Court file no. A-408-09

FEDERAL COURT OF APPEAL

Between:

Nell Toussaint

Appellant

and

Minister of Citizenship and Immigration

Respondent

and

Charter Committee on Poverty Issues

Intervener

Appellant's Memorandum of Fact and Law

Overview

1. This case is fundamentally about whether or not poor people may be barred from accessing Canada's compassion. More specifically, it is about whether the setting of a fee that bars poor people like the appellant from having their application for permanent residence on humanitarian and compassionate grounds heard accords with the principles of procedural fairness. The appellant submits that such a fee is not only contrary to procedural fairness but is also incompatible with the Minister's statutory duty to consider H & C applications. It is also incompatible with the guarantee in section 2(e) of the *Canadian Bill of Rights* of the right to a fair hearing. In the alternative, the appellant submits that the fee is incompatible with her rights under section 15(1) of the *Canadian Charter of Rights and Freedoms* since it bars poor people from a process to which both poor people and other people are in equal need of access.

Part I – Statement of Fact

2. The appellant is a 40 year old single woman who is a Grenadian citizen. She came to Canada in December 1999 as a visitor and has lived in Canada ever since. Her visitor status expired 6 months after her arrival. She worked for several different employers at low-paying jobs until 2007. For much of 2006, 2007, and 2008 the appellant was sick and unable to work and she became indigent. She seeks to remain in Canada as a permanent resident. Her only way to do so is if the Minister of Citizenship and Immigration (the "Minister"), under section 25(1) of the *Immigration and Refugee Protection Act* ("*IRPA*"), exempts her on humanitarian and compassionate grounds from certain requirements of the Act so that she can apply to remain in Canada as a permanent resident. The Immigration and Refugee Protection Regulations ("IRP Regulations") require the appellant to first pay a $550 fee before the Minister can consider her request under section 25(1). The appellant is too poor to be able to pay such a high fee.

-Affidavit of Nell Toussaint sworn January 26, 2009, Appeal Book, volume 1, pages 90 to 94

3. Under cover of a letter dated September 12, 2008 the appellant, through her certified immigration consultant, submitted directly to the Minister an "application for permanent residence from within Canada – humanitarian and compassionate considerations" on form IMM 5001 and a form IMM 5283 "supplementary information humanitarian and compassionate considerations", both dated September 11, 2008, as well as her affidavit sworn August 25, 2008. In her affidavit, the appellant stated that she suffers from a serious medical condition for which she cannot obtain proper care in her country of origin and that she has been in Canada for some time and considers it her home. She described her poverty as follows:

> "I am indigent. I have no fixed income. Currently I receive occasional money by helping friends and others with light housekeeping. As well, I collect aluminium and other returnable cans from the garbage.
>
> I live with a friend who charges me no rent as she feels compassion for my situation. However, she has very little money and cannot help to pay for my legal costs and fees.

> As such I have no way to raise the $550.00 necessary to make the Application for Permanent Residency based on Humanitarian and Compassionate Circumstances."

The letter from the appellant's certified immigration consultant asked for the appellant to be exempted from the $550 fee for processing her application for permanent residency because she was indigent and unable to pay the fee.

> -Letter dated September 12, 2008 from Macdonald Scott to Minister Diane Finley, Appeal Book, volume 1, pages 70 and 71
> -Application for Permanent Residence from Within Canada – Humanitarian and Compassionate Considerations form IMM 5001 dated September 11, 2008, Appeal Book, volume 1, pages 72 to 77
> -Supplementary Information Humanitarian and Compassionate Considerations form IMM 5283 dated September 11, 2008, Appeal Book, volume 1, pages 78 to 80
> -Affidavit of Nell Toussaint sworn August 25, 2008, Appeal Book, volume 1, page 105

4. The IMM 5283 form submitted by the appellant contained the statement that: "Canadian immigration law requires applicants to obtain a permanent resident visa at a visa office outside of Canada and to be admissible to Canada. In your application, you must clearly indicate the special circumstances that would exempt you from these, or other, requirements." Under section 25(1) of the *IRPA* the Minister has the authority to grant such an exemption.

