Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2024 CHRT 35
Date: May 7, 2024
File No.: T2578/13520

Between:

Hamid Arabzadeh

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Immigration, Refugees and Citizenship Canada

Respondent

Ruling

Member: Jennifer Khurana

I. OVERVIEW

[1] Hamid Arabzadeh filed a complaint against Immigration, Refugees and Citizenship Canada (IRCC), the Respondent. In broad terms, the complainant, who is an Iranian national, alleges IRCC delayed processing their application.

[2] In 2020 and 2021, the Canadian Human Rights Commission (the "Commission") referred this complaint and 56 similar but separate individual complaints that are not joined with this complaint. The Commission also referred a related complaint consisting of a group of individuals alleging discrimination by IRCC. Those individuals filed similar complaints against three other government respondents, for a total of four complaints involving that same group of individuals. Those group complaints are also proceeding separately.

[3] Following the Commission's referral to the Tribunal, the Respondent requested that the Commission refer the complaint to the National Security Intelligence and Review Agency (NSIRA) under para 45(2)(b) of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the Act). The Tribunal held the complaint in abeyance and suspended all deadlines pending the completion of the NSIRA process.

[4] NSIRA communicated its report to the Commission on March 13, 2023. The Respondent asked the Commission not to process the complaint pending its application for judicial review challenging the procedural fairness of the NSIRA process. From March until October, the Commission said it was processing the complaint and would decide whether it should be referred to the Tribunal.

[5] In October 2023, the Commission advised the Tribunal that it had made a determination under s.46(2)(a) of the Act and that it decided to refer the complaint to the Tribunal a second time (the "re-referral"). In addition, the Commission amended the complaint to change the grounds from what the complainant appears to have included in the original complaint form filed with the Commission.

[6] By way of letter dated October 20, 2023, the Tribunal advised the parties that, as the NSIRA process had concluded, the abeyance was over and the complaint would proceed in the Tribunal's process.

[7] The Respondent wants the Tribunal to reinstate the abeyance pending the resolution of all matters that are currently before the Federal Court, which it says will only take a matter of months. It argues that the NSIRA process was procedurally unfair and says that if that process is reopened, this may affect the Commission's decision to refer the complaint. As set out below, the parties are all involved in applications for judicial review before the courts. NSIRA has also applied to intervene in the Respondent's application for judicial review of the NSIRA process.

[8] The Commission opposes the Respondent's request and argues that there are no exceptional circumstances justifying granting a stay and that it is not in the "interests of justice" to do so.

[9] The terms "stay" or "hold in abeyance" are used in the parties' submissions. I am not going to address what the difference is between these terms, or whether they should be used interchangeably, because doing so is not necessary to decide the Respondent's request. Regardless of the terms used, it is clear what the Respondent seeks. It wants the Tribunal to put the complaint on hold until all the issues currently before the courts are resolved.

II. DECISION

[10] The Respondent's request is dismissed. I am not persuaded that there are exceptional circumstances that justify staying the proceedings or that it is in the interests of justice to wait until multiple issues currently before the Federal Court are resolved. The timing and result of those applications are uncertain, and the complainant has been waiting for years to have the complaint heard before the Tribunal. There are a number of open questions related to the complaint due to how it was processed and referred, however, and I have outlined a preliminary list of issues to be addressed in case management with the parties. There are likely others.

III. BACKGROUND

[11] The procedural history of the complaint is unusual and the chronology of the Commission and the parties' applications and motions before the Federal Court is complex. While the only issue for me to determine at this point is whether the complaint should be put in abeyance, I have set out what is still pending before the Federal Court to the extent this background is relevant to my decision and to next steps in these proceedings, as set out below.

Status of the re-referrals

[12] I asked the parties—starting with the Commission—to make submissions on the legal status of the "re-referral" of a complaint. More specifically, I asked the Commission to explain why it referred the complaint a second time, how it proposes the Tribunal should treat the second referral, and what, if anything, the Tribunal should do with this second referral decision in light of the fact that the complaint has been open for close to 4 years.

