Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2015 CHRT 20
Date: September 1, 2015
File No.: T2075/7614

Between:

Maiia Mykolayivna Zaafrane

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Citizenship and Immigration Canada

Respondent

Ruling

Member: David L. Thomas

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I. Introduction – Motion For Abeyance

[1] The Respondent, Citizenship & Immigration Canada ("CIC"), requests an adjournment of the current inquiry pending the issuance of a judgment from the Federal Court of Appeal ("FCA") in a different matter. CIC believes that the judgment of the Court will partly dictate the result in the current inquiry.

II. Background

A. Current Inquiry under the *CHRA*

[2] The complaint in this matter was filed by the Complainant, Maiia Mykolayivna Zaafrane, on April 22, 2014, with the Canadian Human Rights Commission (the "Commission"). On February 5, 2015, the Commission, pursuant to s. 44 (3) (a) of the *Canadian Human Rights Act* (the "*CHRA*"), requested the Canadian Human Rights Tribunal (the "Tribunal") to institute an inquiry into the complaint.

[3] The Complainant alleges that CIC discriminated against her, on the grounds of religion, by refusing her participation in a Canadian citizenship ceremony on December 4, 2013. As a result, Ms. Zaafrane has been unable to complete the requirements to become a Canadian citizen. Ms. Zaafrane was not allowed to participate in the ceremony because she refused to remove her niqab, a garment that covers her head and face with the exception of her eyes.

[4] CIC has a policy that requires the removal of face coverings in order to take the oath of Canadian citizenship at a citizenship ceremony (the "Policy"). Ms. Zaafrane claims that she wears her niqab in public as part of her religion, and as such, CIC has wrongly discriminated against her on the grounds of religion by applying the Policy to her and denying her participation in a citizenship ceremony while wearing a niqab.

B. The Matter Pending Before the Federal Court of Appeal: *Canada (A.G.) v. Ishaq*

[5] In a similar case, a woman from Pakistan named Zunera Ishaq applied for Canadian citizenship. Ms. Ishaq also wears a niqab and claims the wearing of it forms a part of her religious beliefs. Ms. Ishaq completed all of the requirements for obtaining Canadian citizenship, except for participating in the ceremony to take the oath of Canadian citizenship. Aware of the Policy, Ms. Ishaq filed an application for judicial review in Federal Court and moved for an order enjoining CIC from applying the Policy to her at her upcoming citizenship ceremony. (*Ishaq v. Canada (Citizenship and Immigration),* 2015 FC 156.)

[6] On February 6, 2015, Justice Boswell of the Federal Court allowed Ms. Ishaq's application.

[7] The Respondent has appealed Justice Boswell's decision to the FCA. The appeal is expected to be heard on an expedited basis in September 2015.

[8] In the *CHRA* inquiry before me, the Respondent has brought a motion seeking an adjournment of the inquiry while the *Ishaq* case is heard by the FCA. Ms. Zaafrane does not object to holding her complaint in abeyance while the *Ishaq* appeal is heard and decided. However, the Commission objects to the delay and has filed submissions requesting that the Tribunal not hold Ms. Zaafrane's complaint in abeyance pending the resolution of the *Ishaq* appeal.

[9] For the reasons set out below, the Tribunal dismisses the Respondent's motion.

III. CIC's Submissions for Abeyance

[10] CIC has submitted that the issue of whether or not the Policy is lawful and valid is at the core of Ms. Zaafrane's complaint and that therefore a resolution of this complaint partly rests on the upcoming ruling of the FCA. CIC also argues that compelling the parties to proceed with the complaint would be contrary to the principles of natural justice.

IV. Analysis

A. Does Resolution Rest on the FCA Outcome?

[11] I am not convinced by CIC's argument that the FCA's findings in the *Ishaq* case on the legality of the Policy will necessarily resolve Ms. Zaafrane's complaint, in whole or in part. While the decision of the FCA may indeed have an influence on CIC's position regarding a possible settlement with Ms. Zaafrane, the issues before the Tribunal are potentially quite different.

[12] In her application to the Federal Court, Ms. Ishaq sought the following relief:

1. a declaration that the Policy infringes paragraph 2(a) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the "*Charter*");
2. a declaration that the Policy infringes section 15(1) of the *Charter*;
3. a declaration that the Policy is inconsistent with the governing legislation and is therefore beyond the powers of CIC;
4. a declaration that the policy unduly fetters the discretion of citizenship judges;
5. an order enjoining CIC and any officials from CIC from refusing citizenship to her on the basis of the Policy; and
6. her costs.

[13] The Federal Court allowed Ms. Ishaq's application because to the extent the Policy interferes with a citizenship judge's duty to allow candidates for citizenship the greatest possible freedom in the religious solemnization or the solemn affirmation of the oath, it is unlawful. (*Ishaq*, supra, paragraph 68). The Federal Court did not decide on the *Charter* issues raised in Ms. Ishaq's application.

