation, in common with all previous and subsequent issues, reveals that murder was and is a "flagship offence" in Canadian law bearing a penalty of life imprisonment. In 1977 one could refer to Criminal code sections 212 defining murder as culpable homicide through to 218, at least, in which the punishment of imprisonment for life is enacted. The criminality of murder is so trite that it requires no further elaboration herein.

In the current edition of Martin's Annual Criminal Code, one notes the crime of torture denounced by Parliament in section 269.1 of the Criminal Code. It is worth reciting:

269.1(1) Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(2) For the purposes of this section, "official" means

(a) a peace officer,

(b) a public officer,

(c) a member of the Canadian Forces, or

(d) any person who may exercise powers, pursuant to a law in force in a foreign state, that would, in Canada, be exercised by a person referred to in paragraph (a), (b), or (c),

whether the person exercises powers in Canada or outside Canada;

"torture" means any act or omission by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person

(a) for a purpose including

(i) obtaining from the person or from a third person information or a statement,

(ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and

(iii) intimidating or coercing the person or a third person, or

(b) for any reason based on discrimination of any kind, but does not include any act or omission arising only from, inherent in or incidental to lawful sanctions.

(3) It is no defence to a charge under this section that the accused was ordered by a superior or a public authority to perform the act or omission that forms the subject-matter of the charge or that the act or omission is alleged to have been justified by exceptional circumstances, including a state of war, a threat of war, internal political instability or any other public emergency.

(4) in any proceedings over which Parliament has jurisdiction, any statement obtained as a result of the commission of an offence under this section is inadmissible in evidence, except as evidence that the statement was so obtained.

The provisions of section 269.1 certainly reveal Parliament's hostility towards torturers.

In an earlier, perhaps more innocent time, in 1977, when the applicants sere still plying their barbaric grade, the crime denounced by the present section 269.1 was not included in the Criminal code. However, that is not to say that the dark deeds which underlie it were not essentially criminal. Again in Martin's 1977 edition, it is demonstrated that the Criminal Code then provided, by paragraph 245.(2)(a) that anyone who committed an assault which caused bodily harm was guilty of an indictable offence and liable to imprisonment for five years. Also, by subsection 247(1), paragraph (a), kidnapping a person with intent to cause him to be confined or imprisoned against his will, or, in paragraph (c) to hold him to service against his will, was an indictable offence carrying liability to imprisonment for life.

Both in 1978 and earlier, and indeed to the present time subsection 21(1) of the Criminal Code provided:

21.(1) Every one is a party to an offence who

(a) actually commits it,

(b) does or omits to do anything for the purpose of aiding any person to commit it, or

(c) abets any person in committing it.

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

"Abets", Martin's notes, means "to encourage" and, while it is common to speak of "aiding and abetting", the two concepts are not the same and either activity constitutes a sufficient basis of liability: R.v. Meston (1975), 28 C.C.C. (2d) 497; 34 C.R.N.S. 323 (Ontario Court of Appeal).

Thus, it is with distinct incredulity that the Court greets counsel's plea that "□ Mr and Mrs. Arduengo are free of any serious criminal objections (sic) to their admission to Canada". Even barbarians and terrorists know full well that torturing and aiding and abetting torturers are barbaric and inherently criminal.

Just watching is equally culpable with just torturing. All humans in distress just naturally look for help to other humans, a truth which has been accorded judicial notice. In 1921, in the U.S. case of Wagner v. Int. R.R. 133 N.E. 147; 19 A.L.R. 1 (N.Y.) the late Mr. Justice Cardozo, albeit in a different context, expressed that which might be a consistent human verity:

Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. The risk of rescue, if only it be not wanton is born of the occasion.

Thus, it is so perverse and reprehensible just to watch the torture of a fellow human, no matter with what posture or expression, be it glee or just indifference, without making any gesture to rescue the victim, that the watchers are just as immorally criminal as the wielders of the electrodes, pliers, cigarette butte or instruments of suffocation. To be purposely inflicted with agonizing pain in the presence of other humans who will not come to one's help, is to be doubly tortured, for it creates utter despair. The "mere" watcher is just as culpable a torturer as the actual physical torturer.

Who can forgive such barbarism? A universal response is God, the victims or their surviving families, and the State. A compassionate and merciful God is not subject to the jurisdiction of this Court or any human agency. Nor is the forgiveness of this Court or any human agency. Nor is the forgiveness of the victims and their survivors, because in that regard they are sui juris, subject only to their own consciences. The State, in this instance is the respondent Minister. The applicants make out no sufficient case here for compelling the Minister to relent from her refusal to do the applicants' bidding.

