SCC File No. 34446

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN

NELL TOUSSAINT

Applicant (Appellant)

and

ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

MEMORANDUM OF ARGUMENT

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. The Applicant, Nell Toussaint respectfully requests that her application for leave to appeal be reconsidered in light of the exceedingly rare circumstance of a subsequent conflicting decision of the UN Human Rights Committee. Both the Federal Court of Appeal and the Human Rights Committee accepted that the Applicant's exclusion from the Interim Federal Health Program because of her irregular immigration status could result in her loss of life or irreversible, negative consequences for her health. The Federal Court of Appeal held that such exclusion did not violate the applicant's right to life and to non-discrimination under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The Human Rights Committee, on the contrary, determined that the Applicant's rights to life and non-discrimination under articles 6 and 26 of the *International Covenant on Civil and Political Rights* (*ICCPR*) have been violated. The question of whether the similar guarantees of the right to life and to equality and non-discrimination under the *Charter* provide the Applicant with comparable protection of these rights as under the *ICCPR* is of such a nature and significance as to warrant decision by this Court.

Background

2. The Applicant sought judicial review before the Federal Court of a decision of an immigration official denying her health-care coverage under the Interim Federal Health Program (IFHP) because of her irregular immigration status. She argued, among other things, that the decision was in breach of her rights to life, to security of the person and to equality without discrimination under sections 7 and 15, respectively, of the *Charter*.

Federal Court's Consideration of the Rights to Life and Non-discrimination

3. The Federal Court found that the evidence established a deprivation of the Applicant's right to life and security of the person that was caused by her exclusion from the IFHP. However, the Court found that this deprivation was not contrary to section 7 of the *Charter* on the basis that denying financial coverage for health care to persons who have chosen to enter or

remain in Canada illegally is consistent with fundamental justice and that the impugned policy was a permissible means to discourage defiance of Canada's immigration laws.

4. The Federal Court recognized that "it is well-established that international law can be used to interpret domestic law including the Constitution."[1] However, on reviewing relevant jurisprudence and commentary available at that time, it concluded that the extent of Canada's obligations under international human rights law to provide health care to irregular migrants was contested in its scope.

Federal Court of Appeal's Consideration of the Rights to Life and Non-discrimination

5. The Federal Court of Appeal upheld the Federal Court's finding that the Applicant "was exposed to a significant risk to her life and health, a risk significant enough to trigger a violation of her rights to life and security of the person". The Court held, however, that the right to life was not violated because the "operative cause" of the risk to her life was her decision to remain in Canada without legal status. The Federal Court of Appeal agreed with the Federal Court's finding that if there were a deprivation of the right to life and security of the person in this case, it would accord with the principles of fundamental justice. The Federal Court of Appeal further held that discrimination on the grounds of immigration or citizenship status did not qualify for protection as an "analogous ground" of discrimination under the *Charter*. The Court held that while international human rights law could be considered in interpreting the *Charter*, it was not relevant in this case

6. The Applicant then sought leave to appeal the Federal Court of Appeal's decision to this Court. The application for leave to appeal was denied on 5 April 2012. Having exhausted her domestic remedies, the Applicant immediately took steps to initiate a complaint to the UN Human Rights Committee under the Optional Protocol to the *ICCPR*.

[1] Federal Court decision at para 63.

UN Human Rights Committee's Consideration of the Rights to Life and Non-discrimination

7. After receiving approval of funding from Legal Aid Ontario's Test Case Funding Committee, the Applicant prepared a petition to the UN Human Rights Committee. Filed on December 24, 2013, the petition alleged, among other things, that the denial of access to essential health care coverage under the IFHP violated the Applicant's rights to life and non-discrimination under articles 6(1) and 26 of the *ICCPR*. Article 6(1) of the *ICCPR* guarantees that:

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 26 of the *ICCPR* guarantees that:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

8. After considering submissions from both parties on admissibility and merits in accordance with its rules, the Committee adopted its Views on the Applicant's petition on July 24, 2018. The Committee relied extensively on the findings of the Federal Courts. It noted that both the Federal Court and the Federal Court of Appeal acknowledged that, "despite the care she may have received, the [Applicant] had been exposed to a serious threat to her life and health because she had been excluded from the benefits of the IFHP."[2] It noted evidence accepted by the Courts that the Applicant had resided in Canada for a period of time, having worked in Canada from 1999 to 2008 and sought to regularize her status in 2005.[3] It also noted that

[2] Para 11.4 of the Committee's decision. Also, see para. 11.2 thereof.

3 Para 11.2

the serious implications of the denial of access to the IFHP were "reviewed in detail by the Federal Courts"[4].

