Court File Number: T-1301-09

FEDERAL COURT

BETWEEN:

NELL TOUSSAINT

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

APPLICANT'S WRITTEN REPRESENTATIONS IN SUPPORT OF MOTION

OVERVIEW

By this motion, the applicant respectfully asks the Court to reconsider its holding that the applicant did not argue her immigration status was an analogous ground of discrimination under section 15(1) of the *Canadian Charter of Rights and Freedoms*. As set out below, the applicant submits that she did so argue. In any event, if it is thought that the matter was not argued and the Court overlooked determining the point because of a misunderstanding in terminology, the applicant wants an opportunity to argue the point, and requests that the hearing be reconvened and the parties be asked to make argument thereon.

1. The applicant respectfully requests that his Lordship reconsider the statements at paragraphs 79, 81 and 82 of the Reasons for Judgment and Judgment, 2010 FC 810, and the wording of Footnote 3 to paragraph 82. In the applicant's respectful submission, these paragraphs inaccurately summarize her arguments with respect to discrimination because of "citizenship", "citizenship status" or "immigration status" in a manner which may prevent the arguments made before his Lordship from being properly considered in an appeal.

2. At paragraphs 79 and 81 of his Lordship's Reasons it is suggested that the applicant alleged discrimination and exclusion from IFHP coverage "on the basis of her lack of Canadian citizenship." This is incorrect. A review of the applicant's Memorandum of Argument demonstrates that the applicant alleged discrimination and exclusion from IFHP coverage on the basis of her particular "citizenship status" or "immigration status" – that of an undocumented migrant seeking permanent resident status – not on the basis of her lack of Canadian citizenship. It is correct that she further argued that the analogous ground of "citizenship" includes discrimination on the basis of what she refers to as "immigration status" or "citizenship status" – i.e. discrimination against undocumented migrants - but she did not allege that she was discriminated against or denied IFHP "on the basis of her lack of Canadian citizenship".

3. The applicant further requests reconsideration of paragraph 82 of the Reasons for Judgment in which his Lordship states:

> The applicant did not argue that "immigration status" was such an analogous ground. It is not for the Court in *Charter* cases to construct arguments for the parties or advance them on their behalf. Given the applicant's failure to argue that "immigration status" was an analogous ground, the applicant's s. 15(1) argument must fail.[1]

4. This statement overlooks the fact that the applicant **did** argue that she was discriminated against on the basis of her "citizenship status" or "immigration status" as an undocumented migrant and that such discrimination constitutes prohibited discrimination under section 15 on the basis of an analogous ground. The fact that the applicant's position was that the analogous ground of "citizenship" prohibits

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[1]This paragraph of the Reasons is accompanied by the following footnote #3 in which his Lordship states that "The Supreme Court's decision in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 leaves open the possibility that "immigration status" may be considered an analogous ground in the future. In *Corbiere*, at para. 60, the Court recognized that in analyzing whether a characteristic is an analogous ground "[i]t is also central to the analysis if those defined by the characteristic are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked." It may be fair to say that illegal migrants lack political power, are frequently disadvantaged, and are incredibly vulnerable to abuse; this, combined with the difficulty of changing one's illegal migrant status, might support an argument that such a characteristic is an analogous ground.'

discrimination against undocumented migrants as a particularly disadvantaged group of non-citizens does not negate the fact that the allegation of discrimination on the ground of "immigration status" was advanced.

5. The following are the relevant paragraphs of the Applicant's Memorandum of Argument, with relevant sections bolded:

> 60. The distinction **on the ground of citizenship status** in this case is a formal distinction, evident on the face of the decision. Ms. Toussaint was disqualified from any coverage for necessary medical care explicitly because **her citizenship status as a foreign national seeking permanent residency on humanitarian and compassionate grounds** did not place her in any of the listed classes of immigrants deemed eligible for the benefit.
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> 61. The fact that the members of the comparator group who receive the benefit are also non-citizens does not negate the fact that the applied policy creates a distinction based on citizenship status. Just as in *Martin*, the distinction between two types of disabled workers was still a disability-based distinction, so in the present case, **the disqualification of one group of non-citizens on the basis of a particular immigration status is still a decision based on citizenship**.[2]
>
> 62. **Non-citizens, particularly those who are undocumented or seeking humanitarian and compassionate consideration in the situation of the Applicant, are subject to negative stereotypes and stigmas** such that any distinction which excludes sub-groups of non-citizens must be seen as "suspect."
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> > It is settled law that non-citizens suffer from political marginalization, stereotyping and historical disadvantage. Indeed, the claimant in *Andrews*, who was himself a trained member of the legal profession, was held to be part of a class "lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated"…In my view, this dictum applies no matter what the nature of the impugned law."[3]
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> 63. **The particular group that is excluded by the impugned policy in the present case includes the most marginalized and disadvantaged of**

[2] *Nova Scotia v. Martin, supra* at para. 80.
[3] *Lavoie v. Canada*, [2002] 1 S.C.R. 769 at para. 45.

