Supreme Court shuts out poor immigrants

Angus Grant

Canada has a laudable program for granting immigration status to people on humanitarian and compassionate grounds. What is not laudable, however, is the government's insistence on charging an exorbitant fee to access the program. Many individuals most in need of humanitarian and compassionate relief are not able to access it because they simply do not have the $550-per-adult charged by the government.

Included in this category are minors, stateless people and individuals who, while not refugees in the narrow legal definition of the term, would nevertheless experience profound, wrenching hardship if sent back to their country. We'll consider whether you deserve our compassion, we tell these people, but only if you pay up front.

In a decision released last week, the Supreme Court of Canada has refused to hear a challenge to this catch-22 of an immigration program. The case, Toussaint v. Canada, involves the question of whether the immigration minister has the obligation to consider waiving the fee charged for humanitarian and compassionate applications in appropriate cases.

The immigration department regularly points to its humanitarian program as being the main way Canada complies with its international obligations. Yet the very program created by the government to ensure that people do not slip between the cracks contains a gaping crevice through which low-income people regularly fall.

Ironically, the matter went up to the Supreme Court after the person involved, Nell Toussaint, won her case at the Federal Court of Appeal. That court found that under the law as it stood at the time, the minister had to consider her request to waive the application fee.

Unfortunately, in the middle of the litigation, and in an end run around it, the government amended the immigration legislation to categorically bar fee waivers, except on the minister's own initiative. This legislative sleight of hand had the effect of eliminating any impact of the Court of Appeal's decision. As a result, Ms. Toussaint appealed the matter to the Supreme Court to get a determination on whether she had a constitutional right of access to the humanitarian program, a proposition the Court of Appeal had rejected.

Leaving aside the dubious practice of charging for decisions that are supposed to be made on compassionate grounds, the case also raised an important legal issue. Put simply, the issue is whether Canadian public institutions are permitted to discriminate against people based on their income.

Prior to the Supreme Court's decision not to hear the case, there had been a significant level of judicial disagreement on the question of whether the Canadian Charter of Rights and Freedoms prohibits poverty-based discrimination, in the same way that it explicitly prohibits discrimination based on other grounds such as race or religion.

The Supreme Court does not explain why it refuses to hear cases, but regardless of its reasons, the decision is a blow for poor and undocumented people seeking a reasoned consideration of this issue by our highest court.

Poor people and their advocates have been trying for years to get the courts to recognize what social science has already clearly established: that poverty is more than just being cash poor—it is a stigmatized social condition that for many is simply impossible to escape. And yet, government lawyers argued in the case that poverty-based discrimination should not be covered under the Charter because, unlike other protected categories, it is not an unchangeable personal characteristic.

The argument is based on the outdated notion that discrimination can only arise from mistreatment directed at people because of their innate or 'immutable' characteristics. You can't complain about discrimination based on poverty, the argument goes, because tomorrow you might be rich.

In other contexts, the courts have rejected this narrow interpretation of discrimination, finding for example, that marital status is a ground of discrimination that benefits from Charter protection. As we know all too well, marital status is a decidedly fluid personal characteristic, particularly when viewed alongside research on the enduring nature of poverty.

Several years ago, the courts determined that there is a constitutional right to access the court system that cannot be infringed through the charging of a fee. Of interest, the case that established this rule related to a $50 filing fee in small claims court.

Without diminishing the importance of the small claims court process, Ms. Toussaint argued in her appeal that, at the very least, she should benefit from the same right of access in relation to her immigration application, given the fundamental impact it would have on her life. The refusal of the Supreme Court to hear the case would seem to indicate that this constitutional right of access does not extend to administrative procedures, even if they may have a profound impact on the lives of those involved.

Aside from the question of whether poor people should have the right to have their humanitarian and compassionate applications considered, the case highlighted another key access-to-justice issue relating to the ability of poor people to go to court to assert their rights. It is almost insurmountably difficult for those living in poverty to engage in the prolonged and costly process of taking to court a Charter-based claim for protection. The decision of the Supreme Court last week represented the culmination of several years worth of litigation, funded in large part by the now cancelled Court Challenges Program.