9. The Committee determined that Canada's denial of coverage for essential health care violated the Applicant's right to life, even though it did not result in the loss of her life, contrary to article 6 of the *ICCPR*. It stated that "as a minimum, States parties have the obligation to provide access to existing health-care services that are reasonably available and accessible when lack of access to the health care would expose a person to a reasonably foreseeable risk that can result in loss of life."[5] In its consideration of whether the distinction between regular and irregular migrants constituted discrimination contrary to article 26, the Committee noted that it was recognized by the domestic courts and not contested by the State party that the exclusion of the Applicant from coverage for the IFHP care could result in the Applicant's loss of life or irreversible negative consequences for the Applicant's health. It therefore determined that denying access to the IFHP to those who have not been fully admitted to Canada was not based on a reasonable and objective criterion, and therefore constituted discrimination under article 26.

10. In light of its findings, the Human Rights Committee stated that pursuant to article 2(3)(a) of the *ICCPR*[6] Canada is under an obligation to provide the Applicant with adequate compensation and to take steps necessary to prevent similar violations in the future,

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4 Para 11.5

5 Para 11.3

6 Article 2(3)(a) of the *ICCPR* states as follows:

> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

including reviewing its national legislation to ensure that irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life.

11. The Committee stated that it wished to receive information from Canada about the measures taken to give effect to the Committee's Views within 180 days. Canada informed the Committee on February 1, 2019 in its response that it is unable to agree with the Views of the Committee and does not intend to adopt any further measures to give effect to the Committee's Views. Specifically, Canada stated that it agrees with the Federal Court of Appeal's finding that the "operative cause" of the risk to the Applicant's life was her decision to remain illegally in Canada to work after entering as a visitor.

PART II – QUESTION IN ISSUE

12. The question on this motion is whether there are exceedingly rare circumstances to warrant this Court's reconsideration of the Toussaint Leave Application and, if so, whether leave should be granted.

PART III – STATEMENT OF ARGUMENT

Exceedingly Rare Circumstances

13. Rule 73(1) of the *Rules of the Supreme Court of Canada* provides that "there shall be no reconsideration of an application for leave to appeal unless there are exceedingly rare circumstances in the case that warrant consideration by the Court."[7]

[7] Rule 73(1), *Rules of the Supreme Court of Canada.*

14. The *Supreme Court of Canada Practice, 2018* explains the effect of Rule 73(1) and summarizes the circumstances where Rule 73(1) has been applied:

> In summary, it appears that reconsideration will be granted to prevent injustice, or more generally, in any "exceptional" case. The power to grant reconsideration is part of the Court's policy to allow this Court the widest degree of flexibility in controlling access to its docket. The case law illustrates that reconsideration, in the Court's discretion, may be granted in the following cases of injustice or exceptional circumstances:
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> 1. Where the original leave panel was unaware of a change in the law, or of relevant and material facts underlying the original application for leave. See *Reekie v. Mes-servey*, [1990] 1 S.C.R. 219, 1990 CarswellBC 750; and *Mapara v. R.* (October 2, 2003), Doc. 29750, 2003 CarswellBC 2444 (S.C.C.);
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> 2. To consider an important question not apparent in the original application. See *R. v. Hinse*, [1995] 4 S.C.R. 597, 1995 CarswellQue 186; or
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> 3. Where the law underpinning the original leave panel's decision is subsequently opened to challenge or review by the Court itself as, for example, where leave is granted on the same issue in a subsequent case. A motion to extend is also required. *Pearson v. Canada* (October 24, 1996), Doc. 24107 (S.C.C.); *Canderel v. M.N.R.* (May 8, 1997), Doc. 24663, 215 N.R. 320 (note) (S.C.C.); and *OSFC Holdings Ltd. v. R.* (October 20, 2005), Doc. 28860, 2005 CarswellNat 7544 (S.C.C.).[8]

15. It is respectfully submitted that this Court now has the opportunity to consider the Leave Application in the full context of the recently developed and conflicting international human rights jurisprudence. This is a timely opportunity for this Court to pronounce about Canada's domestic law in light of this conflicting jurisprudence, and also a matter of fairness and justice to the Applicant.

16. It is exceedingly rare that this Court, not previously having heard an appeal, has the opportunity to do so with the benefit of the decision of an international treaty body on the

[8] Watt et al., *Supreme Court of Canada Practice 2018*, Thomson Reuters, 2018 at p. 402.

very facts of the case, and engaging the same rights. Moreover, the public importance of the Federal Court of Appeal decision in this case has dramatically changed since the time of this Court's consideration of her application for leave to appeal. The decision now raises an extremely serious issue of non-compliance with Canada's international human rights obligations with respect to two of the most fundamental human rights - the right to life and the right to equality (non-discrimination). As Justice L'Heureux-Dubé has observed, "Our *Charter* is the primary vehicle through which international human rights achieve a domestic effect. In particular, s. 15 (the equality provision) and s. 7 (which guarantees the right to life, security and liberty of the person) embody the notion of respect of human dignity and integrity."[9]

17. If the Court does not resolve this issue, there remains a significant level of uncertainty among courts and governments in Canada about their obligations with respect to irregular migrants' rights to life and non-discrimination where their lives are at risk if denied access to essential health care. As long as the decision of the Federal Court of Appeal stands, and in the absence of any other legislative measures, Canada is failing to meet its obligation as a State party under article 2 of the *ICCPR* to ensure access to effective remedies for what the Human Rights Committee has determined constitute serious violations of rights under the *ICCPR*.

