

Court File No. T-1301-C⁹

FEDERAL COURT

Nell Toussaint

Applicant

and

Attorney General of Canada and Minister of Health

Respondents

APPLICATION UNDER section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7

NOTICE OF APPLICATION

TO THE RESPONDENTS:

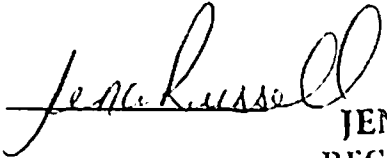
A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Issued by:  AUG 10 2009
JENA RUSSELL
REGISTRY OFFICER
AGENT DU GREFFE

Address of local office: 180 Queen Street West

Toronto, Ontario M5V 3L6

TO: Attorney General of Canada
c/o John H. Sims, Q.C.
Deputy Attorney General of Canada
Department of Justice
Ontario Regional Office
130 King Street West
Suite 3400, Box 36
Toronto, Ontario M5X 1K6

TO: Minister of Health
c/o John H. Sims, Q.C.
Deputy Attorney General of Canada
Department of Justice
Ontario Regional Office
130 King Street West
Suite 3400, Box 36
Toronto, Ontario M5X 1K6

To: Minister of Citizenship and Immigration
c/o John H. Sims, Q.C.
Deputy Attorney General of Canada
Department of Justice
Ontario Regional Office
130 King Street West
Suite 3400, Box 36
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APPLICATION

This is an application for judicial review in respect of the Minister of Citizenship and Immigration.

The date of the decision is July 10, 2009 and it was first communicated to the applicant on July 14, 2009. The decision is contained in a letter from Craig Shankar, Director, Program Management and Control, Health Management Branch, Citizenship and Immigration Canada addressed to Mr. Macdonald Scott, Carranza Barristers & Solicitors wherein the Minister of Citizenship and Immigration decided that the applicant's request for coverage for benefits under the Interim Federal Health Program ("IFHP") cannot be approved because only persons in the following four groups of recipients are eligible, namely refugee claimants, resettled refugees, persons detained under the *Immigration and Refugee Protection Act*, and victims of trafficking in persons, the applicant not being in any of those groups.

Authorization for the IFHP is derived from Order-in-Council numbered 1957-11/848 dated June 20, 1957, and not the *Immigration and Refugee Protection Act* ("IRPA") or any regulations made thereunder, and it is submitted that no leave is required to make this application for judicial review.

The applicant makes application for:

an order quashing and setting aside the aforesaid decision of the Minister of Citizenship and Immigration and referring back to the Minister of Citizenship and Immigration, or in the alternative referring to the Minister of Health, the applicant's request for payment of the costs of her medical care, hospitalization, and expenses incidental thereto, with a direction and declaration that Order-in-Council numbered 1957-11/848, properly interpreted, authorizes the Minister of Citizenship and Immigration, or in the alternative the Minister of Health, to pay such costs on behalf of the applicant and other

persons in the applicant's circumstances and that any policy to not pay the aforesaid costs for such persons is inconsistent with sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the "Charter") and international human rights law obligations including commitments made by Canada under Articles 2, 6, 9 and 26 of the *International Covenant on Civil and Political Rights* and under Articles 2 and 12 of the *International Covenant on Economic, Social and Cultural Rights*, and if Order-in-Council numbered 1957-11/848 cannot be so interpreted, that the said Order-in-Council, to the extent it excludes persons in the applicant's circumstances from coverage under the IFHP, is constitutionally invalid and inoperative as being in breach of sections 7 and 15 of the *Charter* and must be read to include persons in the applicant's circumstances as being eligible for coverage under the IFHP, and such other directions as this Honourable Court considers to be appropriate.

The grounds for the application are:

1. The applicant is an indigent, single woman of colour who is a national of Grenada. She came to Canada on December 11, 1999 with visitor status which expired after 6 months. She has continuously resided in Canada ever since that time and has been recognized as a resident of Canada by Canada Revenue Agency.
2. The applicant has serious medical conditions for which she requires ongoing medical treatment.
3. The applicant does not qualify for public health coverage in Ontario, where she has resided for over nine years, and she does not have the resources to pay for private health coverage were such coverage available for her.
4. The applicant is in receipt of social assistance from Ontario Works. She does not have the resources to pay for the costs of her medical care, hospitalization, and expenses incidental thereto, nor does the Ontario Works program pay for such costs other than the costs of certain medication.

