Federal Court

Cour fédérale

**Date: 20091211**

**Docket: IMM-1088-09**

**Citation: 2009 FC 1269**

**Ottawa, Ontario, December 11, 2009**

**PRESENT: The Honourable Madam Justice Snider**

**BETWEEN:**

**BEN NDUNGU**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

## I. Introduction

[1] The Applicant, Mr. Ben Mathenge Ndungu, is a citizen of Kenya who came to Canada on July 9, 2000. He made a refugee claim in October 2000, which claim was deemed abandoned in June 2002. He took no further steps to regularize his status in Canada until 2007, when he came to the attention of immigration authorities. At that time, Mr. Ngundu made an application for a pre-removal risk assessment (PRRA), which was denied on July 10, 2008.

[2] After this denial, immigration officials began the process to deport Mr. Ndungu. Mr. Ndungu's deportation, scheduled for September 30, 2008, pursuant to s. 48 of *Immigration and Refugee Protection Act,* S.C. 2001, c.27 (*IRPA*), was postponed. After his arrest in October 2008 by the Canadian Border Services Agency (CBSA) for failing to report to immigration officials, his common-law spouse provided a $3000 bond to release Mr. Ndungu on October 27, 2008.

[3] From March 2001 to October 2008, Mr. Ndungu was almost continuously employed at a series of low-paying jobs. Since 2004, he has lived in Canada with his common-law spouse and now has a 16-year old step-daughter and a three-year old daughter. Since his arrest, Mr. Ngundu has been prohibited from working without written authorization from the Minister of Citizenship and Immigration (the Minister).

[4] On November 25, 2008, Mr. Ndungu filed an application pursuant to s. 25(1) of the *IRPA* for exemption, on humanitarian and compassionate (H&C) grounds, from the requirements of the *IRPA* that he obtain a visa prior to entering Canada. In his s. 25(1) application, Mr. Ndungu also sought an exemption from ss. 307 and 10(1)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*Regulations*). The *Regulations* require the payment of $550 for processing his in-Canada H&C application and a $150 fee for processing a Work Permit Application. In respect of the fee exemption requests, Mr. Ndungu submitted that he cannot pay the fee because his family has no savings, his spouse receives social assistance and he is prohibited from working.

[5] In a decision dated February 10, 2009, a delegate of the Minister of Citizenship and Immigration (the Minister) denied both of Mr. Ndungu's applications with the following reasons:

> Paragraph 10(1)(d) of the [*Regulations*] requires all applicants to include evidence of payment of the applicant fee. Your request for an exemption from the fee is contrary to this legislative requirement. If you wish to apply for permanent residence and a work permit in Canada, your application must be accompanied by the required fees.

[6] Mr. Ndungu seeks judicial review of this decision.

## II. Issues

[7] A number of issues that were raised by Mr. Ndungu in his application record were abandoned or not pursued in oral submissions. As I understand the position of the Applicant, the remaining issues are as follows:

1. On a proper statutory interpretation of the relevant provisions of the *IRPA*, does s. 25 of the *IRPA* require the Minister to consider a request to waive the fee for an in-Canada s. 25 application or for a Work Permit Application?

2. Are the provisions of the *IRPA* or the *Regulations* that purport to prevent foreign nationals, who are indigent or on social assistance, from seeking a waiver of fees for services under the *IRPA*, invalid or inoperative on the basis of:

   a. s. 7 of the *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 (*Charter*); or

   b. s. 15 of the *Charter*?

## III. Preliminary Issue of Standing

[8] The Respondent has raised the preliminary issue of whether Mr. Ndungu has standing to bring this application. In response to an affidavit of Ms. Anna Thompson that purports to provide evidence on the issue of standing, Mr. Ndungu has brought a motion to strike the affidavit. Both of these preliminary matters have, as their base, the Respondent's allegation that Mr. Ngundu was able to afford the processing fees and, thus, has no standing to bring this application.

### A. *Motion to Strike*

[9] I will begin with a discussion of the motion to strike Ms. Thompson's affidavit. Leave for this judicial review was granted on September 2, 2009 by Justice Shore. As is the usual practice of the Court, the Order granting leave included a provision for filing further affidavits. The Respondent

filed the affidavit of Anna Thompson on October 8, 2009. The Order also permitted the parties to cross-examine on each others affidavits.