> **the class of non-citizens. Undocumented migrants have been recognized both within Canada and internationally as suffering from multiple disadvantages, usually including language, poverty, low education and lack of access to basic services.**[4] Racialized women with disabilities experience intersecting and compound discrimination and disadvantage.
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> 64. The fact that the IFH program has an ameliorative purpose in relation to non-citizens does not relieve the government of an obligation not to exclude a disadvantaged sub-group of non-citizens. According to *Law*, "underinclusive **ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination."** ...
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> 66. …. The exclusion from healthcare coverage **on the ground of citizenship status** must be found to be discriminatory within the meaning of section 15.

6. The applicant also relied on international jurisprudence in support of the allegation that discrimination on the basis of "illegal" or "undocumented" status is prohibited under international human rights law under the ground of "nationality":

> 74. In a more recent General Comment, the CESCR has clarified obligations with respect to non-discrimination on the ground of "nationality" as follows:
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> > **The ground of nationality** should not bar access to Covenant rights, e.g., all children within a State**, including those with an undocumented status**, have a right to receive education and access to adequate food and affordable health care**.** The Covenant rights apply to everyone including **non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation**.[5]

[4] Affidavit of Ilene Hyman

[5] UN Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/20 2 July 2009 at para. 30.; See also General Comment No. 30 of the Committee on the Elimination of All Forms of Racial Discrimination on non-citizens (2004).

Evidence Overlooked in Footnote 3

7. The applicant further requests that his Lordship reconsider Footnote 3, in which he outlines evidence that might be considered in a future case to substantiate a finding that "immigration status" constitutes an analogous ground of discrimination. The footnote appears to overlook the fact that expert evidence was adduced by the applicant in the present case – specifically that of Ilene Hyman and Dr. Manuel Carballo - showing that undocumented migrants suffer from stereotype, prejudice, poverty, social exclusion and political powerlessness – precisely the kind of evidence which it is suggested in Footnote 3 might be considered "in the future."

8. Ilene Hyman, a recognized expert in Canada in health and health access issues faced by immigrant and marginalized populations in Canada provided extensive evidence on informational, financial, linguistic, cultural and systemic barriers facing what she referred to as "immigrants without status", including systemic barriers linked to prejudice and stereotype.[6] Dr. Manuel Carballo, a prominent international expert on migration and health, provided evidence about the social, economic and historical disadvantages of the group which he refers to as "undocumented migrants". Dr. Carballo stated, for example that:

> Undocumented migrants tend to live in highly insecure situations that are characterized by perceived social marginalization, little job stability, very low wages that are set by employers with no regulation and which are often irregularly paid. Undocumented migrants remain at the bottom of the socio-economic ladder in the countries they move to, and cope with poverty in ways that at times are bad for health. Poor housing, overcrowding, inadequate nutrition and unhealthy eating combined with sudden change to sedentary life can lead to poor health, including chronic diseases such as type 2 diabetes and cardiovascular problems.[7]

[6] Affidavit of Ilene Hyman, at paras.7 and 8. Application Record, pages 204 to 207
[7] Affidavit of Manual Carballo, at paragraph 12, page 6

Justification for the Proposed Reconsideration

9. In requesting reconsideration based on the overlooked argument and evidence cited above, the applicant is not attempting to re-argue her case or retract from the position advanced before his Lordship that discrimination on the ground of immigration status falls within the broad scope of discrimination prohibited by the analogous ground of "citizenship." The issue of the scope of the grounds argued before his Lordship may be particularly critical to determining the scope of an appeal. As noted by the Supreme Court of Canada in *Law*:

> It is the claimant who generally chooses the person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry, thus setting the parameters of the alleged differential treatment that he or she wishes to challenge. However, the claimant's characterization of the comparison may not always be sufficient. It may be that the differential treatment is not between the groups identified by the claimant, but rather between other groups. Clearly a court cannot, *ex proprio motu*, evaluate a ground of discrimination not pleaded by the parties and in relation to which no evidence has been adduced: see *Symes*, *supra*, at p. 762. However, within the scope of the ground or grounds pleaded, I would not close the door on the power of a court to refine the comparison presented by the claimant where warranted.[8]

10. The applicant's originating notice of application did not specify how the analogous ground of discrimination should be named or identified. Whether the analogous ground in this case should be identified as "citizenship", "citizenship status", "immigration status", or some other term, may be a matter for refinement by the court, within the proper scope of the grounds pleaded and the evidence adduced as to the characteristics of undocumented migrants.

RELIEF REQUESTED

11. It is for this reason that we respectfully urge reconsideration of the above-noted paragraphs, to accurately reflect the scope of the grounds pleaded and the evidence adduced by the applicant before his Lordship. In any event, if it is thought that the point

[8] *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497 at para. 58.

of discrimination based on the analogous ground of “immigration status” was not argued, the applicant requests that the hearing be reconvened and the parties be given an opportunity to argue the point.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

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Andrew Dekany

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Angus Grant
Of counsel for the applicant