Federal Court of Appeal Cour d'appel fédérale

CANADA

Date: 20110429

Dockets: A-408-09
A-501-09

Citation: 2011 FCA 146

CORAM: **SHARLOW J.A.**
DAWSON J.A.
LAYDEN-STEVENSON J.A.

Docket: A-408-09

BETWEEN:

NELL TOUSSAINT

Appellant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

CHARTER COMMITTEE ON POVERTY ISSUES

Intervener

Docket: A-501-09

BETWEEN:

BEN NDUNGU

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on January 19, 2011.

Judgment delivered at Ottawa, Ontario, on April 29, 2011.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: DAWSON J.A.
LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] These are appeals of two judgments of Justice Snider, reported as *Toussaint* v. *Canada (Minister of Citizenship and Immigration)*, 2009 FC 873, [2010] 3 F.C.R. 452, and *Ndungu* v. *Canada (Minister of Citizenship and Immigration)*, 2009 FC 1269. The appeals were heard together

based on serious questions of general importance certified by Justice Snider pursuant to paragraph 74(*d*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "*IRPA*"). Those questions, which I have reworded slightly, are as follows:

> (1) On a proper interpretation of subsection 25(1) of the *IRPA*, is the Minister of Citizenship and Immigration (the "Minister") obliged to consider a request for an exemption from the requirement in paragraph 10(1)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "*Regulations*"), to pay a fee for processing an application under subsection 25(1)?
>
> (2) If not, then has the failure of the Governor in Council to enact regulations permitting the waiver of fees for foreign nationals living in poverty who wish to make an in-Canada application for permanent resident status pursuant to subsection 25(1) of the *IRPA* infringed:
>
> (a) the rights of the appellants under section 7 or 15 of the *Canadian Charter of Rights and Freedoms*, or
>
> (b) the rule of law or the common law constitutional right of access to the courts?

[2] Justice Snider concluded that the answer to all of these questions is no, and on that basis dismissed the judicial review applications. I agree with Justice Snider on the second question. However, I respectfully disagree with her on the first question, and for that reason I would allow these appeals.

A. Background

[3] The description of the background to these appeals is divided into three parts: *(1) Subsection 25(1) of the IRPA*; *(2) Provisions of the IRPA and the Regulations relating to fees*; and *(3) Relevant facts and litigation history*.

1. Subsection 25(1) of the IRPA

[4] A foreign national may be granted the status of "permanent resident" under the *IRPA*. "Foreign national" is defined as follows in subsection 2(1) of the *IRPA*:

"foreign national" means a person who is not a Canadian citizen or a permanent resident, and includes a stateless person.	« étranger » Personne autre qu'un citoyen canadien ou un résident permanent; la présente définition vise également les apatrides.

[5] The status of permanent resident brings with it a number of important legal rights, including the right to enter and remain in Canada, and essentially the same rights as a citizen to work in Canada, and to receive social benefits, including health care.

[6] The normal procedure by which a foreign national becomes a permanent resident begins with an application submitted while the foreign national is outside Canada. However, subsection 25(1) of the *IRPA* permits a person to submit an "in-Canada" or "inland" application for permanent resident status with a request that the Minister exercise the discretion to grant specified relief. Subsection 25(1) read as follows at the time relevant to these appeals:

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger —

justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

(Section 25 was amended by subsection 4(1) of the *Balanced Refugee Reform Act,* S.C. 2010, c. 7, effective June 29, 2010. However, no one has argued that the amendments apply to the subsection 25(1) applications that are the subject of these appeals, which were made before the amendments came into force. For that reason, I have not taken the amendments into consideration.)

[7] A foreign national in Canada is eligible to submit a subsection 25(1) application only if he or she is inadmissible or does not meet the requirements of the *IRPA*. A foreign national may be inadmissible on any of the grounds stipulated in sections 34 to 42 of the *IRPA*. It is not necessary to summarize all of those provisions but I will note some examples.

[8] Under section 34, a foreign national is inadmissible on security grounds for, among other things, engaging in any of the listed acts of espionage, subversion, terrorism, or for being a danger to the security of Canada, unless the Minister is satisfied that the presence of the foreign national in Canada would not be detrimental to the national interest. Under section 35, a foreign national is inadmissible on the ground of violating human or international rights in one of the listed ways, again subject to a Ministerial exception. Under section 38, a foreign national is inadmissible on health grounds if, among other things, their health condition might reasonably be expected to cause excessive demand on health or social services.

