Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2017 CHRT 21
Date: June 30, 2017
File No.: T2163/3716

Between:

Amir Attaran

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Immigration, Refugees and Citizenship Canada (formerly Citizenship and Immigration Canada)

Respondent

Ruling

Member: David L. Thomas

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I. Introduction

[1] This is a ruling on a motion by the Complainant, Amir Attaran, dated February 17, 2017, seeking to amend his complaint to add grounds of discrimination and to include an allegation of retaliation against the Respondent, Immigration, Refugees and Citizenship Canada ("IRCC") under section 14.1 of the *Canadian Human Rights Act,* RSC 1985, c. H-6 (the "*Act*").

[2] The complaint against IRCC was filed with the Canadian Human Rights Commission ("CHRC" or the "Commission") on July 28, 2010. The complaint alleged that the significant delay in processing sponsorship applications for parents and grandparents, compared to other categories under the Family Class (as defined in the Regulations to the *Immigration and Refugee Protection Act* S.C. 2001, c.27), was discriminatory, contrary to section 5 of the *Act*. The prohibited grounds of discrimination alleged were the age of the sponsored persons and/or the family status of the sponsor, Mr. Attaran.

[3] On February 22, 2012, the Commission decided that an inquiry into the complaint was not warranted. Mr. Attaran made an application to the Federal Court for a judicial review of the Commission's refusal to refer the complaint to the Canadian Human Rights Tribunal (the "Tribunal"). The Federal Court dismissed his application and Mr. Attaran then appealed to the Federal Court of Appeal ("FCA").

[4] On February 3, 2015, the FCA allowed the appeal and referred the complaint back to the CHRC, on the basis that the CHRC had not adequately addressed the issue of IRCC's *bona fide* justification (*Attaran v. Canada (A.G.),* 2015 FCA 37).

[5] Pursuant to section 44(3)(a) of the *Act*, on September 6, 2016, the Commission requested the Tribunal Chairperson to institute an inquiry into Mr. Attaran's complaint.

[6] The parties to this matter submitted their Statements of Particulars (SOPs) in the normal course. However, in his Reply to the SOP of the Respondent, Mr. Attaran sought to amend his complaint to add the prohibited grounds of race, and national or ethnic origin. This request to amend was prompted by a specific passage in IRRC's SOP which addressed the notion of a "nuclear family". In his Reply SOP, Mr. Attaran also sought to

add an allegation of retaliation relating to comments made in the House of Commons Chamber by a Member of Parliament, the details of which had been particularized in his SOP.

[7] Sections 3(1), 5 and 14.1 of the *Act* provide as follows:

> 3(1) For all purposes of this Act, the prohibited grounds* of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.
>
> […]
>
> 5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
>
> > (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
> >
> > (b) to differentiate adversely in relation to any individual,
> >
> > on a prohibited ground of discrimination.
>
> […]
>
> 14.1 It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim. [1]

[8] The Complainant argues that the SOP of the Respondent contains an admission of stereotyping on the part of IRCC, which amounts to discrimination on the grounds of race and national or ethnic origin. Mr. Attaran cites paras. 30-32, which contain a reference to the "nuclear family", described by the Respondent as "spouses, partners and dependent children" of a sponsor. Mr. Attaran characterizes the term "nuclear family" as a "Western stereotype" because, in his view, it makes no allowance for the equally valid but non-

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[1] This is how s. 3(1) read at the time this motion was presented. However, since then, Parliament has amended s. 3(1) to add prohibited grounds of discrimination. These amendments have no bearing on the present motion.

Western cultural concept of an “extended family” which prevails in many other parts of the world. As such, he argues the adoption of this Western stereotype constitutes discrimination on the grounds of race and national or ethnic origin.

[9] The retaliation complaint arises from comments made by a Member of Parliament, Paul Calandra, in the House of Commons Chamber on February 14, 2011. Mr. Calandra was sitting as a member of the Conservative Party of Canada, which happened to be the party of the Government at that time. The Official Report (Hansard) of the House of Commons Debates on that date records Mr. Calandra’s comments as follows:

> Mr. Speaker, Amir Attaran may have gone to Harvard with the Liberal leader, but that certainly does not make him better than the rest of us.
>
> Earlier today, Amir Attaran had to defend his private lawsuit to move his American parents’ sponsorship application to the front of the line. Attaran is not asking for faster treatment for anyone else’s parents, just for his own.
>
> Attaran is entitled, like everyone else, to sponsor his American parents into Canada, but they need to wait in line, just like my constituents do and just like the constituents of every member of the House.
>
> Immigration Canada considers sponsorship applications in the order in which they are received. Amir Attaran may think that because the Liberal leader was his mentor, because he went to Harvard, that makes him better than the rest of us.
>
> I have news for Mr. Attaran. He is not better than my constituents and his parents are not better than the 150,000 immigrants in the sponsorship queue or the historically high 280,000 immigrants our government welcomed to Canada in 2010.
>
> Why will Amir Attaran’s parents not wait in line like the rest of them, and why will they not join with-
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> (*House of Commons Debates*, vol. 145, No. 130, 3rd Sess., 40th Parl., February 14, 2011, at p. 8104)

[10] As they do not engage identical considerations, it is appropriate for the two different types of amendments in the Complainant’s motion to be dealt with separately. In particular, the rule regarding allegations of retaliation can probably be seen as an exception to the general practice regarding amendments. Whereas the proposition to add

new grounds of discrimination will be mainly focused on whether such amendment alters the substance of the original complaint, retaliation may arise from a completely different set of facts or circumstances. (See *Cook v. Onion Lake First Nation*, 2002 CanLII 61849 (CHRT), para. 20.) I will address first the part of the motion that seeks to add the new grounds of discrimination. I will then address the second part of the motion that seeks to add an allegation of retaliation.

II. Parties' Positions on the Motion to add the Grounds of Race and National or Ethnic origin

A. Complainant's Position

[11] The Complainant's position is that:

1. the additional grounds of discrimination arise from the same set of facts contained in the original complaint;
2. the additional grounds are admitted by the Respondent in its SOP; and
3. adding these grounds of discrimination would not prejudice the Respondent.

B. Commission's Position

[12] The Commission's position is that:

1. the Tribunal has the authority to grant the relief sought by Mr. Attaran;
2. the proposed new grounds of discrimination emanate from the same factual matrix as Mr. Attaran's initial complaint;
3. the Respondent will not be prejudiced by this amendment, especially as the inquiry is still at its early stages;
4. the Tribunal has a responsibility of determining whether a right has been infringed, and has the jurisdiction to do so even if the complaint is not formally amended; and

5. the Complainant's position on the motion meets all of the requirements which have been established for such amendments according to previous decisions of the Tribunal.

C. IRCC's Position

[13] The Respondent essentially concedes at para. 32 of its submissions that the proposed amendments do arise from the same facts as the original complaint. However, the Respondent objects to the amendments for the following reasons:

1. the additional grounds should not be added to the complaint because they have no prospect of success; and

2. the allegations of discrimination based on a Western stereotype of the nuclear family cannot succeed because the term "Western" is overly broad and does not identify any particular race or national or ethnic origin.

III. Law and Analysis (Amendment to Add Grounds)

[14] The Tribunal has the authority to amend a complaint to add grounds of discrimination where there is a common thread linking the amendment to the original complaint, or a common factor underpinning both the new and the original allegations. (See *Canada (Attorney General) v. Parent,* 2006 FC 1313 ("*Parent*"), paras. 41, 43).

[15] The Tribunal is also guided by the Court's judgment in *Canadian Human Rights Commission v. Canadian Telephone Employees Association et al,* 2002 FCT 776, at paras. 30-31:

> [30] The jurisprudence is clear that the Tribunal has the jurisdiction to amend complaints of discrimination. In *Central Okanagan School District No. 23* v. *Renaud*, 1992 CanLII 81 (SCC), [1992] 2 S.C.R. 970 as per Sopinka J. at pages 978 and 996, the Supreme Court of Canada recognized that a Human Rights Commission can amend a deficient complaint to bring the complaint into conformity with the nature of the proceedings before the Tribunal. This can be done at any time during the proceedings.

> [31] This jurisprudence is echoed in the decisions of the Federal Court with respect to amendments to pleadings under Rule 75 of the *Federal Court Rules, 1998.* I refer to the case of *Rolls Royce plc* v. *Fitzwilliam* (2000), 2000 CanLII 16748 (FC), 10 C.P.R. (4th) 1 (F.C.T.D.), where Blanchard J. set outas a general rule that proposed amendments should be allowed where they do not result in prejudice to the opposing party:
>
> > 10 Although leave is discretionary, as a general rule a proposed amendment should be allowed in the absence of prejudice to the opposing party. As stated by Décary J.A., speaking for the Federal Court of Appeal, in Canderel Ltd. v. Canada, 1993 CanLII 2990 (FCA), [1994] 1 F.C. 3 (F.C.A.) at p. 10]:
> >
> > > . . . the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.