[13] The Commission explained that upon receipt of the NSIRA report, it had only two options further to para 46(2)(a) of the Act. It could either dismiss the complaint or "deal with it" using the powers available to it under Part III of the Act. The Commission decided to deal with the complaint per its regular procedures and re-referred the complaint as though it were brand new.

[14] The Tribunal did not open a new complaint file upon receipt of the re-referral because the initial complaint referred to the Tribunal was never closed, withdrawn or otherwise disposed of. The Commission did not request that the initial complaint be declared a nullity or closed.

[15] The Commission acknowledges that it is unusual to refer the same complaint to the Tribunal twice. It says this is because the respondent required a referral to NSIRA after the Tribunal had already commenced its inquiry and because there is no case law to guide how the Tribunal and the parties should proceed in these circumstances.

[16] According to the Commission, the October 2023 referral decision should define the scope of the Tribunal's inquiry and should supersede the initial referral. The Commission argues no weight should be given to its initial referral decision. The other parties did not make submissions on this point or respond to this particular argument.

[17] Determining what to make of the second referral decision is not material to this decision on the abeyance request. In any event, this may be a live issue before the Federal Court as the Respondent has applied for an extension of time to judicially review the Commission's second decision to refer the complaint to the Tribunal on the grounds that the NSIRA process was flawed and procedurally unfair. The Respondent does not appear to have sought judicial review of the first Commission decision to refer the complaint prior to the NISRA process being triggered. The Tribunal will address this issue in case management with the parties.

The pending judicial reviews

(i) Respondent's application for judicial review of the NSIRA Investigation Report

[18] In March 2023, the Respondent brought an application for judicial review of the NSIRA Investigation Report alleging a lack of procedural fairness in the NSIRA investigation (Federal Court File Number T-427-23). The Respondent is also seeking to have the NSIRA Investigation Report set aside and the matter referred back to NSIRA. According to the Respondent, if the judicial review is granted, this would reopen the Commission's investigation of the complaint and may affect the Commission's decision about the referral of the complaint to the Tribunal. It argues that further steps in the Tribunal process will be based on a record that is "ultimately found to be flawed" and will result in wasted time and expense for all parties.

[19] The Respondent argues that a hearing of the application for judicial review is far advanced, will be heard shortly and "is expected to take place in the spring of 2024" if the Commission's motion to strike is unsuccessful.

[20] According to a summary of the status of the outstanding Federal Court proceedings provided by the Commission on April 16, 2024, this application is suspended pending the Commission's motion to strike the application as premature, as described below. NSIRA also brought a motion for leave to intervene in the Respondent's application for judicial review.

(ii) Commission's Motion to Strike the Respondent's Application as Premature

[21] On July 7, 2023, the Commission brought a motion to the Federal Court to strike the Respondent's application for judicial review of the NSIRA Investigation Report on the basis that the application was premature. The Commission argued that the NSIRA report only forms part of the Commission's decision-making and is not reviewable on a stand-alone basis. Rather, the Commission argued that the Respondent ought to await the outcome of the Commission process. In the meantime, the Commission made its determination and re-referred the complaint in October 2023.

[22] According to information the parties provided on April 16, 2024, the Commission's motion to strike was argued on January 30, 2024, supplemental submissions were filed on March 4, 2024, and a decision by the Federal Court is pending.

[23] The Commission explained that if its motion to dismiss is granted, that would finalize the issue of the challenge to the NSIRA process. If the Commission's motion to strike is dismissed, then the motion for intervention from NSIRA would need to be dealt with. NSIRA's request to intervene could be granted or dismissed, and the application for judicial review would proceed, with the court setting new deadlines for all the parties' submissions and affidavits to be filed, including NSIRA, if it is granted leave to intervene and is allowed to file materials. The hearing of the judicial review would then need to be scheduled by the Federal Court.

(iii) Respondent's application for judicial review of the Commission's decision to refer the complaint to the Tribunal and its motion to extend the time to file this application

[24] On December 5, 2023, the Respondent filed an application for judicial review of the Commission's decision to re-refer the complaint to the Tribunal for inquiry (Federal Court File 23-T-129). Because its application was late, the Respondent was required to bring a motion seeking an extension of time to file the application. As of the April 16, 2024, update provided by the Respondent, motion records have been served and filed, and a court decision is pending. According to the Respondent, if it is successful in its application for judicial review, the matter will be sent back to the Commission for reconsideration, pending a new NSIRA Investigation Report.