One must be sorry for the children. Children inevitably suffer from the folly and criminality of their parents. The State's not uncivilized position is that Canada is not a haven for torturers or other miscreants such as war criminals, or perpetrators of genocide - nor, of course is it for even "ordinary" murderers among other various sorts of criminals. In the collisions of values, that is, the effective denunciation of torture and other heinous crimes, as against natural sympathy for the applicants' Canada-born children, ought one to relinquish the denunciation in cases where the perpetrators of foul crime succeed in procreating in Canada? If the State did so, one could foresee that more than a few such. Perpetrators would attempt that gambit not out of a love of children, but rather to make a haven of Canada.

The law is clear. It was again enunciated by Madam Justice Wilson in the well known case of Singh et. v. M.E.I. (1985) 1 S.C.R. 177 at 189:

The appellants make no attempt to assert a constitutional right to enter and remain in Canada analogous to the right accorded to Canadian citizens by s. 6(1) of the Charter. Equally, at common law an alien has no right to enter or remain in Canada except by leave of the Crown: Prata v. Minister of Manpower and Immigration, (1976) I S.C.R. 376. As Martland J. expressed the law in Prata at p. 380 "The right of aliens to enter and remain in Canada is governed right of aliens to enter and remain in Canada is governed by the Immigration Act" and s. 5(1) states that "No person, other than a person described in section 4, has a right to come into or remain in Canada."

As if Ministers of the Crown were the only persons not entitled to have erasers on their pencils, the applicants assert that the respondent is estopped by the temporary relaxation of refusal effected by her predecessor Hon. W.F. McLean, in his words, "as exceptions to current legislative practice". (Exhibit "C" to applicant's affidavit.) However, there is no evidence that the previous Minister was so firm in his view as to have submitted any recommendations to his colleagues, technically to the governor in Council, for the specific facilitation of the applicants' admission to Canada. The applicants invoke subsection 114(2) of the Immigration Act, and its provisions are precise:

114.2 The Governor in Council may by regulation exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Governor in Council is satisfied that the person should be exempted from that regulation or the person's admission should be facilitated for reasons of public policy or due to the existence of compassionate or humanitarian considerations.

The provision is specific. The power is conferred on the Governor in Council, not upon any Minister. The Governor in Council may exercise the power only "by regulation", in effect, an

Order in Council. The subject of such facilitation or exemption is a particular person or a particularly specified class, and the Governor in Council must find and express reasons of public policy or the existence of the noted considerations, as a basis for executive satisfaction. No such action has been taken in this case.

An awfully long time after the Hon. W.F. McLean's letter (ex. "C"), said the applicants' counsel, the acting manager of the Toronto North CIC in exhibit "D" informed the applicants "that there are insufficient humanitarian and compassionate grounds in your situation to warrant granting you, of the Minister's own motion, permanent residence within Canada, as an exception to the immigration legislation" (ex "C"). The time span seems to reach from April 15, 1986 to December 28, 1988, as between the female applicants' exhibits "C" and "D", but that is because the record is not complete. There was a much earlier indication from Mr. McLean to the effect that he would not proceed with his permission contrary to current legislative practice and it is referred to in exhibit "I" to the female applicant's affidavit, but is not itself exhibited. That communication was sent as early as November 13, 1986. The pertinent paragraphs of exhibit "I" are recited above.

Exhibit "I", it will be remembered, is a copy of a letter dated February 9, 1989, from the Hon, Ms. McDougall to the applicants' solicitors. The second and third paragraphs of that letter signed by the Minister are recited earlier herein. The Minister indicated that Mr. McLean himself reversed his decision, not years, but seven months later because of erroneous information received from counsel which had made him believe that the applicants had the support of the Chilean community in Canada.

The Minister was quite right in noting that the previous Minister had the prerogative upon learning more, (in this instance, his new perception of a very different sort of public opinion), to reverse his decision. For example a ministerial permit given pursuant to section 37 of the Act, may at any time be extended or cancelled. The granting of such permits is a purely administrative act to provide flexibility to the administration of the immigration policy and its exercise is not subject to the according of a hearing: Hardayal v. M.M.I. (1978) 1 S.C.R. 470: 75 D.L.R. (3d) 465, Dee v. M.E.I. (1989) 24 F.T.R. 48. See also P.N. Singh v. M.E.I. (1986) 3 F.T.R. 196.