> -Supplementary Information Humanitarian and Compassionate Considerations form IMM 5283 dated September 11, 2008, Appeal Book, volume 1, page 78

5. As the learned application judge found, the appellant seeks to be exempted from the requirement in section 11 of the *IRPA* that she apply for permanent residence status before entering Canada and she seeks permanent resident status from within Canada based on humanitarian and compassionate considerations. More specifically, as explained in section 5.2 of the Minister's IP 5 Manual dated May 12, 2008 entitled "Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds", under section 72(1)(a) of the Immigration and Refugee Protection Regulations ("IRP Regulations") members of certain classes of foreign nationals, set out in section 72(2) of the Regulation, have the right to apply from within Canada to remain in Canada as a permanent resident . The appellant, not falling within those classes, seeks an exemption from the requirement to be a member of those classes.

-Reasons for Judgement of Snider, J., paragraph 1, Appeal Book, pages 9 and 10
-IP 5 Manual, section 5.2, Appeal Book, volume 4, pages 967 and 968

6. By letter dated January 12, 2009 Ms Linda Martin, Administrative Officer, Case Management Branch of Citizenship and Immigration Canada returned the appellant's application unprocessed. No determination was made on the applicant's request to be exempted from the requirements to obtain a permanent resident visa at a visa office outside of Canada and to be admissible to Canada. The letter indicated that to pursue her application the appellant would have to provide proof of payment of the processing fee. It made no mention of reducing or waiving the fee so her application could be examined.

-Letter dated January 12, 2009 from Linda Martin to Macdonald Scott, Appeal Book, volume 1, page 69

7. If she were allowed to make a humanitarian and compassionate application, the appellant's statistical chances of success are high. The respondent's witness, Martha Justus, the Acting Director, Strategic Research and Statistics Division, Research and Evaluation Branch, Citizenship and Immigration Act, stated on cross-examination that the success rate on humanitarian and compassionate applications between 2003 and 2008 was about 75%.

-Transcript of the cross-examination of Martha Justus, questions 37 to 45, Appeal Book, volume 7, pages 1738 and 1739
-Affidavit of Martha Justus sworn May 13, 2009, paragraph 1, Appeal Book, volume 4, page 885

8. The appellant sought judicial review by way of, among other things, mandamus to require the Minister to examine her circumstances and form an opinion whether it is justified by humanitarian and compassionate considerations relating to them, to grant her an exemption from any applicable criteria or obligation of the Act or to grant her permanent resident status. As the learned application judge stated, the appellant seeks "An order that the Minister examine the [appellant's] circumstances to determine whether an exemption from s. 11 of the *IRPA* is justified on H & C grounds, without the payment of any fee".

-Application for Leave and for Judicial Review dated January 26, 2009, page 2, paragraph 2, Appeal Book, volume 1, page 85
-Reasons for Judgment of Snider, J., paragraph 4, Appeal Book, page 11

9. The appellant also sought a declaration that, among other things, the IRP Regulations' section 307 (which prescribes the fee) and section 10(1)(d) (which provides that any application be accompanied by evidence of payment of the applicable fee), are *ultra vires* in that they unduly restrict the Minister's authority and discretion under section 25(1) of the *IRPA*, and access thereto. As stated by the learned application judge, the appellant seeks a declaration that the said provisions "which require the payment of a fee as a condition of accessing the procedure under s. 25(1) of *IRPA* is (*sic*) *ultra vires* in that it fetters the Minister's discretion under s. 25(1) of *IRPA*."

-Application for Leave and for Judicial Review dated January 26, 2009, page 2, paragraph 3, Appeal Book, volume 1, page 85
-Reasons for Judgment of Snider, J., paragraph 4, Appeal Book, page 11

10. In her reasons for judgment the learned application judge found that the appellant

> "is in breach of the obligation of s. 11 of *IRPA* that she must have a visa before entering Canada. Thus, she clearly does not meet a requirement of *IRPA* and s. 25(1) is available to her. Pursuant to s. 25(1), upon request, the Minister must consider whether to exempt the [appellant] from the s. 11 obligation. In other words, if the [appellant] applies, the Minister is obliged to consider whether to exempt her from the requirement or inadmissibility criterion that prevents her from gaining permanent residence in Canada."

Immediately following this passage the learned application judge stated the question before her as "whether the Minister must <u>also</u> consider the [appellant's] request that the application fee be waived." (emphasis in original).