[10] The affidavit in issue was, in effect, the vehicle for providing the Court with certain information related to the financial situation of Mr. Ngundu. The documents attached to the affidavit were obtained from Mr. Ngundu's CBSA file. They purport to be: a Personal Information Sheet completed by Mr. Ngundu's common-law spouse, detailing certain financial information as of May 2007 (the time of Mr. Ngundu's detention and subsequent release); a copy of a Security Deposit form completed by the spouse; a copy of a cheque for payment of the $3000 bond for Mr. Ngundu's release; and information on Mr. Ngundu's employment history.

[11] On October 14, 2009, the Applicant's counsel inquired as to Ms. Thompson's availability for cross-examination, pursuant to the Court Order. On October 19, 2009, counsel for the Respondent replied by letter, stating (Applicant's Motion Record, p. 8):

> The Respondent will not be producing Ms. Thompson for cross examination. Ms. Thompson's affidavit attaches certain documents from Mr. Ndungu's C.B.S.A. file and the litigation file. Ms. Thompson has no specific knowledge of these documents, or of those files, or of Mr. Ndungu's circumstances. The right to cross examination is not absolute and is subject to certain exceptions, including a limit on cross examination when the affidavit is a documentary affidavit attaching certain documents for which the affiant may has [sic] no other personal knowledge. It is our position that there is nothing on which Ms. Thompson could be cross examined on in the circumstances.

[12] The first and most serious concern that I have with the affidavit is the refusal of the Respondent to allow the cross-examination of the affiant. While I acknowledge that cross-examination on an affidavit is not absolute (*Rubin v. Canada (Minister of Foreign Affairs and*

*International Trade)* (2000), 196 F.T.R. 156, 100 A.C.W.S. (3d) 946 (T.D.)), I believe that the express provision of the right in the Order of Justice Shore that allowed cross-examination cannot be ignored. Nor is it for the Respondent to assume that no relevant information can be obtained from this affiant. The failure of the Respondent to permit cross-examination is, in itself, sufficient justification for allowing Mr. Ndungu's motion.

[13] The affidavit of Ms. Thompson will be struck.

[14] Even if I were to decide that the affidavit would remain, I question the relevance and reliability of the evidence produced. Without further information, it is impossible to establish how Mr. Ndungu's spouse found the $3000 for the release bond. Moreover, the fact that the family had some income in 2008 does not change the undisputed fact that neither partner was employed at the time of the H&C application.

B. *Standing*

[15] The Respondent submits that the Applicant lacks standing in this application for judicial review because he has been employed and earned an income for the majority of the time he has been in Canada. As well, the record demonstrates that his common-law spouse was able to pay the $3000 to release Mr. Ndungu from detention.

[16] I am satisfied that Mr. Ndungu does have standing. I agree with the Respondent that there is some evidence of income in 2008, prior to his arrest. Further, we know that $3000 was paid to

release Mr. Ndungu from detention. However, the bond was paid more than a year ago on October 27, 2008, after which the Applicant was forbidden to work. There is no dispute that Mr. Ndungu is the primary breadwinner for his family. Indeed, given that the Respondent chose not to cross-examine Mr. Ndungu on his affidavit, the uncontroverted evidence before me is such that, for purposes of this application for judicial review, I can accept that Mr. Ndungu is not able to afford to pay the processing fees.

[17] As well, I believe that Mr. Ndungu and his family are directly affected (see *League for Human Rights of B'Nai Brith Canada v. Canada*, 2008 FC 732, 334 F.T.R. 63). Should this judicial review application and any subsequent appeals fail, there is a probability that Mr. Ndungu will be deported back to Kenya. This will have a severe impact on his life, his spouse’s life and his children’s lives.

[18] For these reasons, I conclude that Mr. Ndungu has standing to bring this application. This ruling is, in no way, an acknowledgement that Mr. Ndungu is unable to afford to pay a processing fee. In the event that he is successful in subsequent appeals of this decision, a final determination of his ability or inability to pay the processing fees would be made by the Minister.

## IV. Analysis of the Merits

[19] The issues before this Court in *Toussaint v. Canada (MCI)*, 2009 FC 873, [2009] F.C.J. No. 1034 (*Toussaint*) included the issues now before me in this case. *Toussaint* was decided after this application for judicial review was commenced. That case involved a single woman applicant who had applied, pursuant to s. 25(1) of the *IRPA*, for a waiver of the processing fees for her in-Canada permanent resident application. She sought judicial review of the Minister's refusal to waive the processing fee.