The applicants' counsel rightly conceded at the hearing, as the Court finds, that the governor in Council cannot be ordered to grant any exemption or to facilitate the applicants' admission pursuant to subsection 114(2) of the Act. The benefit of that prevision is not a right which can be articulated against the respondent by aliens such as the applicants. The Minister, like her predecessors, has considered the applicants for exemption and has rejected their applications. Mandamus would not lie to force the Minister or the governor in Council would not lie to force the Minister or the governor in council to come to a specific conclusion, once the Minister has considered the applicants' submissions. This, as the record voluminously demonstrates, she and her predecessors have done. Subsection 114(2) in any event has been held to provide the governor in Council with the authority to exempt individuals from the visa requirement of subsection 9(1) of the Act: Jiminez-Perz v. M.E.I. (1983) 1 F.C. 163, at 169-170 (C/A), varied but not as to this point (1984) 2 S.C.R. 565.

Neither the Minister, nor her officials, is authorized to exempt anyone from the requirement of subsection 9(1). The Minister and her officials can grant an application for landing from within Canada, but only after such an exemption has been accorded by the governor in Council: Jiminez-Perez v. M.F.I. above, at S.C.R. p. 567. However, the absence f any regulation made by the Governor in Council cannot be filled only by the previous Minister's letter exhibit "C", especially in view of what is related in exhibit "I" quoted above.

So, since the applicants raise estoppel against the respondent, and cite in support thereof the 1952 English decision of Re War Damage Act 1943: Re 56 Denton Road, Twickenham, Middlesex (1952) 2 All E.R. 799 (Ch. D.) (tab 8 applicants' authorities) the precise dimensions of the doctrine must be examined. This equitable doctrine holds that an individual or a public authority who, by promissory representation, causes another to rely, to his detriment, on that

representation, will be held to it. The facts of that English case are far removed from those of the case at bar. The issue was whether the War Damage Commission was bound by its classification of the property as apt for replacement of cost of works, or whether it could thereafter switch to a classification bearing less compensation. Mr. Justice Vaisey of the Chancery Division came to two conclusions which are pertinent her: that the initial classification was binding despite the different subsequent conclusions of a superior officer; and that the proposition of law to be allowed is -

that where Parliament confers on a body such as the War Damage Commission the duty of deciding or determining any - question, the deciding or determining of which affects the rights of the subject, such decision or determination made and communicated in terms which are not expressly preliminary or provisional is final and conclusive, and cannot, in the absence of express statutory power or the consent of the person or persons affected, be altered or withdrawn by that body.

In applying that proposition to the present case, the War Damage Commission is obviously substituted for the Governor in Council, not the previous Minister. That Minister could accord a permit to be sure, but it must be regarded as provisional only for, according to subsection 37(3) it could not endure for more than twelve months and, under subsection 37(4) Parliament authorizes the Minister at any time, in writing, to extend or cancel it. The body upon whom or which Parliament has conferred not a duty, but a power, of deciding or determining any question of exemption or facilitation by regulation is the Governor in Council. If one went so far as to consider the exercise of that power to be a duty, which it is not according to subsection 114(2), then it appears to have been discharged by not passing any such regulation, since the responsible Minister did not recommend it and, apparently neither did any of her cabinet colleagues. So, accepting the proposition of law enunciated in the Re 56 Denton Road case, results necessarily in a different result because of different facts, even when one makes an appropriate legislative analogy.

In support of the result actually obtained here that is no conditions in which to find estoppel - the respondent's counsel cites:

P. McDonald, Contradictory Government Action (1979) 17 O.H.L.J. 160, at p. 161

Wade Administrative Law (5th ed.) at pp. 232 33, and

Granger v. C.E.I.C. (1986) 69 N.R. 212 at pp. 215-16 (F.C./A)

It is clear that the previous Minister simply had no legal authority to promise the applicants that they could be "landed" within Canada. But the applicants plead that they relied on the Minister's short-lived intention to their detriment. Indeed there is no evidence of any irreversible harm suffered by the applicants by what ought to have been their short-lived reliance on the letter, exhibit "C", dated April 15, 1986. They did withdraw their application to the Court of Appeal for review pursuant to section 28 of the Federal Court Act to be sure. They had launched that application to obtain a review of the rejection by the Immigration Appeal Board of their claim to refugee status. They did so in order to clear the way for the previous Minister to act upon his short-lived intent to "process their applications for permanent residence". The respondent's counsel however makes the point that "it is premature to argue that this constitutes a detrimental reliance, in the absence of any attempt (since November, 1986) by the applicants to apply to that Court to re-open the abandoned proceedings". To be sure, the delay is that of the applicants and is not to be levied against the respondent, who is not limited by exhibit "C" in the exercise of her discretion.