-Reasons for Judgment of Snider, J., paragraph 22, Appeal Book, page 18

11. The appellant also sought declarations that sections 307 and 10(1)(d) of the IRP Regulations, without any provision for the waiver of the fee, are inoperative or invalid as contrary to sections 15(1) and 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), sections 1(a) and (b) and 2(e) of the *Canadian Bill of Rights*, the rule of law and the constitutional norm of equality.

-Application for Leave and for Judicial Review dated January 26, 2009, page 2, paragraphs 4, 5, and 6 Appeal Book, volume 1, page 85

Part II - Statement of the Points in Issue

12. Are sections 307 and 10(1)(d) of the IRP Regulations *ultra vires* or invalid because they prevent the Minister from carrying out his statutory duty under section 25(1) in the case of the appellant who is unable to pay a fee and because they violate the appellant's statutory entitlement to request the Minister to make a determination under section 25(1) and to be heard thereon, thus depriving the appellant of procedural fairness including access to a fair hearing – indeed, access to any hearing?

13. On a proper statutory interpretation of s. 25(1) of *IRPA*, is the Minister obliged to consider a request to grant an exemption from the requirement to pay the H & C processing fee, otherwise required under s. 307 of the IRP Regulations?

14. Does the failure of the government (through 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 section 25(1) of *IRPA*, infringe the appellant's rights under sections 7 or 15 of the *Charter,* the rule of law, or the common law constitutional right of access to the Courts?

Part III – Statement of Submissions

15. The appellant submits that sections 307 and 10(1)(d) of the IRP Regulations are *ultra vires* the *IRPA* and invalid in that they unduly restrict the Minister's authority and discretion and impede the Minister from carrying out the duty imposed on him under section 25(1) of the *IRPA*, which requires that the Minister "shall, upon request" examine a person's circumstances to form an opinion whether humanitarian and compassionate considerations relating to them justify granting permanent resident status or an exemption from any applicable criteria or obligation of the Act.

16. That the Minister has a duty to carry out a humanitarian and compassionate examination if requested to do so is not only clear from a plain reading of section 25(1), but also has been judicially held in the decision of Le Dain, J.A. (as he then was) in this Honourable Court in *Jiminez-Perez* v. *Canada (Min of Employment & Immigration)*, a case involving a comparable procedure under the former *Immigration Act.* where he wrote:

"I am of the opinion that administrative fairness requires that a request for exemption from the requirement of section 9 be processed by the local immigration officials. I am further of the view that it is not sound to separate the application for landing from the request for exemption. The respondent Jiminez-Perez seeks to apply for landing from within Canada on the basis that he be granted an exemption from the requirement of section 9 on compassionate or humanitarian grounds. Since the Act contemplates that admission may be granted on this basis in particular cases, a prospective applicant is entitled to an administrative decision upon the basis of an application, and there is, therefore, a correlative duty to permit him to make the application."

-*Jiminez-Perez* v. *Canada (Min of Employment & Immigration)*, [1982] F.C.J. No. 87, [1983] 1 F.C. 163

17. An appeal to the Supreme Court of Canada was allowed in part on the question of whether to give relief by mandamus or declaration, the Court declaring that the immigration officers:

". . . are under a duty to consider respondents' application for an exemption on compassionate and humanitarian grounds of the requirement of the *Immigration Act 1976*, to deal with it in the name of the Minister of Employment and Immigration and to advise respondents of the result."

-*Minister of Employment and Immigration et al* v. *Jimenez-Perez et al*, [1984] 2 S.C.R.565

18. In *Baker* v. *Canada (Minister of Citizenship and Immigration*, the Supreme Court of Canada confirmed and expanded on its decision in *Jiminez-Perez* as follows:

"This Court has found that it is necessary for the Minister to <u>consider</u> an H & C request when an application is made: *Jiminez-Perez, supra*. Similarly, when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate considerations." (emphasis in original)

