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Volume 17
Number 4 *Symposium on Punitive Damages*

Article 7

10-1-1995

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Recommended Citation

Peter Tompkins, *Immigration: Governments and Lawyers on a Collision Course*, 17 Loy. L.A. Int'l & Comp. L. Rev. 891 (1995).

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ESSAY

Immigration: Governments and Lawyers on a Collision Course

PETER TOMPKINS*

To qualify for authorship of any work covering international law and politics, a background as a lawyer or a politician, or both, is desirable, if not essential. I am afraid I am neither. Nevertheless, after my forty years with the U.K. Immigration Service, I take comfort from having acquired a detailed knowledge of a subject with an international dimension that also presents like-minded governments with similar problems. This period also has brought me into close contact with a good many lawyers and politicians. This Essay is written in the hope that some well-intentioned advice to the legal profession from a practitioner in immigration controls might produce a positive response. As I hope to demonstrate, the alternative is likely to be increased confrontation, which will be of little benefit to either side and which may weaken the democratic process in those countries that value it most.

I. THE PROBLEM OF LARGE-SCALE MIGRATION

At first sight, the administration of immigration controls would not seem to be one of the more controversial aspects of democratic government. The right of a sovereign state to defend its borders is fundamental. It is a right for which most states have been prepared to legitimately take up arms under international scrutiny. But while the concept of a just war is firmly enshrined in international law, the right of those same governments to impose controls on more peaceful invasions in the shape of large-scale migration has been surrounded by controversy, conflict, and litigation. The battle rages most fiercely between governments and

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lawyers, with the latter claiming the moral high ground as defenders of individual rights and liberties in the face of repressive legislation.

Any argument that dismisses the advocacy of high moral principle out of hand is, of course, "skating on very thin ice." First, those aiming to immigrate from one country to another are likely to be poor, underprivileged, and in need of all the help they can get. Second, immigration controls invariably are endowed with a provision for detention, often lengthy, without a requirement for the detainee to be brought before a court. Third, the latest manifestation of large scale migration, with a case for admission being accompanied by a plea for asylum, touches on difficult and sensitive issues that are open to different interpretations. The main thrust of this Essay is whether these problems represent overriding issues. Doubtless, in most developed countries, a serious conflict has developed between governments and members of the legal profession over the way immigration cases are handled.

II. THE ADVENT OF IMMIGRATION LEGISLATION

The confrontation about the way to handle immigration cases was neither planned nor anticipated. Until the end of World War II, most countries fell neatly into one of two groups: (1) the old, or exporting, world; and (2) the new, or importing, world. Traffic between the two groups was conducted in an orderly fashion at the behest of the importing state. In addition, during the nineteenth century, some governments introduced the practice of encouraging large numbers of people to move from one country to another as low-paid laborers, often for specific projects. For example, the immigration included Tamils from Southern India to Sri Lanka, Indians to Africa, and Chinese to the United States. No great notion existed that any of these people would be granted, or even expected, individual rights. The same applied to the early illegal immigrants, who usually were stowaways on ocean-going vessels and, in the case of the United States, the trickle of immigrants crossing the Rio Grande from Mexico. The first occasion in recent times when states became uneasy about the numbers of uninvited migrants followed the pogroms in Eastern Europe at the end of the nineteenth century. In the United Kingdom, such movements

led to the enactment of the 1905 Immigration Act,¹ which provided the basis for present-day legislation and marked the birth of the U.K. Immigration Service.

The background of the Immigration Act makes interesting reading. It was preceded by a Royal Commission. The principle witness at the Commission was a customs officer, incredibly named Hawkeye, who was stationed in the London docks. Hawkeye was asked how he was able to identify potential refugees. He replied that he was in the habit of calling "Good Morning" in Yiddish to those travelling below decks. If anyone replied, he assumed that person to be a refugee. This somewhat bizarre interviewing technique was reflected in the subsequent legislation, which applied only to steerage passengers. Those passengers in first class were exempt.

After World War II, when the 1951 U.N. Convention² came into operation, none of the current controversy existed. Designed to deal with refugees from behind the former Iron Curtain, the grant of asylum depended on nationality. Heat was generated only where a clash existed with long-established customs and practices.

A number of factors combined to transform the international situation as it had remained for around twenty years after the adoption of the 1951 U.N. Convention. Chief among these were: (1) the population explosion in the developing world, often accompanied by war and famine, plus internal migration from rural communities to conurbations unable to support their new populations; (2) the development of cheap, mass air travel; and (3) the realization that the 1951 U.N. Convention could be utilized far beyond its original intention and could provide a way for many thousands of people to migrate to a country of their choice without advance permission.

