

## CASE SUMMARY

### ***Toussaint v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 873**

**Issue:** Section 15 *Charter* challenge to the *Immigration and Refugee Protection Act* on the basis of the analogous ground of poverty

**Decision:** Claim dismissed. Poverty not an analogous ground protected under *Charter* s. 15

**Status:** Appeal to Federal Court of Appeal pending.

### **Overview**

This was an application for judicial review of the decision of the Minister of Citizenship and Immigration, which refused to waive the \$550 fee for applying for permanent resident status from within Canada based on humanitarian and compassionate grounds.

The applicant, Nell Toussaint, who had been living in Canada for nine years and was homeless, disabled and unable to pay the fee at the time of the application, applied for a waiver of the fee. When her application was returned unprocessed, she argued, among other things, that the sections of the Immigration and Refugee Protection Regulations which prevented Ministerial discretion to waive the administration fee for her application infringe the equality section (s. 15(1)) of the *Charter*.

Ms. Toussaint argued that her social condition of poverty in association with her gender, disability, race and ethnic origin engender bias and stereotypes and thereby constitute an analogous ground of discrimination under *Charter* s. 15(1). The refusal to waive the fee in her case had the effect of denying her equal access to the scheme under which she could apply for permanent residency on humanitarian and compassionate grounds.

Ms. Toussaint also argued that: 1) because the regulations impermissibly fetter the Minister's discretion to waive the administration fee, they are *ultra vires* the authority of the *Immigration and Refugee Protection Act*, which states that the Minister shall examine the circumstances of a foreign national and may grant an exemption from a requirement of the *Act*; and 2) the refusal to waive the administration fee results in a situation where Ms. Toussaint may be removed from Canada and separated from her children, in violation of her right to life, liberty and security of the person, as protected under s. 7 of the *Charter*.

The court rejected all of the applicant's arguments: application for judicial review dismissed.

### **Background**

The applicant, Nell Toussaint, came from Grenada to Canada under a 6-month Visitor's Visa in 1999. She worked for 9 years as a cleaner, caregiver and babysitter, and applied for permanent residency from within Canada in 2008. Ordinarily, such an application for permanent resident status must be done from outside the country. Ms. Toussaint applied for permanent residency based on humanitarian and compassionate considerations, under s. 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27, and, citing previous cases where the fee had been waived, for example, for tsunami survivors, she asked that the Minister exercise discretion to waive the application fee in her case. Her application was returned without consideration, on the basis that

she had not remitted the required \$550 processing fee. She sought judicial review of the decision and, among other things, argued that the requirement to pay the administration fee discriminates against her on the analogous ground of the social condition of poverty, infringing her right to equality under s. 15(1) of the *Charter*.

Intervening in support of the applicant's position were the organizations, Low Income Families Together, and the Charter Committee on Poverty Issues.

[Note: Ms. Toussaint initiated a separate action against the federal government for denying her eligibility in the Interim Federal Health Program: *Toussaint v. Canada (Attorney General)*, 2010 FC 810.]

### Reasoning

Ms. Toussaint alleged that the regulations which prevent the Minister from exercising discretion to waive the administration fee for those too poor to pay, discriminate on the basis of poverty. The court identified the group seeking *Charter* protection in these circumstances as persons,

who receive social assistance and who can be categorized as experiencing the social condition of poverty. The comparator group would therefore be foreign nationals who seek to make an in-Canada H&C [Humanitarian and Compassionate] Application and who are not impecunious nor in receipt of social assistance. (para. 64)

Ms. Toussaint's s. 15 claim relied on the recognition of the social condition of poverty as an analogous ground of discrimination under the *Charter*. Her claim sought to distinguish the "economic status" of poverty from the "social condition" of poverty, which is highly associated with race, and single motherhood, and subject to social bias and stereotype.

The court dismissed the s. 15 argument on a number of bases. First, the court did not find that the statutory scheme uniformly disadvantages poor applicants, because the evidence suggested that some poor applicants are able to pay the fee. The court therefore rejected the argument that the statutory scheme differentiates against Ms. Toussaint on the basis of poverty. The court did not consider such factual variations as assistance provided by religious and charitable organizations, which could account for differing circumstances with respect to individual applications for permanent residency, but would not alter the underlying conditions of discrimination. [Note: it may also be questioned whether this analysis is sound, as the Supreme Court has said that to engage s. 15 protection, it is not necessary for all members of a protected class to suffer disadvantage from the differential treatment, so long as the claimant does (see, for example, *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54).]

The court continued by rejecting the condition of living in poverty and/or the receipt of social assistance as an analogous ground of protection under *Charter* s. 15(1). It reasoned that poverty is not a personal characteristic that is either actually or constructively immutable: financial circumstances may change, and the government has a legitimate interest in expecting such a condition to change. Unlike previous cases where receipt of social assistance accompanied by other disadvantaging characteristics has been accepted as a protected analogous ground (see *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R.(3d) 481 (C.A.)), the court held that no such multi-faceted condition of disadvantage existed in Ms. Toussaint's case. [Note: In fact, the applicant also raised the issues of her race, gender, disability, and ethnic origin as

relevant to the discrimination that she suffered, however, the court dismissed these issues on the ground that there was no evidence that the processing fee had a disproportionately adverse impact on the basis of each of these characteristics individually.]

The court concluded its discrimination analysis by finding that even if differential treatment on the basis of an analogous ground had been established, the applicant did not suffer disadvantage from the perpetuation of prejudice or stereotype. The court came to this conclusion after rejecting the reliability and relevance of the expert evidence regarding poverty. The court's contextual analysis focused instead on statistics about humanitarian and compassionate ground applications, and broad immigration policy considerations.

(In particular, see [paragraphs 52-108](#) of the decision.)

The Court's clear rejection of poverty as an analogous ground solidifies an already growing body of jurisprudence dismissing arguments for the recognition of poverty as an analogous ground protected under the *Charter's* equality provision.

**Status of Case:** Ms. Toussaint issued a Notice of Appeal to the Federal Court of Appeal on October 5, 2009.

See [Factum of the Intervener Charter Committee on Poverty Issues](#)

**Related case:**

*Toussaint v. Canada (AG)*, [2010 FC 810](#)

**Other cases:**

*Boulter v. Nova Scotia Power Inc.*, [2009 NSCA 17](#)

*Guzman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1134 (TD), [2007 FCA 358](#), leave to appeal to SCC denied, [2008] S.C.C.A. No. 4

*R. v. Banks*, [2007 ONCA 19](#), leave to appeal to SCC denied, [2007] S.C.C.A. No. 139

*Falkiner v. Ontario (Ministry of Community and Social Services)*(2002), [59 O.R.\(3d\) 481](#) (C.A.)

*R. v. Rehberg* (1994), [127 N.S.R. \(2d\) 331](#) (S.C.)

*Dartmouth/Halifax (County) Regional Housing Authority v. Sparks* (1993), [119 N.S.R. \(2d\) 91](#) (C.A.)

**Document prepared on February 1, 2010; updated August 30, 2010.**