[14] While the *Charter* arguments may have a role in the FCA decision, they also may not be considered. The appeal is likely to be based mainly on the legality of the Policy in light of its inconsistency with the Regulations to the *Citizenship Act.* The questions about

whether or not the Policy infringes the *Charter* are still live in the appeal and it is possible the FCA will have to deal with them (*Minister of Citizenship and Immigration v Ishaq*, 2015 FCA 151, para. 4).

[15] To the extent it focuses on non-*Charter* issues, the opinion of the FCA on the legality of the Policy will be of little relevance to the question of whether the Policy complies with the *CHRA*.

[16] Ms. Zaafrane is asking for her allegations of discrimination to be considered under the *CHRA*, not the *Citizenship Act* or its Regulations. There is a different test that will be applied in determining whether or not discrimination on a prohibited ground occurred. Furthermore, Ms. Zaafrane and the Commission may be seeking substantively different remedies from those sought by Ms. Ishaq. For example, under the s. 53(2) of *CHRA* the Tribunal may order the payment of compensation to the victim of a discriminatory practice. For the above reasons, I believe that the outcome of Ms. Zaafrane's case is not necessarily dependent on the *Ishaq* appeal and therefore it should proceed independently.

B. Principles of Natural Justice

[17] CIC puts forth the argument that if this complaint proceeded before the outcome of the *Ishaq* case, it would be contrary to the principles of natural justice. CIC argues that it would be forced to pursue its case without having all the facts at hand. Furthermore, it argues that waiting for the FCA's decision in *Ishaq* is necessary to understand the exact nature of this dispute. CIC also suggests that the FCA's decision may have an impact on the relief the Tribunal may grant.

[18] The Tribunal normally strives to proceed with inquiries as expeditiously as possible. Section 48.9(1) of the *CHRA* reads:

> "Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow."

[19] Compelling reasons are required to justify derogating from this general principle. Typically, in order to obtain an adjournment, a respondent "must establish that allowing the

proceedings before the Tribunal to follow their normal course will result in a denial to the Respondent of natural justice." (*Marshall v. Cerescorp Company* 2011 CHRT 5.) In this case, it is incumbent on CIC to persuade the Tribunal that natural justice would be denied if there was no adjournment. I am not so persuaded.

[20] In fairness to the parties, the Tribunal would naturally afford the parties the opportunity to make supplementary submissions on any supervisory court judgments rendered between the commencement of the case and the issuance of the Tribunal's final decision if such court judgment touches a live issue before the Tribunal. Certainly in the case at hand, I will afford the parties ample opportunity to address the FCA decision in *Ishaq* if it is rendered before a final decision. Therefore, there is no risk of the Respondent not knowing "the case it has to meet" or being denied "the right to be heard".

[21] I do not agree that an adjournment is necessary to obtain clarity on the factual issues, and as noted above, the legal issues to be decided at the FCA may not be the same at all. Secondly, Ms. Zaafrane's remedies under the *CHRA* are her remedies and not necessarily systemic in nature. On balance, I do not feel the Respondent will be prejudiced with this case moving forward at this time.

[22] Even if the FCA finds the Policy to be invalid and unlawful, this finding may still have little impact on the issues before the Tribunal. In any event, at this point, the matter is purely speculative.

[23] The Respondent has cited previous Tribunal decisions where an abeyance was granted pending a judgment from the superior courts in a different matter: *Bailie et al v. Air Canada and Air Canada Pilot Association*, 2012 CHRT 6; *Renaud, Sutton and Morgeau v. Aboriginal Affairs and Northern Development Canada*, 2013 CHRT 30. In my view, the case at hand is distinguishable because the Tribunal is not being asked to await the outcome of another Tribunal decision or a superior court's consideration of a Tribunal decision. The adjournments in the cases cited were granted based on virtually identical issues being squarely placed before the FC or FCA in pending proceedings. In those cases, it was clear that highly relevant judicial direction would be forthcoming (see *Bailie*, para. 26; *Renaud*, paras. 16-17; see also *Canadian Jewish Congress v. Henry Makow*,

2010 CHRT 13, para. 8; *League for Human Rights of B'nai Brith, Abrams v. Topham, Arthur*, 2010 CHRT 14, para. 9). It is far from certain that the s. 15 *Charter* issue in *Ishaq* will be decided by the FCA. There are other live issues before the Court, at least one of which is a non-constitutional issue. See *Ishaq* Federal Court judgment, 2015 FC 156, paras. 66-67.

V. Ruling

[24] For the foregoing reasons, the Tribunal dismisses the Respondent's request and the complaint will proceed as per the Tribunal's normal pre-hearing case management process.

Signed by

David L. Thomas
Tribunal Chairperson

Ottawa, Ontario
September 1, 2015