IV. ANALYSIS

[25] It is only in the most exceptional cases that the hearing of a complaint should be suspended (*Bailie et al. v. Air Canada and Air Canada Pilots Association*, 2012 CHRT 6 at para 22 and C*anadian Association* of *Elizabeth Fry Societies and Acoby v. Correctional Service* of *Canada*, 2019 CHRT 30 at para 14).

[26] The Act requires the Tribunal to balance the principles of natural justice with expeditiousness (s. 48.9(1)). In considering stays of proceedings, the Tribunal can consider whether it is in the "interests of justice" to do so (*Duverger v. 2553-433-Quebec Inc (Aeropro)*, 2018 CHRT 5 at paras 58-60 [*Duverger*]). This approach relies on a reasonable and flexible assessment of factors relevant to stay requests, including but not limited to principles of procedural fairness, whether a serious question of fact or law is to be judged, irreparable harm, the balance of convenience between the parties, and the public interest in dealing with human rights complaints expeditiously. The factors and interests to be taken into consideration by the Tribunal may vary depending on the circumstances of each case (*Williams v. Bank of Nova Scotia*, 2021 CHRT 24 at para 38 and *Duverger* at para 58).

[27] It is generally not in the interests of justice for the Tribunal to grant stays of proceedings pending a judicial review of the Commission's decision to refer a complaint to the Tribunal (*Duverger* at 68 and 71).

[28] The burden is on the party seeking the stay to adduce clear and non-speculative evidence that irreparable harm will follow if their motion is denied (*Canada (Attorney General) v. Amnesty International Canada*, 2009 FC 426 at para 29). A waste of time and financial resources, the impossibility of recovering costs and the stress and anxiety involved in judicial and quasi-judicial processes do not, in and of themselves, constitute irreparable harm to the parties (*Duverger* at paras 64-65 and 70, citing *Bell Canada v. Communication, Energy and Paperworkers Union of Canada* (1997), 127 FTR 44, 1997 CanLII 4851 (FC), [*Bell Canada*] at para 40).

[29] In my view, it is in the interests of all parties, and in the public interest, to move forward at this stage and to avoid further delay. The procedural history and circumstances of this complaint are complex and novel, but I do not find there are exceptional circumstances present that warrant staying these proceedings or reinstating the abeyance based on the limited information available. The circumstances of the complaint and the information available to the Tribunal do not currently justify a stay.

[30] The Respondent alleges that it was deprived of the opportunity to provide submissions to NSIRA during the investigation, which led to a flawed Investigation Report, which in turn led to a flawed Commission decision to refer the complaint. While I am willing to accept on the face of the limited information available that the Respondent has raised a serious issue with respect to the procedural fairness of the NSIRA process, I am not persuaded that the Tribunal proceedings should be stopped based on speculation about the outcome and timing of the judicial reviews.

[31] The Respondent submits that it would suffer irreparable harm if the complaint proceeds before the Tribunal. It argues that the Tribunal process would involve a waste of irrecoverable time and money for all parties in preparing and participating in what might ultimately be an unnecessary hearing if the Federal Court finds that the NSIRA proceeding was procedurally unfair and that the Commission decision to refer the complaint was based

on a faulty record. The Respondent also submits it would suffer irreparable harm in the event of inconsistent findings between the Federal Court and the Tribunal.

[32] The Tribunal has rejected similar arguments on the basis that the alleged harm was based on the hypothetical premise that the Federal Court would allow the judicial review applications (*Duverger* at para 64 and *Williams* at para 43). The Respondent's arguments about wasting time and money are not sufficient to constitute irreparable harm in and of themselves. The Respondent has not provided the clear and non-speculative evidence required to establish that it would suffer irreparable harm if these complaints proceeded.