5. Order-in-Council numbered 1957-11/848 dated June 20, 1957 authorizes the Department of National Health and Welfare (the authorization is said to have been transferred to the Minister of Citizenship and Immigration in 1995) "to pay the costs of medical and dental care, hospitalization, and any expenses incidental thereto, on behalf of . . . a person who at any time is subject to Immigration jurisdiction . . . in cases where . . . such person lacks the financial resources to pay these expenses, chargeable to funds provided annually by Parliament for the Immigration Medical Services of the Department of National Health and Welfare."

6. The applicant applied for coverage under the IFHP on May 6, 2009. At the time she was subject to Canadian Immigration jurisdiction within the meaning of the said Order-in-Council. On September 12, 2008 the applicant had made an application for permanent residency from within Canada based on humanitarian and compassionate considerations seeking a waiver of the application fee. Her right to an exemption from the humanitarian and compassionate fee is the subject of an application for judicial review made on January 26, 2009 in this court in application no. IMM-326-09, which was argued on June 23 and 24, 2009 before the Honourable Madam Justice Snider whose decision is currently under reserve. In addition to the aforesaid September 12, 2008 application, on March 12, 2009 the applicant had applied for an exemption from the fee for an application for a temporary resident permit. By letter dated April 19, 2009 Citizenship and Immigration Canada stated that such an application must be accompanied by the required fee.

7. Under the IFHP there are funds available to pay for the costs and expenses of the applicant's adequate health and medical care and, moreover, there is authority to do so pursuant to Order-in-Council numbered 1957-11/848.

8. In denying the applicant eligibility for coverage under the IFHP the Minister of Citizenship and Immigration unlawfully refused to exercise his jurisdiction and acted in breach of the principles of

procedural fairness by allowing his discretion to be unlawfully fettered by purporting to limit coverage to refugee claimants, resettled refugees, persons detained under the *IRPA*, and victims of trafficking in persons.

9. Any construction or application of Order-in-Council numbered 1957-11/848, or exercise of discretion thereunder, that denies the applicant coverage under the IFHP is inconsistent with the objective that lies behind the said Order-in-Council and inconsistent with the applicant's right to life and security of the person, her right to equality before and under the law and equal protection and benefit of the law, and her rights under Articles 2 and 12 of the *International Covenant on Economic, Social and Cultural Rights* in which Canada recognized "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" without discrimination, and obligated itself to take all steps necessary for "the creation of conditions which would assure to all medical service and medical attention in the event of sickness".

10. Such further grounds as counsel may advise and this Honourable Court permit.

This application will be supported by the following material: the affidavits and exhibits thereto of the applicant, Nell Toussaint, of Gordon Guyatt, and of Stephen Hwang, and such further affidavits and exhibits as counsel may advise and this Honourable Court permit.

The applicant requests the Minister of Citizenship and Immigration and the Minister of Health to send a certified copy of the following material that is not in the possession of the applicant but is, in whole or in part, in the possession of the Minister of Citizenship and Immigration or the Minister of Health or both of them, to the applicant and to the Registry:

Certified copies of any and all policy documents, orders, minutes, notes, correspondence, manuals, guidelines, analyses, and other documents pertaining or relating to the following, including certified

copies of the documents specifically described below:

- 1) Order-in-Council numbered 1957-11/848 and recommendations by the Treasury Board (TB) for the authorization of payment of hospitalization, medical care, dental care, and expenses incidental thereto for immigrants in cases where the immigrants lack the financial resources to pay these expenses for themselves (including Order-In-Council of August 4, 1949, PC 41/3888, minutes of a May 29, 1952 meeting of TB, and TB 429126 in PC 1952-4/3262), and the extension of that authorization to payments for such costs on behalf of persons who at any time are subject to Immigration jurisdiction and who lack the financial resources to pay such expenses (including June 20, 1957 TB 515380 in the aforesaid Order-in-Council 1957-11/848);
- 2) all Treasury Board approvals, Treasury Board submissions, and appropriations voted by Parliament for the above payments, including Treasury Board Submission 830313 of January 2003, and oversight thereof by the parliamentary Standing Committee on Citizenship and Immigration;
- 3) the client groups for whom payments described in point 1) above were made, and the extent of health coverage provided, by the Department of National Health and Welfare and its predecessors under the aforesaid orders-in-council prior to any purported transfer of authority therefor from the Department of National Health and Welfare to Citizenship and Immigration Canada, and by Citizenship and Immigration Canada subsequent to any purported transfer of such authority;
- 4) the purported transfer of authority from the Department of National Health and Welfare to Citizenship and Immigration Canada or to any other department, for the making of the above payments, and the authorization for such purported transfer;