-*Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

The broad administrative law duty of procedural fairness

19. After the Supreme Court of Canada's decision in *Nicholson v. Haldimand-Norfolk Regional Police Commissioners,* it is clear that every administrative decision can be reviewed as to process in terms of its procedural fairness, the content of which is defined in *Baker* v. *Canada (Minister of Citizenship and Immigration)*. For example, has a hearing been granted and has the quality been appropriate considering the nature of the consequences? The appellant submits that one of the principles of procedural fairness in humanitarian and compassionate applications under section 25(1) of the *IRPA* is that nobody is to be deprived of access to the process by a fee that bars some proportion of the population from making application and having a hearing, whether oral or in writing. Building on the *Baker* definition of procedural fairness, procedural fairness is of variable content. Here, the Minister has a decision to make on humanitarian and compassionate grounds. That is a decision that has to be conducted in accordance with the principles of procedural fairness. Preventing the appellant from access to any process at all by a fee barrier is not fair. Nor is it "respectful of humanitarian and compassionate considerations", using the language of the majority in *Baker*. If a tribunal is exercising a rights determining function, it has to do so fairly. While the appellant does not have the right to a particular outcome, she does have the right to access the process pursuant to which the Minister considers her application. And it would require unequivocal language for the Court to conclude that Parliament intended otherwise.

-*Nicholson* v. *Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 S.C.R. 311
-*Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

20. Regarding paragraph 114 of the application judge's reasons and her statement that section 25(1) creates a discretionary benefit, while it may be discretionary when the Minister gets to the decision, it is nevertheless the exercise of a statutory discretion that is reviewable under *Baker* and *Nicholson*. The question is the content of the process. The Minister's policy manual directs immigration officers to consider certain specified administrative law principles when dealing with H & C applications under section 25(1), noting that it does "not constitute an exhaustive presentation of legal principles applicable to H & C decision-making." The guide, under the heading "Duty to consider", refers to the obligation to consider imposed on immigration officers by legislation and under the heading "The right to be 'Heard'", states that "One of the fundamental components of natural justice or fairness is the right to be heard. This means that applicants have a fair opportunity to present their case." The appellant

submits that it is not a fair process if one is barred from participating in the process.

-IP 5 Manual, paragraphs 5.25 and 5.28, Appeal Book, volume 3, page 626

21. Given the mandatory language of section 25(1) and considering the importance of the rights protected by the common law duty of "fairness", it is respectfully submitted that Parliament would have had to explicitly legislate in unequivocal language before it could be taken to have intended to empower the Minister to deny poor people access to the Minister's process.

-*Canadian Union of Public Employees (C.U.P.E.)* v. *Ontario (Minister of Labour),* [2003] 1 S.C.R. 539, 2003 SCC 29 (CanLII), *per* Binnie, J., paragraph 117
-*Ocean Port Hotel Ltd.* v. *British Columbia (General Manager, Liquor Control and Licensing Branch),*[2001] 2 S.C.R. 781, 2001 SCC 52, *per* the Chief Justice, paragraph 21

22. The statutory language is by no means unequivocal, in fact to the contrary. The appellant submits that the *IRPA* should not be interpreted as authorizing a fee of this size for a humanitarian and compassionate application, except on a condition that the Minister is required to examine the reasonableness of the fee in relation to an applicant's ability to pay. If Parliament had intended to make the Minister seized of an exemption request under section 25(1) only if the designated fee in respect of that request, however high relative to an applicant's ability to pay, has been paid, it should have expressly provided in section 25 that while the Minister's obligation to consider the humanitarian and compassionate grounds was triggered by the foreign national's request, that obligation was subject to the absolute condition that the applicant first have paid the fee that has been designated, however high that fee may be relative to the applicant's ability to pay.

23. The reason for putting this interpretation burden on those who would argue that Parliament had intended that the requirements of procedural fairness be disregarded is to ensure that established norms such as these are not swept away inferentially or consequentially as a result of legislatures not paying enough attention. The point is made expressly in the following statement by the House of Lords in its 2000 decision in *I. R.* v. *Secretary of State for the Home Dept, ex parte Simms,*

"[T]he principle of legality means that Parliament must squarely confront what it is doing and

accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual . . .”

-*I.R.* v. *Secretary of State for the Home Department, ex. P. Simms*, [2000] 2 A.C. 115 (H.L.) at 131
- *R (on the application of Morgan Grenfell & Co Ltd)* v *Special Commissioner of Income Tax*, [2002] 3 All E.R.1 (H.L) *per* Lord Hoffmann, at paragraph 8

24. Moreover, construing the fee provisions as *ultra vires* is consistent with section 2(e) of the *Canadian Bill of Rights* which guarantees that “. . . no law of Canada shall be construed or applied so as to . . . (*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.” The Supreme Court of Canada in *Authorson* v. *Canada (Attorney General)* observed that section 2(e) of the *Canadian Bill of Rights* continues to be operative following the enactment of the *Canadian Charter of Rights and Freedoms* since the protection it provides is not expressly available in the *Charter*.