The court's refusal to hear the case was disappointing. But even more troubling is the question of how such cases will be brought to the court's attention in the future.

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Criminal justice without reason

Gar Pardy

Central to the success of all democratic societies are the laws which regulate the daily interactions of citizens and the associated mechanisms through which transgressors are judged and punished. Throughout history the laws societies gave themselves evolved on the basis of reason, and in the process they shed those elements of law that found foundation in faith, myth and emphasis on retribution and revenge for transgressors.

Aristotle, as he did on so many other aspects of the democratic societies, wrote some 2300 years ago that "law is reason free from passion." While his words have been ignored and debated ever since, his pithy aphorism has emerged as the solid rock on which democratic societies have been able to accept justice for all as its most sacred principle. The hesitations and advances over the years are illustrated by the apocryphal Moses story when he answered his grumbling wanderers that he was able to get God to reduce his commandments to ten but that adultery was still in.

Aristotle's aphorism has seen both increased adherence and digressions in the past century in western societies. There has been both an emphasis on laws designed to spread the equality of justice for all while at the same time there are shrill cries to increase the safety of citizens. "Wars" on crime and drugs, and being "tough on crime" are common rallying cries from political populists, most of whom see little comfort and real dangers in moving away from the exhortations of the Hebrew bible of an "eye for an eye" for those who transgressed.

Sadly, in spite of overwhelming evidence to the contrary, they see simplistic solutions for one of the constants in human evolution—the willingness of some to go outside societal boundaries.

It is a reasonable judgment that for the past 50 or so years, Canada has followed Aristotelian direction as it has gone about shedding its laws and regulations of historical baggage associated with faith, myth and old testament urgings based on small, less complex societies. The ending of the death penalty and harsh, cruel imprisonment conditions were signposts on the road of the emergence of Canadian law based on reason and where the modern ideas of equality, restorative justice and rehabilitation became central.

No one would argue that the present system is perfect and not in need of ongoing examination and change. The flux of our society as thousands from vastly different environments come to our shores each year, the restless needs of our aboriginal people for long-in-coming social, economic and political justice, and the inability of our local and national police forces to understand and meet these associated oncoming challenges, requires skilled and intelligent responses from our political system.

What these large changes do not need are responses based on unreason and unbridled passion based on a dimly perceived past in which injustice and inhumanity dominated.

Since 2006, the present government has promoted the view that there are serious problems with our criminal justice system and in recent weeks has assembled a number of new laws that are under debate in Parliament. Central to these new laws is the view that the discretion of the judiciary is not to be trusted, and rehabilitation and restorative measures inherent in our prison system is inconsistent with our need to protect us all from the predations of criminals.

As so many have detailed elsewhere, these measures fundamentally alter the careful calibration of criminal laws over the past half-century, and when fully implemented will fundamentally alter our system of justice and add billions of dollars to its cost.

Yet surprisingly, Canadians have exhibited a blissful ignorance on these issues and the odds are that these measures will pass parliament in the coming weeks. Two provinces, Ontario and Quebec, have raised objections to the measures but only Quebec has attacked on the basis that these measures represent a fundamental reordering of our judicial principles.

It is ironic that the United States, which has experimented with these sorts of changes over the past several decades, is slowly coming to the realization of their costs and lack of effectiveness in dealing with crime and its enforcement. A recent book by a former professor of law at Harvard University, William J. Stuntz, titled The Collapse of American Criminal Justice, deals with these same issues.

The book's title summarizes his views on the effectiveness of populist measures associated with "tough on crime" policies even during a period of then-rising crime rates in the United States. The country, for both lack of effectiveness and costs, is abandoning such measures and is seeking answers with measures that were at the core of Canadian policy in years past.

In Canada, of course, there is ample evidence of the wisdom of our earlier approach, with crime rates falling to the lowest level in our history, demonstrating that there are no problems to be fixed in this area, or justification for a "tough on crime" agenda. Even the justice minister in recent days has had difficulty in justifying the wisdom of these laws. He was reduced to the banality of saying that "Canadians gave us a mandate to go after criminals in this country and that is exactly what we are going to do." Reason has exited the criminal justice system.

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