III. ABUSE OF CLAIMS FOR ASYLUM

The upshot has been that people living in poor and sometimes dangerous conditions, who feel that they have nothing to lose, have made their way to more prosperous and usually more peaceful countries and claimed asylum on arrival. The spectacular increases in applications throughout the developed world are no more than the latest stage of an escalating cycle. In its early

1. Aliens Act, 1905, 5 Edw. 7, ch. 13 (Eng.).

2. U.N. Convention Relation to Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

stages, people attempted to gain entry in one category, usually as visitors or students, and then remain for settlement. As governments closed these loopholes, illegal entry, including trafficking in forged and falsified travel documents, increased. This, in turn, necessitated legislation to penalize carriers for transporting inadequately documented passengers. Criminal elements moved in to organize the movements of inadmissible passengers by arranging passage. In order to make deportation more difficult, passengers claimed that travel documents were destroyed en route. Couriers accompanied groups of inadmissible passengers to collect their travel documents on board for re-issue to the next group. Finally, it became apparent on all sides that delaying tactics, employed to prevent the removal of those refused entry, increased the chance of those same persons to achieve their objective of settlement. A claim for asylum soon was identified as the most successful way to achieve such a delay.

IV. THE INTRODUCTION OF IMMIGRATION APPEALS

The timing of a much closer involvement by the legal profession in matters related to immigration controls coincided with the introduction of systems of appeals against a decision by a control authority. I spent my first fifteen years in the U.K. Immigration Service in a world where the decision to refuse entry was not contestable. Failure to satisfy the immigration officer, usually on grounds such as insufficient means of seeking work, required only the endorsement of a supervising officer and was not appealable. Occasional exceptions, where habeas corpus or mandamus were invoked, would involve some headline-catching individual case, but these scarcely affected the system under which the immigration officer's decision was final. It is ironic that when it was decided that this arbitrary justice was not sustainable, the United Kingdom copied the Canadian model. By the time arrangements in the United Kingdom became operational, huge backlogs, created by the introduction of appeals, threatened the effectiveness of Canadian controls.

At the institution stage, no one in the United Kingdom suggested that immigration appeals would become an integral part of the legal process. Serving at the time as a junior manager, I was surprised to learn, along with my colleagues, that we were to present Home Office cases to an independent adjudicator. After a training course that lasted all of three hours, a number of us

expressed concern that we would be facing professional advocates. We were informed that this was a false premise because appeals would be informal and would consist only of a submission and rebuttal of the facts. Adjudicators were not expected to have a legal background, thus ensuring that the process would not become enmeshed in legal argument. Twenty-five years and many House of Lords judgments later, it is easy to see that the principle of a right of appeal was allowed to override all issues of practicality. As a consequence, the entire structure of immigration controls currently is under threat, not only in the United Kingdom, but across the developed world.

V. THE ROLE OF LAWYERS IN THE APPEALS PROCESS

Many lawyers argue that principle should override all other considerations. The case is set out eloquently by Philip Rudge, General Secretary of the European Consultation on Refugees and Exiles in London. He asks in *Asylum Law and Practice in Europe and North America*:

What then is the role of the legal practitioner in this context? It is clear that a lawyer must work with his or her legal expertise. But it is also more urgent than ever to stress that he or she must also work as an active citizen concerned to ensure that the human rights of any group of persons are respected. The measure of a civilized society must be the way it treats the vulnerable and the marginalised; thus respect for the rights of refugees and asylum seekers is vital to the maintenance of our own values, and any violation of them is a violation of our own self-esteem. In the relationship between the lawyer and the State, it is self evident that, as the Universal Declaration of Human Rights³ made clear, respect for human right is a matter not just for the Governments *but also for the peoples of the world*.⁴

I endorse every word of that, as should any official implementing his or her government's immigration controls. The protection of genuine refugees and the exposure of mistakes or maladministration by governments are essential features of a democratic society. To these ends, the ability of lawyers to

3. G.A. Res. 217A(III), U.N. GAOR 3d Comm., 3d Sess., U.N. Doc. A/810 (1948).

4. Philip Rudge, *The Asylum Crisis: The Challenge for Lawyers, a European View*, in *ASYLUM L. & PRAC. IN EUR. & N. AM.* 17 (Geoffrey Coll & Jacqueline Bhabha eds., 1992).

challenge executive decisions, and of the courts to scrutinize them, must not be denied. I take issue with lawyers, however, when they argue, as did their predecessors when appeal rights were introduced, that every application, including one easily identified as being without merit, is entitled to the same lengthy process of determination. This process is coupled with an awareness on both sides that the resultant backlogs may destroy the government's ability to decide who lives within their borders. In this scenario, am I not entitled to invite Mr. Rudge, and the many lawyers who share his views, to pay more heed to the linchpin of the democratic process, the wish of the people? It is an indisputable fact that, in every developed country, there is a substantial majority against further immigration. These majorities would agree that the rights of genuine asylum seekers should be protected, and they surely are entitled to expect reciprocal efforts on all sides to effect speedy removal of those who are unqualified. If a lawyer who believes a claim is spurious seeks to gain settlement for a client by taking advantage of or prolonging delays, or by manipulating the appeal process, then he or she is just as guilty of flouting the democratic process as the insensitive government official aiming to cut corners.