[9] The categories of admissibility that are most relevant to the statutory context for these appeals are set out in section 39 (financial reasons) and section 41 (non-compliance with the *IRPA*). Those provisions read as follows:

39. A foreign national is inadmissible for financial reasons if they are or will be unable or unwilling to support themself or any other person who is dependent on them, and have not satisfied an officer that adequate arrangements for care and support, other than those that involve social assistance, have been made.	39. Emporte interdiction de territoire pour motifs financiers l'incapacité de l'étranger ou son absence de volonté de subvenir, tant actuellement que pour l'avenir, à ses propres besoins et à ceux des personnes à sa charge, ainsi que son défaut de convaincre l'agent que les dispositions nécessaires — autres que le recours à l'aide sociale — ont été prises pour couvrir leurs besoins et les siens.
...	[…]
41. A person is inadmissible for failing to comply with this Act (*a*) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and (*b*) in the case of a permanent resident, through failing to comply with subsection 27(2) or section 28.	41. S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.

[10] Subsection 25(1) on its face imposes a legal obligation on the Minister to do certain things upon the request of a foreign national in Canada who is inadmissible or who does not meet the requirements of the *IRPA*. (It also permits the Minister to do those same things on his own initiative, or upon the request of a foreign national outside Canada, but those elements of subsection 25(1) are not in play in these appeals).

[11] As I read subsection 25(1), the Minister's statutory obligation generally is as follows: (1) to examine the circumstances of the applicant; (2) to identify any humanitarian and compassionate considerations relating to the applicant (taking into account the best interests of a child directly affected), and any relevant public policy considerations; and (3) to form an opinion as to whether the humanitarian and compassionate considerations, or the public policy considerations, justify granting the applicant permanent resident status or an exemption from any applicable criteria or obligation of the *IRPA*.

2. Provisions of the IRPA and the Regulations relating to fees

[12] The *IRPA* does not stipulate the procedural requirements for a subsection 25(1) application. The procedural requirements are established by regulations enacted by the Governor in Council pursuant to subsection 5(1) of the *IRPA*, which reads as follows:

5. (1) Except as otherwise provided, the Governor in Council may make any regulation that is referred to in this Act or that prescribes any matter whose prescription is referred to in this Act.	5. (1) Le gouverneur en conseil peut, sous réserve des autres dispositions de la présente loi, prendre les règlements d'application de la présente loi et toute autre mesure d'ordre réglementaire qu'elle prévoit.

Pursuant to subsection 5(2) of the *IRPA*, regulations proposed to be made under certain provisions of the *IRPA* must be tabled in Parliament and referred to a Parliamentary Committee before they can be enacted by the Governor in Council. No such Parliamentary reference was required for any regulations that are relevant to the issues in these appeals.

[13] Section 26 of the *IRPA* authorizes the making of regulations relating to subsection 25(1), the provision in issue in this case. Section 26 read as follows at the relevant time (my emphasis):

26. The regulations may provide for any matter relating to the application of sections 18 to 25, and may include provisions respecting	26. Les règlements régissent l'application des articles 18 à 25 et portent notamment sur :
(*a*) entering, remaining in and re-entering Canada;	*a*) l'entrée, la faculté de rentrer et le séjour;
(*b*) permanent resident status or temporary resident status, including acquisition of that status;	*b*) le statut de résident permanent ou temporaire, et notamment l'acquisition du statut;
(*c*) the circumstances in which all or part of the considerations referred to in section 24 may be taken into account;	*c*) les cas dans lesquels il peut être tenu compte de tout ou partie des circonstances visées à l'article 24;
(*d*) conditions that may or must be imposed, varied or cancelled, individually or by class, on permanent residents and foreign nationals; and	*d*) les conditions qui peuvent ou doivent être, quant aux résidents permanents et aux étrangers, imposées, modifiées ou levées, individuellement ou par catégorie;
(*e*) deposits or guarantees of the performance of obligations under this Act that are to be given to the Minister.	*e*) les garanties à fournir au ministre pour l'exécution de la présente loi.

[14] Paragraph 26(*b*) of the *IRPA* permits regulations to be made regarding "permanent resident status", including "the acquisition of that status". That would include regulations stipulating the procedural requirements for a subsection 25(1) application.

[15] The procedural regulations in play in this case are subsection 10(1) and section 66 of the *Regulations*. Subsection 10(1) states the general procedural requirements for all applications under

the *IRPA*. Section 66 stipulates how a subsection 25(1) application is to be made. Those provisions read as follows (my emphasis):