[20] The first issue dealt with in *Toussaint* was that of the proper statutory interpretation of s. 25(1) of the *IRPA*. At paragraph 32, this Court concluded as follows:

> […] s. 25(1) does not require that the Minister consider a request to exempt a foreign national from the payment of fees established pursuant to s. 89 of *IRPA* and the relevant *IRP Regulations*. Indeed, the Minister is without authority to do so. This interpretation is apparent when s. 25(1) is read harmoniously in its entire context and in its grammatical and ordinary sense, together with the scheme of *IRPA*, the object of *IRPA* and the intention of Parliament.

[21] The alleged breach of s. 7 of the *Charter* was also considered. On that issue, this Court concluded, at paragraph 51:

> I find that the deportation of the Applicant prior to consideration of H&C factors does not engage the liberty and security issues protected by s. 7 of the *Charter*. In any event, since neither the assessment of H&C factors or of the best interests of the child are principles of fundamental justice to which s. 7 of the *Charter* applies, it follows that there is no breach of s. 7 of the *Charter*.

[22] In *Toussaint*, this Court also considered the possible application of s. 15 of the *Charter*. On this question, the Court concluded, at paragraph 107, as follows:

> In sum, even if I were to accept that persons living in a state of poverty, within which they cannot afford the s. 25 processing fee, face a distinction as compared to the comparator group, the s. 15(1) claim fails. This is because I have concluded that poverty is not an analogous ground. Further, and even if poverty were accepted as an analogous ground, there is insufficient evidence to persuade me that any distinction caused by the failure of the Minister to implement a fee waiver for foreign nationals living in poverty perpetuates the prejudice or stereotyping of persons living in poverty.

[23] In the case before me, Mr. Ndungu acknowledges that these determinations are directly applicable to him. The only difference between his case and that of Ms. Toussaint is that Mr. Ndungu has children. Even though the best interests of children were not directly before this Court in *Toussaint*, the findings on the issues of statutory interpretation and ss. 7 and 15 of the *Charter* are equally applicable to Mr. Ndungu. Mr. Ndungu does not disagree.

[24] While Mr. Ndungu does not agree with the findings in *Toussaint*, he accepts that, as a matter of judicial comity, I will most likely adopt the reasoning and findings in *Toussaint*. He is right. For the same reasons as expressed in *Toussaint*, I will dismiss this application for judicial review.

## V. <u>Certified Questions</u>

[25] The parties agreed that, if I dismiss the application for judicial review, that the same questions that were certified in *Toussaint*, to the extent that they are relevant, should be certified.

[26] Accordingly, for the same reasons that I expressed in *Toussaint* (above, at paras. 119-121) the following questions of general importance will be certified:

1. On a proper statutory interpretation of s. 25(1) of the *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*?

2. Does the failure of the government (through the GIC) 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 s. 25(1) of the *IRPA* infringe the Applicant's rights under s. 7 or s.15 of the *Charter*?

[27] I would like to thank counsel for both parties for their conduct during this judicial review. The parties were able to agree on many issues – such as the proposed certified questions – thus focusing my attention on the only remaining issues. While protecting the interests of their respective clients, they were also fine examples of Officers of the Court.

# JUDGMENT

**THIS COURT ORDERS AND ADJUDGES that**

1. The Affidavit of Ms. Anna Thompson is struck;

2. The Application for judicial review is dismissed; and

3. The following questions are certified:

   a. On a proper statutory interpretation of s. 25(1) of the *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*?

   b. Does the failure of the government (through the GIC) 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 s. 25(1) of the *IRPA* infringe the Applicant's rights under s. 7 or s.15 of the *Charter*?

"Judith A. Snider"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1088-09 |
| **STYLE OF CAUSE:** | BEN NDUNGU<br>v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | DECEMBER 7, 2009 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | SNIDER J. |
| **DATED:** | DECEMBER 11, 2009 |

**APPEARANCES:**

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|---|---|
| Mr. Rocco Galati | FOR THE APPLICANT |
| Mr. Martin Anderson<br>Ms. Kristina Dragaitis | FOR THE RESPONDENT |

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