

EXECUTIVE SUMMARY

Nell Toussaint v. Canada (December 28, 2013)

A. Overview

1. This case raises the important question of whether one of the most vulnerable and disadvantaged groups in Canadian society can be denied access to health care necessary for the protection of their lives solely on the grounds of their undocumented immigration/citizenship status; and whether denying access to health care necessary for life is a permissible means of encouraging compliance with immigration laws.

B. Facts

2. After a number of years working as an undocumented migrant, and while in the process of seeking to obtain legal residency status, the author became ill with life-threatening medical conditions. In a letter of May 6, 2009 the author applied for coverage under the federal government's program to provide health care to immigrants - the Interim Federal Health Benefit Program (IFHP). The IFHP was authorized to expend funds for medical or dental care, hospitalization, or any incidental expenses for immigrants or anyone "subject to immigration jurisdiction or for whom the immigration authorities feel responsible" where the person lacks the resources to pay the costs of the medical care.

3. In a decision letter dated July 10, 2009, the author's application for coverage under the IFHP was denied. The decision letter stated that the author did not fit into any of the four categories of immigrants eligible for IFHP coverage as set out in departmental guidelines of Citizenship and Immigration Canada: refugee claimants; resettled refugees; persons detained under the *Immigration and Refugee Protection Act*; and victims of trafficking in persons. The life threatening nature of the author's health problems was not mentioned as a consideration.

4. As was subsequently found by the courts in this case, the denial of coverage for health care under the IFHP put the author's life and health at serious risk. Although she was intermittently able to obtain emergency health care from hospitals and some assistance from a community health service, there were serious delays in obtaining necessary treatment and she did not have access to the medical management by skilled professionals that her health

problems required. The author's life and health were endangered in ways which could have been avoided had she been provided health care under the IFHP.

5. The author sought judicial review before the Federal Court of Canada regarding the Immigration Officer's decision to deny her health care coverage under the IFHP, arguing that the decision was contrary to the protections of rights to life, to security of the person and to non-discrimination under sections 7 and 15, respectively, of the *Canadian Charter of Rights and Freedoms* (*Canadian Charter*) and that the immigration officer had failed to apply domestic law consistently with the international human rights treaties ratified by Canada. The author filed with the court extensive medical evidence showing that her life had been placed at risk. The author also filed evidence from experts in migration and health establishing that undocumented migrants migrate for work rather than for health care, that providing health care to undocumented migrants does not increase illegal migration and that ensuring access to health care by undocumented migrants is fiscally sound health care policy. The author's expert evidence was not contested or contradicted by any expert evidence filed by the respondent state authority.

6. After reviewing the expert medical reports the Federal Court found that the evidence established a deprivation of the author's right to life and security of the person that was caused by her exclusion from the IFHP. However, the Federal Court found that the deprivation of the rights to life and security of the person in the author's case was in accordance with principles of fundamental justice and therefore not contrary to section 7 of the *Canadian Charter*. The Court found 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. The Federal Court did not refer to any of the expert evidence that denying access to health care is not an effective means to promote compliance with immigration laws.

7. The author then appealed to the Federal Court of Appeal, submitting that the Federal Court had erred, including in its interpretation and application of international human rights law and the *Canadian Charter*. The author argued that the Federal Court decision was contrary to the pre-eminent status of the right to life in the ICCPR and to protections from discrimination on the ground of immigration status under international human rights law.

8. The Federal Court of Appeal upheld the Federal Court's finding that the author "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 "operative cause" of the risk to her life was her decision to remain in Canada without legal status and agreed with the lower court's finding that the deprivations of the right to life and security of the person in this case accords with the principles of fundamental justice. The Federal Court of Appeal further held that discrimination on the grounds of immigration or citizenship status does not qualify for protection as an "analogous ground" of discrimination under the *Canadian Charter*. The Court also commented that in assessing whether the exclusion of immigrants without legal status from access to health care is justifiable as a reasonable limit under section 1 of the *Canadian Charter* appropriate weight should be given to "the interests of the state in defending its immigration laws." The Court held that while international human rights law can be considered in interpreting the *Canadian Charter*, it is not relevant in this case.