The applicants plead that they had a legitimate expectation of having their applications for permanent residence allowed. Cited in support by the applicants (their tab 43) is Bendhamane v. M.E.I. (1989) 8 Imm. L.R. (2d) 20, a majority decision of the Court's Appeal Division, in which the principle, whose pertinent passage is quoted below, was accepted and applied:

When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. (emphasis not in original text)

The applicant say that this principle is to be applied to their circumstances because they urge, it would surely not interfere with that or this Minister's statutory duty.

The respondent latches on to the first emphasized phrase and argues that "legitimate expectations" bind a public authority only with respect to procedural promises; but the previous Minister's promise, it is urged, was not procedural but rather a substantive one (he would exercise his discretion to recommend exemption from subsection 9(1)) and therefore the doctrine of legitimate expectations does not bind past, present or future Ministers to that recommendation. This argument might be technically, literally correct, but it has a faintly spurious and hollow ring to it. However there is more to this than even the respondent suggests. First it is clear that, since the Court has no authority to dictate the outcome of the exercise of the Minister's discretion, it is certain that no previous Minister can do that, either. Second it is clear that the present Minister has given full and profound attention and consideration to the applicants' request for permanent residence. The file abounds wit copies of correspondence between the applicants' solicitor and the Minister personally and her officials and office staff. Record: Tab C, exhibits "D", "E", "F", "G", "H" and "I".

There can be no doubt that the Minister, while she is not legally obliged to carry out the short-lived intent of the Hon. Walter McLean, from which he himself subsided in November, 1986, (exhibit "I" above quoted), because of his new view of the information provided by the said solicitor, she, the Minister, did not default on the promise to accord careful consideration to the applicants' request and thereupon to exercise her discretion. That they do not like the Minister's conclusion not to seek a favourable regulation pursuant to subsection 114(2) is nothing against its legality.

The applicants' basic difficulty is that even the previous Minister lost sympathy with them and was moved to recede from his original humanitarian and compassionate view of them when he learned of community revulsion over their dark deeds in DICAR. Because the present Minister, in common with an even earlier Minister, does not consider the applicants fit subjects for humanitarian and compassionate considerations, despite their children's plight, the Court is not entitled to perform her office for her, against her legitimate will.

Parliament, for better or for worse has confided the exceptional powers here to the executive branch and not the judicial branch nor yet to an independent administrative board. Since there is no perfection in human affairs, the Court may be permitted to observe that each repository of statutory power has its peculiar weaknesses. So, one does not dictate to Parliament which to choose for the wielding of such exceptional powers which can be, but cannot be compelled to be, invoked to relieve from the strict application of the statute. The Minister's discretionary decisions not to extend the permits, but to order that the applicants be deported, are not objectively unreasonable, unfair or oppressive. Nor are they in any other way illegal. The applicants' allegation of abuse of process is without foundation.

Neither of those decisions required anything so elaborate as oral hearings, for neither adjudicated the applicants' legal rights. Thus, they do not submit that there is, or that they have, or ever had, a legal right to permits. Nor can they assert any legal right to remain in Canada without such permits or without a regulation made pursuant to subsection 114(2). They do intensely wish that the Minister would yield to their pleas. But, withal, no oral hearing is exacted because no legal rights to remain in Canada are asserted.

These reasons are very long. The volume of material laid before the Court herein took no little perusing, and the length of the reasons, and the length of time taken to produce them on an urgent basis without continuous free time to do so, are both the result of the volume of material and issues raised. Had there been less material or less urgency the reasons might well have been shorter.

In conclusion, apart from sympathy for the applicants' children, the Court finds no compelling basis upon which to accord them relief. Parliament gives provision for compassion into the Minister's or the cabinet's hands. For the foregoing reasons, the applicants' applications for certiorari, prohibition and mandamus expressed in their notice of motion dated August 23 and filed August 25, both in 1989, are dismissed.

The applicants' counsel made much in oral argument about the Minister's long delay in bringing this matter to a head. That assertion generates thoughts about costs. If the Minister had acted sooner than she did she would have run the risk of the applicants' counsel's levying two complaints, at least. The first, that the Minister was thereby scorning the voluminous correspondence which passed between her (including her officials) and the applicants' counsel and solicitors; and the second that the applicants would not have been accorded sufficient time to apply to the Appeal Division for a reopening of their abandoned "section 28" applications. Costs will therefore follow the disposition of the case.