10. (1) Subject to paragraphs 28(*b*) to (*d*), an application under these Regulations shall	10. (1) Sous réserve des alinéas 28*b*) à *d*), toute demande au titre du présent règlement :
(*a*) be made in writing using the form provided by the Department, if any;	*a*) est faite par écrit sur le formulaire fourni par le ministère, le cas échéant;
(*b*) be signed by the applicant;	*b*) est signée par le demandeur;
(*c*) include all information and documents required by these Regulations, as well as any other evidence required by the Act;	*c*) comporte les renseignements et documents exigés par le présent règlement et est accompagnée des autres pièces justificatives exigées par la Loi;
(*d*) <u>be accompanied by evidence of payment of the applicable fee, if any, set out in these Regulations</u>; and	*d*) <u>est accompagnée d'un récépissé de paiement des droits applicables prévus par le présent règlement</u>;
(*e*) if there is an accompanying spouse or common-law partner, identify who is the principal applicant and who is the accompanying spouse or common-law partner.	*e*) dans le cas où le demandeur es accompagné d'un époux ou d'un conjoint de fait, indique celui d'entre eux qui agit à titre de demandeur principal et celui qui agit à titre d'époux ou de conjoint de fait accompagnant le demandeur principal.
…	[…]
66. A request made by a foreign national under subsection 25(1) of the Act must be made as an application in writing accompanied by an application to remain in Canada as a permanent resident or, in the case of a foreign national outside Canada, an application for a permanent resident visa.	66. La demande faite par un étranger en vertu du paragraphe 25(1) de la Loi doit être faite par écrit et accompagnée d'une demande de séjour à titre de résident permanent ou, dans le cas de l'étranger qui se trouve hors du Canada, d'une demande de visa de résident permanent.

[16] The *IRPA*, as it read in 2008, mentions fees only in sections 89, 148 and 150. It is undisputed in these appeals that section 89 of the *IRPA* is the provision that authorized the enactment of section 307 of the *Regulations*, the provision that stipulates the fee in issue in these appeals. Sections 148 and 150 of the *IRPA* (found in Part 3, "Enforcement") relate to the obligations of operators of vehicles or transportation facilities bringing persons into Canada. Those provisions shed no light on the issues in these appeals. Section 89 reads as follows:

89. The regulations may govern fees for services provided in the administration of this Act, and cases in which fees may be waived by the Minister or otherwise, individually or by class.	89. Les règlements peuvent prévoir les frais pour les services offerts dans la mise en oeuvre de la présente loi, ainsi que les cas de dispense, individuellement ou par catégorie, de paiement de ces frais.

[17] No regulation has been enacted governing the waiver of fees by the Minister or otherwise.

[18] Fees are dealt with in Part 19 of the *Regulations* (sections 294-315), which consists of five divisions: Division 1 (interpretation), Division 2 (fees for applications for visas and permits, including work permits and study permits), Division 3 (fees for applications to remain in Canada as a permanent resident), Division 4 (right of permanent residence) and Division 5 (fees for other applications and services). Within each division, fees are imposed in numerous categories, each with its own scheme that in some cases includes exceptions and remissions.

[19] The fee in issue in this case is the fee stipulated by section 307 of the *Regulations*, which is found in Division 5 (fees for other applications and services) and reads in relevant part as follows:

307. The following fees are payable for processing an application made in accordance with section 66 if no fees are payable in respect of the same applicant for processing an application to remain in Canada as a permanent resident or an application for a permanent resident visa:	307. Les frais ci-après sont à payer pour l'examen de la demande faite aux termes de l'article 66 si aucuns frais ne sont par ailleurs à payer à l'égard du même demandeur pour l'examen d'une demande de séjour au Canada à titre de résident permanent ou d'une demande de visa de résident permanent :
(*a*) in the case of a principal applicant, $550 ….	*a*) dans le cas du demandeur principal, 550 $ [....]

(The reference to section 66 is a reference to section 66 of the *Regulations*, which is quoted above.)

3. Relevant facts and litigation history

[20] The facts relating to Ms. Toussaint and Mr. Ndungu are similar insofar as they are relevant to these appeals. Ms. Toussaint and Mr. Ndungu are foreign nationals. In 2008 they were living in Canada without permanent resident status and without a visa entitling them to remain in Canada. They had no legal right to remain in Canada and were liable to be removed. If they were to leave Canada, they would have no legal right to return to Canada without obtaining either a visa or the status of permanent resident.

[21] Ms. Toussaint and Mr. Ndungu both wish to become permanent residents. Each submitted a subsection 25(1) application in 2008. The Minister does not dispute that they were eligible to do so, and for the purposes of these appeals it is not necessary to identify precisely why they were eligible.

[22] Paragraph 10(1)(*d*) of the *Regulations* required Ms. Toussaint and Mr. Ndungu to include with their subsection 25(1) applications proof that they had paid the $550 fee stipulated by section

307 of the *Regulations*. Ms. Toussaint and Mr. Ndungu did not comply with that requirement. They both claim that the payment of the $550 fee would be an undue financial hardship for them. When they submitted their subsection 25(1) applications, they did not include proof of payment of the fee. Instead, they submitted evidence of their poverty and a request that the fee be waived.