9. The author sought leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada, including as an exhibit a letter from the Office of the High Commissioner for Human Rights affirming the importance of the issues raised in relation to Canada's compliance with its international human rights treaty obligations. The application for leave to appeal was denied in a decision released on April 5, 2012.

10. The author has at no time claimed that she had a right to remain in Canada in order to receive the health care she needed. Her claim has been restricted to her circumstances while in Canada attempting to legally secure permanent residency. Nor does the author claim an unqualified right to access publicly funded health care that is available to permanent residents of Canada through provincial health insurance plans. It is the denial of access to health care necessary for the protection of life and health on the grounds of irregular or undocumented immigration status, where individuals lack the means to pay for the care themselves that is at issue in the present communication.

C. Rights under the ICCPR Alleged to Have Been Violated

i) *Articles 2(1), 26*

11. The author submits that the exclusion from health care necessary for the protection of life on the basis of her irregular citizenship or immigration status – residing in Canada

without legal status while seeking humanitarian and compassionate consideration of an application for permanent resident status – constitutes a discriminatory distinction and exclusion under Articles 2(1) and 26 of the ICCPR. Moreover, the author submits that discrimination on the basis of citizenship or immigration status in her circumstances was not reasonable or justifiable.

12. The uncontroverted evidence in this case establishes that denying access to health care to undocumented migrants does not act as an effective deterrence of illegal immigration. The author submits that denying health care necessary for life to undocumented migrants on the basis of their immigration status is not an objective, proportionate or reasonable means of discouraging illegal immigration. On the contrary, ensuring access to health care necessary for the protection of life and health of undocumented migrants saves host countries health care costs in the long run.

ii) Article 6

13. The author submits that the threat to her life resulting from the denial of access to IFHP health care coverage violated her right to life and that such denial is not justified as a means of promoting compliance with immigration laws. Denying health care necessary for life is, on the contrary, an arbitrary punitive measure disproportionately impacting migrants suffering from serious illness or disability. More proportionate and effective measures, including deportation to the country of origin, are available to the State Party.

iii) Article 7

14. The author submits that the State Party, including its independent judiciary, violated Article 7 of the ICCPR by denying her access to health care coverage under the IFHP necessary for the protection of her life in order to discourage defiance of Canada's immigration laws. Denial of access to medical care as a punitive response to illegal action constitutes cruel, inhuman or degrading treatment or punishment. The author alleges that the decisions of the Federal Court and the Federal Court of Appeal to permit the denial of health care to the author as a deterrent to others who may consider defying Canada's immigration laws violated the author's rights under Article 7.

iv) Article 9(1)

15. The author submits that the severe psychological stress and the long term negative health consequences endured as a result of the State Party's denial of access to necessary health care may also constitute a violation of the right to security of person under Article 9(1). The Federal Court in this case found on the basis of the evidence that the author was deprived of her right to security of the person under the *Canadian Charter* by the State Party's denial of access to essential health care. Canadian courts have applied the right to security of the person, similarly with the right to life, to issues arising both inside and outside of the administration of justice, including access to health care. In line with the Human Rights Committee's jurisprudence establishing that the right to security of person under article 9(1) is not restricted to persons in detention, the author requests that the Committee consider whether in her case article 9(1) also was violated.

v) Article 2(3)

16. The author further submits that effective remedies were available under domestic law in her case but that the courts failed to provide them. The author submits, first, that the courts should have interpreted and applied the relevant domestic law in accordance with the ICCPR. Second, the author submits that she was denied an effective remedy to discrimination by the domestic courts' failure to refer to expert evidence documenting widespread prejudice and false stereotypes about undocumented migrants. The courts instead relied on common stereotypes and prejudice put forward by the government, to the effect that illegal migrants can be expected to seek out countries where they can access free health care or other services. This stereotype was refuted by expert evidence before the court. The State Party's reliance on stereotype rather than evidence violated the author's right to an effective remedy.

D. Remedy Requested

17. The author seeks that the State Party ensure that individuals residing in Canada with irregular immigration or citizenship status have access to IFHP coverage for health care necessary for the protection of their rights to life and security of person, without discrimination on the ground of immigration or citizenship status. The author also requests that the Committee recommend compensation for the severe psychological stress, indignity, and exposure to risk to life and to long term negative health consequences she suffered as a result of the violation of her rights.