[16] Useful guidance may also be garnered from the judgment rendered in *Canadian Museum of Civilization Corporation v. P.S.A.C. (Local 70396)*, 2006 FC 704. Therein the Court acknowledged that when a complaint is before the CHRT, a proposed amendment could alter the allegations set out in the original complaint to such a degree that it amounts to a new subject of inquiry that has not been referred to the Tribunal by the Commission (para. 30). However, the extension, elaboration or clarification of a complaint is permitted where it does not take the complaint outside the scope of the referral, subject to any prejudice caused to the parties (paras. 40, 50). Complaints are open to refinement. Provided that the substance of the original complaint is respected, the complainant and CHRC are allowed to clarify and elaborate upon the initial allegations before the matter goes to a hearing (para. 52).

[17] The allegations of discrimination based on the additional grounds of race and national or ethnic origin emanate from the same factual matrix as the initial complaint. The Complainant alleges that IRCC discriminated in the way it prioritized the processing of certain Family Class applications. The additional alleged grounds of discrimination arise

from the Respondent's explanation of that prioritization. As such, there is a common factor underpinning both the family status allegation and the race and national or ethnic origin allegation: namely, the Respondent's prioritization of Family Class applications and the assumptions this prioritization is allegedly making about families of different origins. This is the common thread between the original complaint and the proposed amendment (See *Parent,* para. 43).

[18] In my opinion, IRCC will not be prejudiced by the amendment to add the additional grounds of discrimination, as it will have ample time and opportunity prior to the hearing to respond to the new grounds raised. In addition, even with the amendment, the facts and events upon which the complaint is based remain those of which the Respondent has already been notified.

[19] However, I share the concern of the Respondent that Mr. Attaran's use of the term "Western" is overly broad. In order for the Respondent to fully know the case to be met in respect of these new additional grounds, further particularization will be necessary. For the foregoing reasons, and without pronouncing myself on the merits of the allegations, I will allow this part of the motion to add the grounds of race and national or ethnic origin, subject to the terms of my order at the end of this ruling.

IV. Parties' Positions on the Motion to add the Allegation of Retaliation

A. Complainant's Position

[20] The Complainant's position is that:

1. the event that he considers as retaliation occurred in 2011 and as such, the Respondent has been aware of it for a long time;

2. he was attacked in Parliament because he once knew the then-leader of the Liberal Party, Michael Ignatieff, when they were at Harvard University together, and that made him a "legitimate target of attack" for filing a human rights complaint;

3. he has a reasonable perception that the MP's statements were retaliation, and that based on jurisprudence, it is not necessary to prove that the act was intentionally retaliatory;

4. retaliation is a serious allegation and should not be rejected at a preliminary stage of the inquiry; and

5. the respondent would suffer no prejudice if the retaliation allegation was added.

B. Commission's Position

[21] The Commission's position is that:

1. it is not clear that Mr. Calandra's statements can be said to amount to statements made by or on behalf of the Respondent, such that s. 14.1 of the Act is engaged;

2. Parliamentary privilege, giving Parliamentarians freedom of speech for statements made in Parliament, may be an impediment to this part of the motion succeeding; and

3. the allegation cannot be said to disclose a tenable claim of retaliation, unless Mr. Attaran can assert facts that demonstrate a plausible connection between Mr. Calandra's statement and the Respondent.

C. IRCC's position

[22] The Respondent's position is that:

1. the allegation of retaliation should not be added to the complaint because it has no prospect of success;

2. the allegation of retaliation has no factual nexus to the original complaint; and,

3. the alleged acts of retaliation were not committed by IRCC and are not connected to IRCC in any way.

V. Law and Analysis (Retaliation)

[23] The guiding principles of *Parent,* discussed above*,* remain relevant in the context of motions to add an allegation of retaliation. In addition, in motions to amend the complaint to add an allegation of retaliation, the Tribunal has held that it is necessary to assess whether the allegations of retaliation are by their nature linked, at least by the complainant, to the allegations giving rise to the original complaint and disclose a tenable claim for retaliation (*Virk v. Bell Canada*, 2004 CHRT 10 ("*Virk*"), para. 7).