18. This Court has held that the protection of persons' rights under the *Charter* should be assumed to be at least as great as under treaties that Canada has ratified, and that international law is a persuasive source for interpreting *Charter* rights.[10] In order to ensure, where appropriate, that the protections afforded by the *Charter* accord with those under international human rights law this Court has relied on the views and commentary of various

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[9] *R.* v. *Ewanchuk*, [1999] 1 SCR 330, 1999 CanLII 711 (SCC), at para.73 [citations omitted]

[10] *Henry* v. *British Columbia (Attorney General)*, [2015] 2 SCR 214, 2015 SCC 24 (CanLII), at paras. 135-137; *Saskatchewan Federation of Labour* v. *Saskatchewan*, [2015] 1 SCR 245, 2015 SCC 4 (CanLII), at paras. 64-70; and ***Divito v. Canada (Public Safety and Emergency Preparedness)***, 2013 SCC 47, [2013] 3 S.C.R. 157, at paras. 22-23.

types of international human rights bodies to clarify the scope of international human rights guarantees. The Court has suggested that decisions rendered in individual cases under ratified complaints procedures should generally be accorded high authority. As Peter Hogg has noted, the decisions of the UN Human Rights Committee in particular ought to be accorded more authority by courts interpreting and applying similar rights under the *Charter*, given the nature of the expertise of the Committee members and the fact that jurisprudence often interprets rights which are explicitly protected in the *Charter*.[11]

19. At the time that the Applicant's *Charter* claims were considered by the Federal Court and the Federal Court of Appeal, and when this honourable Court considered the Applicant's application for leave to appeal, there was no authoritative international jurisprudence as to whether the guarantees of the right to life and to non-discrimination under the *ICCPR* require States to ensure that irregular migrants have access to essential health care necessary for the protection of life. The UN Human Rights Committee now has provided authoritative jurisprudence on this point.

20. Canada undertook in article 2(3) of the *ICCPR* to ensure that if the Applicant's rights to life and equality without discrimination as recognized in the *ICCPR* were violated she would have an effective remedy and her right to such remedy would be determined by a competent authority. Considering the broad powers and authority of this Court, and considering that an appeal to this Court would provide the Applicant with the most expeditious procedure to determine if Canada violated her *Charter* rights in light of the Human Rights Committee's decision in her case, this Court is the most appropriate judicial authority to ensure the Applicant has timely access to justice. It would be unjust for the Applicant not to have the benefit of this Court's consideration of the merits of her appeal in light of this decision of the Human Rights Committee in her favour.

[11] Peter Hogg, *Constitutional Law of Canada*, 5d ed loose-leaf, (Toronto: Carswell), ch 36, 39-43.

21. As such, the Applicant Nell Toussaint respectfully requests that this motion be granted and that the Judgment of this Court in respect of the Leave Application be reconsidered pursuant to Rule 73 of the Rules.

PART IV – SUBMISSIONS ON COSTS

22. Since the Applicant is of limited means, she respectfully requests costs should her motion be allowed and the application for leave be granted, but asks that no costs be awarded if her motion and application are not successful.

PART V – ORDER SOUGHT

23. The Applicant seeks the following:

    a) an Order granting the motion for an extension of time and for reconsideration; and

    b) an Order granting Leave to Appeal from the decision of the Federal Court of Appeal court file no. A-362-10, dated June 27, 2011.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Ottawa, Ontario this 5th day of June, 2019

FOR Andrew C. Dekany
Counsel for the Applicant Nell Toussaint

PART VI – TABLE OF AUTHORITIES

Authority	**Citing Paragraph(s)**
Divito v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 47	18
Henry v. *British Columbia (Attorney General)*, [2015] 2 SCR 214, 2015 SCC 24	18
Peter Hogg, *Constitutional Law of Canada*, 5d ed loose-leaf, (Toronto: Carswell)	18
R. v. *Ewanchuk*, [1999] 1 SCR 330	16
Saskatchewan Federation of Labour v. *Saskatchewan*, [2015] 1 SCR 245, 2015 SCC 4	18
Watt et al., *Supreme Court of Canada Practice 2018*, Thomson Reuters, 2018	14