[23] For the purpose of these appeals, I have assumed that the claims of financial hardship asserted by Ms. Toussaint and Mr. Ndungu are such that the Minister could reasonably conclude that the fee should be waived on humanitarian and compassionate grounds. I do not suggest that this would have been the only decision reasonably open to the Minister.

[24] Ms. Toussaint and Mr. Ndungu each received a letter stating that their subsection 25(1) applications would not be considered until the $550 fee was paid. Ms. Toussaint's letter is dated January 12, 2009, and Mr. Ndungu's letter is dated February 10, 2009. The explanations are identical and read as follows:

> Paragraph 10(1)(*d*) of the *Immigration and Refugee Protection Regulations* requires all applicants to include evidence of payment of the applicable fee. Your request for an exemption for the fee is contrary to this legislative requirement. If you wish to apply for permanent residence in Canada your application must be accompanied by the required fee.

This explanation reflects the interpretation of subsection 25(1) of the *IRPA* and the applicable *Regulations* asserted by the Minister in the Federal Court and in this Court.

[25] Both Ms. Toussaint and Mr. Ndungu sought and obtained leave to bring an application in the Federal Court for judicial review of the Minister's decision to refuse to consider their subsection 25(1) applications. Justice Snider heard Ms. Toussaint's application for judicial review first, dismissing it and certifying the questions referred to above. Justice Snider later heard Mr. Ndungu's application, with the same result.

[26] Both judicial review applications challenged the Minister's interpretation of subsection 25(1) of the *IRPA*, and raised a number of constitutional challenges in the event the Minister's interpretation was found to be correct.

[27] On the question of statutory interpretation, Justice Snider acknowledged that the interpretation of subsection 25(1) proposed by Ms. Toussaint and Mr. Ndungu reflects a valid literal interpretation of subsection 25(1), but she accepted the Minister's interpretation because, as she explained in paragraphs 23 to 32 of her reasons in *Toussaint*, she considered the Minister's interpretation to be more consistent with the object and purpose of the statutory scheme that includes subsection 25(1).

[28] Justice Snider rejected the constitutional arguments of Ms. Toussaint and Mr. Ndungu, concluding that there is no constitutional principle that compels the Governor in Council to enact regulations governing the waiver of fees payable under the *IRPA*.

B. Standard of Review

[29] This case has been argued throughout on the basis that the Minister is owed no deference on the question of statutory interpretation or the constitutional issues raised in these appeals. I agree, and have applied the standard of correctness.

C. Principles of statutory interpretation

[30] As the main issue in these appeals requires a resolution of a debate about the interpretation of subsection 25(1) of the *IRPA*, the principles of statutory interpretation must be considered. Justice Snider summarized the relevant principles in paragraphs 16 to 20 of her reasons in *Toussaint*. I agree with her summary and repeat it here:

> [16] Since the first issue before me is one of statutory interpretation, it is useful to begin with an overview of the principles related to such matters. On a number of occasions, the Supreme Court of Canada has given guidance on how to approach a problem of statutory interpretation. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21, Mr. Justice Iacobucci, speaking for the unanimous Court, endorsed the statement of Elmer Driedger in *Driedger on the Construction of Statutes*, 2nd ed. (Toronto: Butterworths Canada Ltd., 1983) that:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> [17] Accordingly, the task of the Court in interpreting legislation cannot be restricted to analysing the plain meaning of the provision in question. Further, while the statutory words must be given a "fair, large and liberal construction and interpretation as best ensures the attainment of its objectives" (*Interpretation Act*, R.S.C. 1985, c. I-21, s. 12), attention must be directed to the scheme and objective of the statute, the intention of the legislature, and the context of the words in issue (*Rizzo*, above, at para. 23). Regardless of how clear and unambiguous the words of a provision may be, further analysis must be carried out. Indeed, a failure to determine the intention of the legislature in enacting a particular provision has been found to be an error (*Rizzo*, above, at paras. 23, 31).

> It follows that, where there are conflicting but not unreasonable interpretations available, the contextual framework of the legislation becomes even more important.
>
> [18] In short, my task cannot be limited to interpreting the individual words or phrases used in s. 25; rather, I must have regard to the context in which the words are placed, the objects of *IRPA* and the intention of Parliament.
>
> [19] In considering the context of *IRPA*, the nature or architecture of the statutory scheme is important. In *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R. 655 at paragraph 23, the Court of Appeal described *IRPA* as "framework legislation": That is to say, the Act contains the core principles and policies of the statutory scheme and, in view of the complexity and breadth of the subject-matter, is relatively concise. The creation of secondary policies and principles, the implementation of core policy and principles, including exemptions, and the elaboration of crucial operational detail, are left to regulations, which can be amended comparatively quickly in response to new problems and other developments. Framework legislation thus contemplates broad delegations of legislative power.
>
> [20] In *De Guzman* (at paragraph 26), the Court also commented that if there is a conflict between the express language of an enabling clause and a regulation purportedly made under it, the regulation may be found to be invalid. Otherwise, courts approach with great caution the review of regulations promulgated by the Governor (or Lieutenant-Governor) in Council.