[24] The Tribunal must also consider the prejudice that IRCC could suffer in allowing the Complainant to amend his complaint to allege retaliation. In *Virk, supra*, at para. 10, the Tribunal noted that the complainant in that case had clearly identified the facts upon which he relied to assert retaliation. Thus the respondent had proper knowledge and adequate notice of the case to be met with respect to allegations of retaliation, and could properly defend itself against them.

[25] In determining whether the motion to amend the complaint should be granted, the Tribunal should not embark on a substantive review of the merits of the retaliation allegation at the time the amendment is sought (see *Bressette v. Kettle and Stony Point First Nation Band Council*, 2004 CHRT 2 ("*Bressette*") at para. 6). The merits of the allegations should be assessed after the hearing when the parties have had a full and ample opportunity to provide and make submissions.

[26] Regarding the part of the motion to add retaliation, Mr. Attaran has not satisfied me that statements made by Mr. Calandra give rise to a tenable claim for retaliation. I acknowledge that the Complainant links Mr. Calandra's statement to the original human rights complaint, and that substantive review of this allegation is not appropriate at the amendment stage. Nonetheless, the obstacle the allegation faces is the principle of parliamentary privilege. The privilege of freedom of speech in parliamentary debates is one of the most important privileges enjoyed by Members of Parliament (See *Michaud c. Bissonnette*, 2006 QCCA 775 ("*Michaud")*, leave to appeal refused [2006] C.S.C.R. no 333] paras. 33, 46).

[27] Parliamentary privilege is an important part of the general public law of Canada, inherited from the Parliament at Westminster by virtue of the *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, s. 18, and enacted by the *Parliament of Canada Act,* R.S.C., 1985, c. P-1. Section 4 of the *Parliament of Canada Act* prescribes that the Senate and the House of Commons and the members thereof each hold, enjoy and exercise all of the privileges held, enjoyed and exercised by the members of the British House of Commons at the time of Confederation. These include the parliamentary freedom of speech guaranteed by Article 9 of the British *Bill of Rights* of 1689. (See *Canada (House of Commons) v. Vaid,* 2005 SCC 30, para. 29, principles 3 and 10).

[28] Freedom of speech protected by Parliamentary privilege allows Members to freely engage in democratic debate (*Michaud, supra*). This freedom to debate is a vital national interest for all Canadians. It has been held that the need for the right of freedom of speech in the House is so obvious as to require no comment and the right of the House to be the sole judge of the lawfulness of its proceedings, is similarly evident (*Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission),* 2001 CanLII 8549 (ON CA), para. 27. Also, *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 *per* McLachlin J., at paras. 385-386.)

[29] Mr. Calandra's comments may have been for partisan purposes as the Complainant alleges. They may also have been "wholly inappropriate" as alleged by the Commission. However, it is not this Tribunal's place to pass judgment on statements made by a Member in the House of Commons. Moreover, for the Tribunal to hold the Respondent accountable for comments made by Mr. Calandra in this context would violate the constitutional separation of powers (*Vaid, supra,* para. 21). Were such a violation to be permitted, it would put a chill on free debate in the Houses of Parliament. Parliamentarians have been elected to speak, debate and state points of view, and their freedom of speech is not confined to popular points of view. However, human rights tribunals should not, as a matter of principle, interfere with this most protected level of discourse, so necessary to Parliamentarians' ability to carry out their functions (*Vaid*, *supra*, para. 29).

VI. Decision and Order

[30] For the foregoing reasons, the part of the motion to amend the complaint to add the grounds of discrimination of race and national or ethnic origin is granted. However, the Complainant must provide additional particulars with respect to the definition of terms he has used in this motion, specifically the terms “Western” and “non-Western”, and their use as the basis for his allegation of discrimination. The Registrar will contact Mr. Attaran regarding dates for these submissions, and the Respondent and Commission will be given the opportunity to respond in the normal course.

[31] The part of the motion to add the allegation of retaliation is dismissed.

Signed by

David L. Thomas
Tribunal Member

Ottawa, Ontario
June 30, 2017

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2163/3716

Style of Cause: Amir Attaran v. Immigration, Refugees and Citizenship Canada (formerly Citizenship and Immigration Canada)

Ruling of the Tribunal Dated: June 30, 2017

Motion dealt with in writing without appearance of parties

Written representations by:

Amir Attaran, for himself

Daniel Poulin and Sasha Hart, for the Canadian Human Rights Commission

Korinda McLaine, for the Respondent