- 5) the Final Report of the Internal Audit and Disclosures Branch, Citizenship and Immigration Canada, April 21, 2004 containing the Audit of the Control Framework for the Interim Federal Health Program;
- 6) the finding in the aforesaid April 21, 2004 Audit that "In 1994, a project team from CIC and Health Canada recommended that [Order-in-Council numbered 1957-11/848] be amended to more accurately define the client groups and the extent of health coverage to be provided.";
- 7) the aforesaid 1994 project team's findings and recommendations;
- 8) the finding in the aforesaid April 21, 2004 Audit that "The audit raised the above issues [referred to in point 6 above] with Medical Services Branch management. They indicated that senior management had considered the issue in the past but had rejected amending [Order-in-Council numbered 1957-11/848]. The Department has been defining the parameters of the IFH [Interim Federal Health] program in the absence of a formal review of [Order-in-Council numbered 1957-11/848] and has been able to operate without problems in spite of this. Management indicated that updating [Order-in-Council numbered 1957-11/848] is a priority and that resources will be dedicated to this activity in the current year";
- 9) all considerations by senior management to amending Order-in-Council numbered 1957-11/848;
- 10) the defining [referred to in point 8 above] by the said Department of the parameters of the IFH program;
- 11) the updating of Order-in-Council numbered 1957-11/848 [referred to in point 8 above] and resources dedicated to this activity;
- 12) the parliamentary Standing Committee on Citizenship and Immigration hearing on October 28,

- 2003 in which the funding levels for 2003–04 for the IFH program were discussed, the committee questioned the funding increases, and the Department explained that the program is entirely guided by demand and for that reason, funding fluctuates from one year to the next;
- 13) all other parliamentary Standing Committee on Citizenship and Immigration hearings in which the IFH program was discussed;
 - 14) all meetings of the Interim Federal Health Advisory Committee dealing with the authorization for the IFH and with the client groups affected and extent of health coverage provided by the IFH;
 - 15) all IFH program reports, including the January 2004 *Interim Federal Health Program 5-Year Report (1998–2003)* prepared by the Medical Services Branch of Citizenship and Immigration Canada;
 - 16) Recommendation 1 in the aforesaid April 21, 2004 Audit that “The assistant deputy minister, Operations, should seek to renew and update the IFH program authority.”
 - 17) the management response to the recommendation referred to in point 16) above, namely that “Management agrees with the recommendation”, including all actions taken by Management to implement the said recommendation;
 - 18) the extension of the IFH program to victims of trafficking in persons, including the authority for such extension;
 - 19) all interpretations of the extent of the authorization provided by Order-in-Council numbered 1957-11/848;
 - 20) any memoranda, studies or communications prepared or disseminated pursuant to the aforesaid recommendations of Treasury Board and pursuant to the authorizations provided in the

aforesaid orders-in-council; and

21) any and all acts, statutes, laws or other authority pursuant to which Order-in-Council numbered 1957-11/848 was made and/or from which the Interim Federal Health program derives its authority.

August 10, 2009

A handwritten signature in black ink, appearing to read 'Andrew C. Dekany', written over a horizontal dotted line.

Andrew C. Dekany

Barrister and Solicitor

1724 Queen Street West

Toronto, Ontario M6R 1B3

telephone number: 416-888-8877

fax number: 416-532-7777

solicitor for the applicant

Court File No.

FEDERAL COURT

BETWEEN:

NELL TOUSSAINT

Applicant

And

ATTORNEY GENERAL OF CANADA
and MINISTER OF HEALTH

Respondents

APPLICATION FOR JUDICIAL REVIEW

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July 10, 2009

Mr. Macdonald Scott
Carranza Barristers & Solicitors
1280 Finch Avenue West, Suite 200
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Dear Mr. Scott,

This is further to your letter dated May 6, 2009, which requested medical coverage for your client, Nell Toussaint, through the Interim Federal Health Program (IFHP).

Health care services are provided by the Provinces and Territories. As such, access or denial to health care rests with those Provincial and Territorial authorities, in this case the Province of Ontario.

The Interim Federal Health Program is an interim measure to provide emergency and essential health care coverage to eligible individuals who do not qualify for private or public health coverage and who demonstrate financial need. IFHP services aim to serve individuals in the following four groups of recipients:

- Refugee Claimants;
- Resettled Refugees;
- Persons detained under the Immigration and Refugee Protection Act (IRPA); and,
- Victims of Trafficking In Persons (VTIPs).