D. Interpretation of subsection 25(1)

1. Introduction

[31] The question of statutory interpretation raised in these appeals is this: Does subsection 25(1) of the *IRPA* give the Minister the authority to grant a request made by a foreign national in Canada to waive the requirement in paragraph 10(1)(*d*) of the *Regulations* to pay the fee stipulated by section 307 of the *Regulations* for a subsection 25(1) application? In my view, the answer is yes, for the reasons explained below. It follows that the Minister erred in law when he rejected the

subsection 25(1) applications of Ms. Toussaint and Mr. Ndungu on the basis that subsection 25(1) did not give him the authority to waive the fee.

[32] For ease of reference, subsection 25(1) is reproduced here (my emphasis):

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from <u>any applicable criteria or obligation of this Act</u> if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever <u>tout ou partie des critères et obligations applicables</u>, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

[33] I summarize the Minister's argument as follows. The phrase "any applicable criteria or obligation of this Act" in subsection 25(1) of the *IRPA* refers only to the grounds of inadmissibility for permanent residence set out in sections 34 to 42 of the *IRPA*, and the various obligations under the *Regulations* to provide specified information and official documents. In contrast, the requirement under paragraph 10(1)(*d*) of the *Regulations* to pay the $550 fee is a precondition to the making of a valid subsection 25(1) application. Until that fee is paid, there is no subsection 25(1) application, and therefore there is no subsection 25(1) request for the Minister to consider. It follows

that the phrase “applicable criteria or obligation of this Act” cannot be interpreted to include the authority to waive the fee.

[34] Ms. Toussaint and Mr. Ndungu propose an entirely different interpretation. I summarize their argument as follows. Under subsection 25(1) of the *IRPA*, the Minister is given the statutory authority to grant a foreign national in Canada an exemption from “any applicable criteria or obligation of this Act”. Paragraph 10(1)(*d*) imposes on every subsection 25(1) applicant the obligation to pay the fee stipulated in section 307 of the *Regulations*. By virtue of subsection 2(2) of the *IRPA*, the obligation to pay that fee is an obligation “of this Act”, and therefore it is an obligation that the Minister may waive pursuant to subsection 25(1). Subsection 2(2) of the *IRPA* reads as follows:

2. (2) Unless otherwise indicated, references in this Act to “this Act” include regulations made under it.	2. (2) Sauf disposition contraire de la présente loi, toute mention de celle-ci vaut également mention des règlements pris sous son régime.

2. Analysis of subsection 25(1)

[35] I agree with Justice Snider (at paragraph 21 of her reasons in *Toussaint*) that the interpretation of subsection 25(1) of the *IRPA* proposed by Ms. Toussaint and Mr. Ndungu is consistent with its language, read literally in its ordinary and grammatical sense. That conclusion accords with the broad language used to describe what the Minister may waive – “any applicable criteria or obligation of this Act” – and the correspondingly broad basis for such a waiver – humanitarian and compassionate considerations and public policy considerations.

[36] I also agree with Justice Snider that this does not necessarily mean that the literal interpretation of subsection 25(1) is correct. If the language of subsection 25(1) can reasonably bear another meaning that accords better with the context and objectives of the statutory scheme, then that other meaning should be accepted. Therefore, it is necessary to consider the elements of the statutory scheme relating to applications for permanent residence and the related fees, and the place of those elements within the *IRPA*.

[37] Based on the submissions of the parties, I have concluded that the following contextual factors should be considered in interpreting subsection 25(1): (a) the general principle that immigration is a privilege, not a right; (b) the statutory objectives of the *IRPA* as stated in section 3; (c) whether the existence of section 89 of the *IRPA* implies that the question of fee waivers was intended to be solely a matter for regulation by the Governor in Council; (d) the fact that the criteria used to assess a subsection 25(1) application include financial self sufficiency in Canada; and (e) whether requiring fee waivers to be considered with a subsection 25(1) application is absurd because it would be unduly cumbersome. I will discuss each of these in turn below.

(a) Immigration as a privilege

[38] The Minister argues that subsection 25(1) requires the Minister to consider a subsection 25(1) application upon request, but does not require the Minister to enable that request by waiving the fee. This argument, according to the Minister, is consistent with the fundamental principle of Canadian immigration law that immigration is a privilege (see, for example, *Canada (Minister of Citizenship and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at paragraph 24).

[39] In my view, the principle that immigration is a privilege means that a subsection 25(1) applicant has no legal right to a favourable decision by the Minister on any request for an exemption. However, that principle says nothing about the scope of the Minister's discretion under subsection 25(1), or more specifically, whether it should be interpreted narrowly as the Minister contends, or broadly as contended by Ms. Toussaint and Mr. Ndungu.

