File Number: 34336

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN

NELL TOUSSAINT

Applicant
Appellant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent
Respondent

APPLICANT'S REPLY
TO THE RESPONDENT'S MEMORANDUM OF ARGUMENT

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Applicant's Reply
To the Respondent's Memorandum of Argument

Reply to the respondent's submissions on mootness and the amendment of section 25 of *IRPA*

1. Contrary to paragraph 19 of the respondent's memorandum, the applicant raised two issues in the courts below, a procedural one and a substantive one. She only succeeded on the procedural, not the substantive one.

2. In paragraph 1 and subparagraph 2(1) of the Federal Court of Appeal's judgment[1] the Court granted the applicant the procedural relief of applying to the Minister for a discretionary fee waiver, but in subparagraph 2(2) denied the applicant the substantive relief of a *right* to a fee waiver on constitutional grounds, which would *require* the Minister to consider her H & C application without the payment of any fee[2]. And the procedural relief is not real relief because any limitations on the Minister are grossly inadequate as a result of subparagraph 2(2) of the judgment.

3. Paragraphs 2, 19 to 21, and 44 of the respondent's memorandum disregard subparagraph 2(2) of the Federal Court of Appeal's judgment when they suggest that the applicant merely seeks to appeal the Federal Court of Appeal's reasons and not its judgment. It is subparagraph 2(2) of the judgment itself that denies the applicant the constitutional relief she is seeking[3]. Moreover, in her notice of application for leave to appeal the applicant seeks to have the judgment varied by

[1] Application for leave to appeal, pp. 95 and 96
[2] The constitutional remedies sought by the applicant in her application for judicial review, which were denied by the courts below, are set out in paragraph 4 of the reasons for judgment of the judge of first instance, application for leave to appeal, pp. 9 and 10
[3] In footnote 2 in paragraph 3 of the applicant's memorandum of argument she clearly identifies subparagraph 2(2) of the Federal Court of Appeal's judgment as the subject of the appeal. See application for leave to appeal, pp. 97 and 98

replacing subparagraph 2(2) with a declaration that the absence of a provision *entitling* persons like her to a fee waiver infringes constitutional rights[4].

4. Subparagraph 2(2) of the judgment is not merely some extraneous *obiter dictum*. It empowers the Minister to refuse to waive the fee and directs the Minister that refusing impoverished applicants a fee waiver would not be inconsistent with sections 7 or 15 of the *Charter* or the rule of law Constitutional requirements concerning access to justice.

5. The statutory scheme has not changed so as now to be a "historic scheme" as suggested in paragraphs 42 and 43 of the respondent's memorandum. The provision giving foreign nationals in Canada a right to have the Minister consider an H & C application is still in effect.[5] The first element of the scheme giving rise to this litigation is the fee, which is also still in effect. The only reason to address the issue of waiver is the onerous nature of the fee. The fee has not been reduced. However, now there is no discretionary fee waiver procedure because the amendment provides that all applicable fees first must be paid.

6. It is the *procedural* part of the scheme which is no longer in effect since the amendment to the legislation removes the possibility of requesting the Minister to exercise discretion and waive the fee on humanitarian and compassionate grounds. As a result, an appeal to this Court now is of even greater public importance and public interest because the Minister will no longer be able to mitigate the effects of the fee by the occasional exercise of discretion. Every time that ability to pay the fee is in issue, an applicant will have no recourse as a result of subparagraph 2(2) of the Federal Court of Appeal's judgment. The constitutional issues have become, if anything, more acute.

[4] Application for leave to appeal, pp. 1 and 2
[5] See paragraph 8 below.

7. As to the suggestion in paragraph 43 of the respondent's memorandum that "[t]here is nothing preventing other, affected foreign nationals from advancing a constitutional challenge to the new legislative scheme", the applicant has set out in paragraphs 9 to 11 of her memorandum of argument why, realistically, this core issue of poverty law related to access to justice will not be easy to bring again.[6]

Reply to the respondent's submissions on the public importance of the constitutional issues

8. Contrary to the assertion in paragraph 23 of the respondent's memorandum that "H & C relief is not a statutorily mandated exercise of discretion", section 25(1) of the *IRPA*, both before and after the amendment, uses imperative language that obliges the Minister to examine for H & C considerations where requested to do so by a foreign national in Canada. The statutory language is only permissive where the request is made by a foreign national outside Canada. In the case of foreign nationals in Canada, the wording is "shall" (pre-amendment) or "must" (post-amendment), whereas in the case of foreign nationals outside Canada the wording is "may".[7] As section 11 of the *Interpretation Act* states: "The expression 'shall' is to be construed as imperative and the expression 'may' as permissive."[8] While section 25(1) of *IRPA* does not mandate any particular outcome on an H & C application, it does *require* the Minister to conduct an H & C examination when requested to do so by a foreign national in Canada.