In fact, most governments' records on genuine asylum seekers are very good. Not only have they been proven to be scrupulously fair in observing the terms of the 1951 U.N. Convention, but in almost every case governments have introduced fail-safe arrangements to cover borderline applicants who do not qualify as refugees but may be at some risk if returned. Roughly twenty percent of asylum seekers qualify for settlement in one form or another. They, however, are not the problem. The problem for governments is the remaining eighty percent, who make unfounded claims for asylum and simply seek settlement without authorization. Many lawyers, meanwhile, appear content to compound the problem by adding to decisionmaking delays. Thus, applicants and their representatives contrive to deny natural justice. Now the game consists of the governments' attempts to shorten the timescale for dealing with applications, while their opponents, with the assistance of the legal profession, do everything possible to extend delays and backlogs. Both sides are aware that the longer the delay, the greater the chance a person will be allowed to stay, irrespective of the determination of the application.

The end product is an increase in unauthorized migration that governments cannot afford to ignore, and where arguments about

moral principles will take second place to practicalities. Governments on both sides of the Atlantic have made attempts to down play the current scale of migration. These efforts have failed, however, as ordinary people see only too clearly how it affects their lives. Whether it be the violent protests that have taken place in a number of European countries or Proposition 187⁵ in California, governments must take the question seriously. Alarmed at the collapse of their immigration policies, governments have felt obliged to introduce measures that enable them to make decisions on immigration cases outside their borders through additional visa requirements and sanctions against carriers for unsatisfactory documentation. Many lawyers dislike these measures. Philip Rudge refers critically to what he terms "restrictionism," under which heading he lumps visas, carrier sanctions, harmonized controls within the European Union, and even "fair and efficient" procedures for speeding up manifestly unfounded applications.⁶ On this point, our views diverge sharply. He clearly feels that these are conservative measures designed by governments whose attitudes toward genuine asylum seekers are hardening. This seems both an illogical and indefensible position. Because large numbers of those who are allowed to stay demonstrably fall outside the Convention's terms, it follows that the only group against whom governments are taking a tougher line is the eighty percent of applicants who have no valid claim to asylum. Because this action accords completely with the wishes of the overwhelming majority of these governments' citizens, arguments thus far heard to favor a softer government approach are perhaps less persuasive than their authors would wish.

The measures, which are lumped together under "restrictionism," are the logical consequence of the problematic long delays, as compounded by lawyers. Lawyers cannot blame governments if additional measures are introduced. For example, it would not be surprising for a government to attach an international panel of document specialists to overseas airports, airlines, or groups of airlines, in order to deny boarding to even more inadmissible

5. Proposition 187, also known as the "Save Our State" initiative, was voted into law on November 8, 1994, and seeks to deter illegal immigration by denying immigrants many publicly funded benefits, including access to public education. CAL. EDUC. CODE §§ 48215, 66010.8 (West Supp. 1995); CAL. HEALTH & SAFETY CODE § 130 (West Supp. 1995); CAL. WEAL. & INST. CODE § 10001.5 (West Supp. 1995).

6. Rudge, *supra* note 4, at 16.

passengers. If that happens, lawyers may well point out that some genuine cases for asylum might be caught up in such procedures and left without redress. These same lawyers must examine their own part in the exercise, as and when this happens.

VI. CONCLUSION

It would be unfortunate if the legal profession, through a policy of self-indulgence, were to end up with a reduced role in immigration cases, as they do have an important role. Even the best-intentioned official can make mistakes, and no bureaucracy is excluded from arbitrary decisions. If, however, as happens so often, the deciding factor in the grant or refusal of settlement status is the time it has taken to resolve it, and not the case's merit, then who is to blame if the lawyer's role is diminished?

In the United States, debate over the next few months undoubtedly will concentrate on California Proposition 187 and its inevitable passage to the Supreme Court. It shall be unfortunate, in my opinion, if the argument over its legality overshadows the reasons for its approval in a state with a historically liberal approach. The people of California gave a clear message to the government that the state must heed their wishes, whatever the verdict of the Supreme Court. Lawyers from developed nations will be obliged to take account of the same message. It is one thing to be endowed with high moral principles about protecting the weak and oppressed. It is a very different matter to attempt to deflect a democratically elected government from deciding its population's composition in accordance with the majority's wishes of that population.