(b) The statutory objectives of the IRPA as stated in section 3

[40] It is often the case that the resolution of a debate on the interpretation of a statute requires consideration of the objectives of the statute. In this case, the objectives of the *IRPA* are set out in section 3 of the *IRPA*. Subsection 3(1) refers to immigration, subsection 3(2) refers to refugees, and subsection 3(3) refers to interpretation and application.

[41] The Minister cites paragraphs 3(1)(*a*), (*c*) and (*e*) in support of his interpretation of subsection 25(1). Those provisions read as follows:

3. (1) The objectives of this Act with respect to immigration are	3. (1) En matière d'immigration, la présente loi a pour objet :
(*a*) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration;	*a*) de permettre au Canada de retirer de l'immigration le maximum d'avantages sociaux, culturels et économiques;
…	[…]
(*c*) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada;	*c*) de favoriser le développement économique et la prospérité du Canada et de faire en sorte que toutes les régions puissent bénéficier des avantages économiques découlant de l'immigration;

…	[…]
(*e*) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society;	*e*) de promouvoir l'intégration des résidents permanents au Canada, compte tenu du fait que cette intégration suppose des obligations pour les nouveaux arrivants et pour la société canadienne;

[42] The Minister argues that interpreting subsection 25(1) to permit a discretionary waiver of fees would be inconsistent with the *IRPA* provisions of pursuing maximum economic benefits of immigration, supporting the development of a strong and prosperous economy, and promoting the goal of the successful integration of permanent residents to Canada. I see nothing in any of these provisions that is inconsistent with a statutory provision that permits the Minister to waive the fee for a subsection 25(1) application. On the contrary, it may well be more consistent with these objectives to give the Minister the authority to facilitate a process that might lead to a foreign national being granted the status of a permanent resident. A foreign national in Canada who does not have the status of permanent resident does not have an unqualified right to work to achieve self-sufficiency. If such a person has a potentially meritorious claim for a discretionary grant of permanent residence under subsection 25(1), there is no obvious policy objection to a process that could facilitate his subsection 25(1) application by a fee waiver.

[43] I do not read anything in subsection 3(1) as referring directly or indirectly to fees. Such fees are imposed primarily as a cost recovery device, to improve the efficiency of the government department charged with the administration of the *IRPA*. Administrative efficiency is undoubtedly important in all government endeavours, but I am unable to read section 3 of the *IRPA* as including

administrative efficiency as one of the core statutory objectives of immigration. In my view, the stated objectives of the *IRPA* are not liable to be harmed by adopting the interpretation of subsection 25(1) proposed by Ms. Toussaint and Mr. Ndungu.

[44] One argument for Mr. Ndungu was based in part on paragraphs 3(3)(*d*) and (*f*) of the *IRPA*, which read as follows:

3. (3) This Act is to be construed and applied in a manner that	3. (3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet :
…	[…]
(*d*) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;	*d*) d'assurer que les décisions prises en vertu de la présente loi sont conformes à la *Charte canadienne des droits et libertés*, notamment en ce qui touche les principes, d'une part, d'égalité et de protection contre la discrimination et, d'autre part, d'égalité du français et de l'anglais à titre de langues officielles du Canada;
…	[…]
(*f*) complies with international human rights instruments to which Canada is signatory.	*f*) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.

[45] The argument, in summary, is that to interpret paragraph 25(1) in a way that precludes the Minister from waiving the fee would be inconsistent with paragraph 3(3)(*d*) or (*f*) of the *IRPA*, especially where the best interests of a child are at stake. This presumes that the fee imposed on a subsection 25(1) applicant for permanent residence engages the rights of the applicant under the

Charter and certain international agreements to which Canada is a signatory (relating to the interests of children). The same presumption underlies the argument for Mr. Ndungu on the second certified question and in that context was correctly rejected by Justice Snider. In my view, it bears no greater weight in the context of statutory interpretation.

(c) Role of section 89 of the IRPA

[46] The Minister cites section 89 of the *IPRA* in support of his interpretation of subsection 25(1). Section 89 is quoted above and is repeated here for ease of reference:

89. The regulations may govern fees for services provided in the administration of this Act, and cases in which fees may be waived by the Minister or otherwise, individually or by class.	89. Les règlements peuvent prévoir les frais pour les services offerts dans la mise en oeuvre de la présente loi, ainsi que les cas de dispense, individuellement ou par catégorie, de paiement de ces frais.

As indicated above, the Governor in Council has enacted no regulations dealing with discretionary fee waivers by the Minister.