-*Canadian Bill of Rights, S.C. 1960, c. 4 (reproduced in R.S.C. 1985, App. III)*
-*Authorson* v. *Canada (Attorney General)*, [2003] 2 S.C.R. 40, 2003 SCC 39, para. 34

25. If the fee provisions deprive the appellant of the right to a fair hearing to determine her right to have her circumstances examined for humanitarian and compassionate considerations, then by virtue of section 2 of the *Canadian Bill of Rights* they are invalid unless the *IRPA* expressly declares that they shall operate notwithstanding the *Canadian Bill of Rights*, something which the *IRPA* has not done.

-*Canadian Bill of Rights, supra*

26. In the alternative, if this Honourable Court were to find that the Governor in Council is authorized by statute to set a fee of this size for a humanitarian and compassionate application without any obligation on the Minister to consider a request to have it waived or reduced, then the appellant submits such fee provisions are incompatible with the appellant’s rights under section 15(1) of the *Canadian Charter of Rights and Freedoms* on the basis that the legislation bars poor people from a

process to which both poor people and other people are in equal need of access.

> -Canadian Charter of Rights and Freedoms, Part I of The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
> -*Eldridge* v. *British Columbia (Attorney General),* [1997] 3 S.C.R. 624
> -*Falkiner* v. *Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.)

Part IV - Order Sought

27. The appellant asks that the order below be set aside and in its place an order be made:

(a) declaring that to the extent that sections 307 and 10(1)(b) of the IRP Regulations require payment of the fee and evidence thereof, without provision for the waiver or reduction of the fee for poor applicants, they (the impugned provisions) are *ultra vires* the *IRPA*;

(c) in the alternative, declaring that the impugned provisions deprive poor applicants like the appellant of the right to a fair hearing in accordance with the principles of fundamental justice and are therefore inconsistent with section 2(e) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, and as such are invalid and inoperative;

(c) in the further alternative, declaring that the impugned provisions infringe the rights of poor applicants like the appellant to equality before and under the law and equal protection and benefit of the law, contrary to section 15(1) of the *Canadian Charter of Rights and Freedoms* and are therefore invalid and of no force and effect;

(d) quashing the decision of the Minister to not exempt the appellant from the obligation to pay a fee and submit proof of payment thereof before being entitled to make a request based on humanitarian and compassionate considerations under section 25(1) of the *IRPA*, and remitting the matter to the Minister with a direction to inquire into the ability of the appellant to pay the fee and if it is found that the appellant is not reasonably able to pay the fee then to waive the fee and to proceed with the consideration of the appellant's application under section 25(1), all in accordance with this Honourable Court's reasons for decision; and

(e) such further and other order as to this Honourable Court may seem just.

All of which is respectfully submitted this 6th day of May, 2010 by

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Andrew C. Dekany

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Angus Grant

Of counsel for the appellant

Part V - List of the Authorities to be Referred To

Cases

1. *Authorson* v. *Canada (Attorney General)*, [2003] 2 S.C.R. 40, 2003 SCC 39
2. *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817
3. *Canadian Union of Public Employees (C.U.P.E.)* v. *Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 (CanLII)
4. *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624
5. *Falkiner* v. *Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.)
6. *Jiminez-Perez* v. *Canada (Min of Employment & Immigration)*, [1982] F.C.J. No. 87, [1983] 1 F.C. 163
7. *I.R.* v. *Secretary of State for the Home Department, ex. P. Simms*, [2000] 2 A.C. 115 (H.L.)
8. *Minister of Employment and Immigration et al* v. *Jimenez-Perez et al*, [1984] 2 S.C.R.565
9. *Nicholson* v. *Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 S.C.R. 311
10. *Ocean Port Hotel Ltd.* v. *British Columbia (General Manager, Liquor Control and Licensing Branch)*,[2001] 2 S.C.R. 781, 2001 SCC 52
11. *R (on the application of Morgan Grenfell & Co Ltd)* v *Special Commissioner of Income Tax*,[2002] 3 All E.R.1 (H.L)

Statutes

12. *Canadian Bill of Rights, S.C. 1960, c. 4 (reproduced in R.S.C. 1985, App. III)*
13. *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11