9. The respondent states in paragraph 26 of his memorandum that the applicant has not sought refugee protection or requested a pre-removal risk assessment

[6] Application for leave to appeal, p. 100
[7] The application for leave to appeal, at p. 119, sets out the version of section 25(1) in force when the applicant made her H & C application, which uses the word "shall", and at p. 120 sets out the amended version, which uses the word "must" in the case of requests made by foreign nationals in Canada. In both versions the French text uses the word "doit" for requests made by foreign nationals in Canada, and "peut" for requests made by foreign nationals outside Canada. The respondent's record, at p. 26, sets out the amended version, but at page 28 instead of setting out the pre-amendment version, duplicates the amended version.
[8] *Interpretation Act*, R.S.C. 1985, c. I-21

("PRRA"). However, the judge of first instance, with whom the Federal Court of Appeal substantially agreed, recognized that the right to life, liberty and security of the person, as contemplated by section 7 of the *Charter*, may extend beyond the rights assessed during a refugee hearing or a PRRA[9], although she went on to find that there was no deprivation of those rights contrary to the principles of fundamental justice. The applicant has set out in her memorandum of argument the reasons why, unlike the Courts below, this Court should determine that it is inconsistent with the principles of fundamental justice within the meaning of section 7 of the *Charter* to bar access to H & C review for those unable to afford the fee because of poverty.[10]

10. The judgment of this Court in *Ontario (Attorney General)* v. *Fraser* cited in paragraph 32 of the respondent's memorandum dealing with section 15(1) of the *Charter* is not apposite. The case primarily deals with freedom of association under section 2(d) of the *Charter* for farm workers. The majority, referring to the section 15 claim, held that it was premature and not made out on the record, observing that "what s. 15 contemplates is substantive discrimination, that impacts on individuals stereotypically or in ways that reinforce existing prejudice and disadvantage".[11] The particular passage referred to by the respondent is from the reasons of Justice Deschamps who notes that occupation or "employment status" has not, to date, been accepted as an analogous ground and that "economic equality" is not a right under section 15. The applicant does not rely in any way on a finding that occupational or employment status is an analogous ground and she certainly does not claim that economic equality is a right under section 15. She argues only that denying access to H & C procedures by failing to waive fees for those who are unable to afford to pay them constitutes discrimination on the analogous grounds of receipt of public assistance and the social condition of poverty. In her memorandum of argument the applicant has set out the social science evidence in the record in this case showing widespread stigma and

[9] Reasons for judgment of Federal Court, para. 39, application for leave to appeal, p. 24
[10] Applicant's memorandum of argument, paras. 41 to 43, application for leave to appeal, pp. 110 and 111
[11] *Ontario (Attorney General)* v. *Fraser*, 2011 SCC 20, para. 116

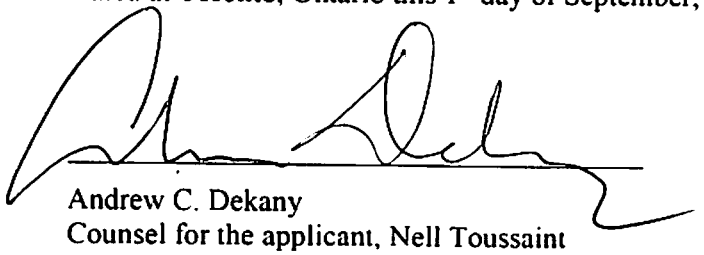
stereotype applied to members of these groups and explains how denying access to justice in this case perpetuates and reinforces prejudice and disadvantage.[12]

11. This Court's judgment in *British Columbia* v. *Imperial Tobacco Canada*, cited in paragraph 41 of the respondent's memorandum dealing with the rule of law, does not stand for the proposition asserted by the respondent, namely that the principles of access to the courts and rule of law do not extend to the administrative law context. That case had nothing to do with administrative law, but rather involved a challenge by several tobacco companies to British Columbia's *Tobacco Damages and Health Care Costs Recovery Act* in an attempt to resist monetary claims brought against them in the civil courts under that legislation by the Province of British Columbia. The tobacco companies argued, unsuccessfully, that the legislation was invalid on, among other things, the principle of the rule of law because it operated retrospectively or retroactively, was not of general application, provided special advantages for the government, and failed to ensure a fair civil trial.

12. In all other respects, the issues raised by the respondent are fully answered in the Application for Leave.

All of which is respectfully submitted.

Dated at Toronto, Ontario this 1st day of September, 2011



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[12] Applicant's memorandum of argument, paras. 17 to 22 and 54 to 56, application for leave to appeal, pp. 102 to 104 and 114 to 116