[47] The Minister argues that the existence of section 89 is an indication that Parliament intended the Minister to have no discretion to waive fees except as permitted by a regulation enacted by the Governor in Council. According to the Minister, to find a fee waiving authority within subsection 25(1) would suggest that Parliament has provided for competing authorities. I see no reason to read that much into section 89. In my view, section 89 and subsection 25(1) are capable of standing together no matter which interpretation of subsection 25(1) is adopted.

[48] I see no reason in principle why Parliament would not see fit to authorize the Minister to waive the fee for a subsection 25(1) application on humanitarian and compassionate grounds or public policy grounds, necessarily on a case by case basis, while at the same time authorizing the Governor in Council to enact regulations governing when a fee may be waived "by the Minister or otherwise, individually or by class." The scope of the regulation making authority in section 89 is plenary – it permits regulations to be made for the waiver of any of the dozens of fees imposed in Part 19 of the *Regulations*, most of which have nothing to do with subsection 25(1). In my view, there is ample scope for the enactment of regulations relating to fee waivers without encroaching on the authority given to the Minister under subsection 25(1).

(d) Statutory requirement of financial stability and independence

[49] The Minister argues that waiving the fee payable by a subsection 25(1) applicant who is not financially self sufficient and is not capable of attaining that status would be inconsistent with the financial admissibility criteria in section 39 of the *IRPA*. That provision is quoted above and is repeated here for ease of reference:

39. A foreign national is inadmissible for financial reasons if they are or will be unable or unwilling to support themself or any other person who is dependent on them, and have not satisfied an officer that adequate arrangements for care and support, other than those that involve social assistance, have been made.	39. Emporte interdiction de territoire pour motifs financiers l'incapacité de l'étranger ou son absence de volonté de subvenir, tant actuellement que pour l'avenir, à ses propres besoins et à ceux des personnes à sa charge, ainsi que son défaut de convaincre l'agent que les dispositions nécessaires — autres que le recours à l'aide sociale — ont été prises pour couvrir leurs besoins et les siens.

[50] I do not accept the Minister's argument on this point. The result of the Minister's interpretation is this. It is possible as a matter of law for a person with no financial resources to be granted permanent resident status if the Minister is of the opinion that such a decision is warranted by humanitarian and compassionate considerations or public policy considerations. However, because that same person does not have $550, the Minister cannot permit the opening of the door that would engage the Minister's statutory authority to assess those considerations. In my view, that state of affairs makes no sense. It would be more consistent with the objectives of the *IRPA* to interpret subsection 25(1) in a way that allows the Minister to waive that fee, than to interpret it in a way that bars any such relief.

(e) Administrative considerations

[51] The Minister suggests that it would be unduly cumbersome for the Minister to have to deal with a fee waiver (which necessarily would deal with many of the same considerations as a request for an exemption from section 39 – financial inadmissibility) in the case of an application based on an entirely unrelated ground of admissibility – for example, inadmissibility on health grounds. The Minister asserts that this would entail "enormous resource implications", such that it is unreasonable to conclude that Parliament intended such a result.

[52] It is difficult, if not impossible, to assess the merits of the allegation of increased costs because the Minister has offered no evidence to support it. However, drawing what inferences I can from the common general knowledge of administrative matters, it seems to me that dealing with fee waivers might prove to be relatively simple compared, for example, to assessing claims for

exemptions from inadmissibility provisions. There is no obvious reason why the Minister could not consider a subsection 25(1) application on its merits before considering any request for a fee waiver. The question of the fee waiver would then have to be considered only if the principal request for an exemption is successful.

[53] Even if I were to assume that interpreting subsection 25(1) as proposed by Ms. Toussaint and Mr. Ndungu would entail more work on the part of the Minister (and Ministerial delegates) than is now the case, so that the cost of administering subsection 25(1) would increase, I am not persuaded on balance that an increased administration burden, in and by itself, is a sound reason for adopting the Minister's interpretation of that provision, particularly in the absence of any evidence on the point.

[54] Justice Snider in her reasons raises a concern that if subsection 25(1) is interpreted as proposed by Ms. Toussaint and Mr. Ndungu, the Minister would be inundated with requests for fee waivers for any and all fees imposed by the *Regulations*. In my view, the record discloses no foundation for that concern. Indeed, it does not form any part of the submissions of the Minister in these appeals.

3. Conclusion on statutory interpretation

[55] In my view, there is nothing in the scheme of the *IRPA* or the statutory context to compel the conclusion that the obligation under paragraph 10(1)(*d*) of the *Regulations* to pay a fee for a subsection 25(1) application is not within the scope of the phrase "any applicable criteria or

obligation of this Act" in subsection 25(1) of the *IRPA*. I conclude that on a proper interpretation of subsection 25(1) of the *IRPA*, the Minister is obliged to consider a request for an exemption from the requirement in section 307 of the *Regulations* to pay a fee for processing an application under subsection 25(1), and I would answer the first certified question accordingly.

E. The constitutional questions

[56] My answer to the first certified question is a sufficient basis for allowing this appeal, and rendering the second question moot. I have nevertheless considered the second question and the constitutional issues to which they relate because they were dealt with thoroughly by Justice Snider, and were the subject of full argument in these appeals.

[57] As indicated above, I agree with the conclusions of Justice Snider on the constitutional issues that are the subject of the second certified question, as summarized below. Because I agree substantially with her analysis as set out in paragraphs 34 to 117 of her reasons, I do not consider it necessary to repeat it.

[58] Section 7 of the *Charter*. The rights of Ms. Toussaint and Mr. Ndungu under section 7 of the *Charter* are not engaged by the failure of the Minister to consider their requests for a fee waiver. That is so for two reasons. First, their removal from Canada prior to consideration of the humanitarian and compassionate grounds raised in their subsection 25(1) applications does not deprive them of their right to life, liberty or security of the person. Second, they have not been deprived of any rights without the application of the principles of fundamental justice.

[59] Subsection 15(1) of the *Charter*. If there were no provision in the *IRPA* or the *Regulations* for the waiver of the fee for a subsection 25(1) application by a foreign national living in poverty in Canada, that would not constitute discrimination against Ms. Toussaint or Mr. Ndungu contrary to subsection 15(1) of the *Charter* on the ground of "poverty" or "being a person in receipt of social assistance". That is so for several reasons.

(1) The subsection 15(1) claim fails on the facts. There is no evidence that foreign nationals living in poverty in Canada suffer disproportionate hardship that can be attributed to the absence of a provision for a fee waiver

(2) The absence of a provision for a fee waiver does not affect access to a process for claiming a legal right. It affects only access to a process for requesting a discretionary and exceptional benefit.

(3) "Poverty" or "being in need of social assistance" are not analogous grounds for purposes of subsection 15(1). A person's financial condition is not an immutable personal characteristic. People who are poor or who are in need of social assistance are not a discrete and insular group defined by a common or shared personal characteristic. The absence of a provision for a fee waiver does not create a disadvantage by perpetuating prejudice or stereotyping.

[60] Access to the courts and the rule of law. The absence of a provision for the waiver of fees is not contrary to the common law constitutional right of access to the courts or to the rule of law. Access to the Minister under subsection 25(1) of the *IRPA* is not the same as, or analogous to,

access to the courts because the Minister's authority under subsection 25(1) is limited to providing an exceptional discretionary benefit. In the context of the immigration provisions of the *IRPA*, the rule of law cannot be used to create a fee waiver where none exists in the legislation.

F. Conclusion

[61] I would allow both appeals, set aside the judgments of the Federal Court, allow both applications for judicial review, and refer both matters back to the Minister for consideration of the requests of the appellants for a waiver of the fees payable in respect of their subsection 25(1) applications. I would answer the certified questions as follows:

1. On a proper interpretation of subsection 25(1) of the *IRPA*, is the Minister obliged to consider a request for an exemption from the requirement in paragraph 10(1)(*d*) of the *Regulations* to pay a fee for processing an application under subsection 25(1)?

   Answer: Yes.

2. Has the failure of the Governor in Council to enact regulations permitting the waiver of fees for foreign nationals living in poverty who wish to make an in-Canada application for permanent resident status pursuant to subsection 25(1) of the *IRPA* infringed:

   i. the rights of the appellants under section 7 or 15 of the *Charter*, or
   ii. the rule of law or the common law constitutional right of access to the courts?

   Answer: No.

"K. Sharlow"

J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
Carolyn Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-408-09
(APPEAL FROM AN ORDER OF THE HONOURABLE JUSTCE SNIDER DATED SEPTEMBER 4, 2009, DOCKET NO. IMM-326-09, IMM-2926-08 AND IMM-3045-08)	
STYLE OF CAUSE:	NELL TOUSSAINT v. MINISTER OF CITIZENSHIP AND IMMIGRATION AND CHARTER COMMITTEE ON POVERTY ISSUES (Intervener)
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 19, 2011
REASONS FOR JUDGMENT BY:	**SHARLOW J.A.**
CONCURRED IN BY:	**DAWSON J.A.** **LAYDEN-STEVENSON J.A.**
DATED:	April 29, 2011

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-501-09
(APPEAL FROM AN ORDER OF JUSTICE SNIDER DATED DECEMBER 11, 2009, DOCKET NO. IMM-1088-09)	
STYLE OF CAUSE:	BEN NDUNGU v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 19, 2011
REASONS FOR JUDGMENT BY:	**SHARLOW J.A.**
CONCURRED IN BY:	**DAWSON J.A.** **LAYDEN-STEVENSON J.A.**
DATED:	April 29, 2011

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