[33] I acknowledge that the Respondent is challenging what it alleges was a procedurally flawed NSIRA and Commission investigation process and that this is currently a live issue before the Federal Court. However, the Commission's investigation is not evidence before this Tribunal, and the Tribunal's process is *de novo*. In very basic terms, what the Commission investigated or decided at this point is water under the bridge and has no bearing on the Tribunal's inquiry. While the Commission's investigation is material to its decision to refer, once a complaint is referred to the Tribunal, the Tribunal's inquiry begins. The parties can make their cases before this Tribunal as they see fit. The complainant must make out their case, and the respondent can defend against a claim of discrimination and make any arguments it wishes to put forward.

[34] I also reject the Respondent's claim that the balance of inconvenience favours the Crown and that any stress and anxiety that the complainant may experience because of a few months' delay in the Tribunal's proceedings should be no more than equal to the stress and anxiety that the Respondent would experience if the matter were not held in abeyance. According to the Respondent, if the judicial review application challenging the NSIRA report is denied, the Tribunal case could resume in a few months, whereas the time and energy the Respondent will be required to incur if the Tribunal refuses to hold the matter in abeyance "eclipses" the time and energy the complainant would incur if the stay were allowed.

[35] I do not accept the Respondent's claims about the stress and anxiety it faces, nor its attempts to suggest that the pressures are uniformly experienced between the complainant and the Respondent.

[36] The Respondent is a large institutional litigant, represented by counsel from the Department of Justice. The complainant appears to be self-represented and an individual who filed a complaint years ago seeking redress for alleged discrimination. The Respondent has made bald assertions about the “stress and anxiety” it would experience as compared to the complainant. Comparing their relative resources and stress and anxiety in defending claims under the Act to that experienced by the complainant is disingenuous at best.

[37] I also reject the Respondent’s submissions that the resolution of “all pending matters currently before the Federal Court” is a “matter of months”. This is potentially a significant understatement given the complexity of the issues involved in the judicial review applications and the uncertainty that remains, as well as the possibility of any subsequent appeals. A “matter of months” has already passed since the Respondent made this request in December and the matters are not all resolved, as the Respondent and the Commission reported on April 16, 2024.

[38] Further, the complainant and the public have a vested interest in human rights complaints being heard expeditiously, and unnecessary delays jeopardize the preservation of evidence (*Duverger* at para 68).

[39] Finally, as set out above, it is not even clear what the legal status is of the re-referral or the implications of dismissing or choosing not to deal with a complaint that is already before this Tribunal. Similarly, it is not clear what the consequence may be for an application for judicial review of a re-referral when it appears no such application was made when the complaint was initially referred four years ago.

[40] The initial complaint has not been declared a nullity, or withdrawn, and the Tribunal will proceed with its task, which is to conduct an inquiry into complaints the Commission refers to it. Whether when or how the Commission should or should not have referred the complaint is not the Tribunal’s task to evaluate. In any event, the Tribunal has no authority to review the exercise of the Commission’s discretion.

V. NEXT STEPS

[41] The Tribunal will send the parties a letter setting out deadlines for the filing of Statements of Particulars (SOPs), disclosure and intended witnesses.

[42] The Tribunal has identified the following non-exhaustive list of preliminary issues from reviewing the limited materials in this file. The Tribunal will canvass the parties to schedule a case management conference call (CMCC) to address these issues following receipt of the SOPs. The parties may have others to add and may wish to write to the Tribunal with any preliminary issues they want to address:

- Relevance of the initial complaint compared to the re-referral: the scope of complaint in light of Commission's amendment to initial complaint
- Confidentiality and privacy
- Possible consolidation with other complaints

VI. ORDER

[43] The Respondent's request for an abeyance is denied. The Registry will send its initial letter setting out a schedule for the filing of particulars, disclosure and witness lists.

Signed by

Jennifer Khurana
Tribunal Member

Ottawa, Ontario
May 7, 2024

Canadian Human Rights Tribunal

Parties of Record

File No.: T2578/13520

Style of Cause: Hamid Arabzadeh v. Immigration, Refugees and Citizenship Canada

Ruling of the Tribunal Dated: May 7, 2024

Motion dealt with in writing without appearance of parties

Written representations by:

Christine Singh and Sarah Chênevert-Beaudoin, for the Canadian Human Rights Commission

Sandy Graham, Helen Gray, Alexander Gay, Jennifer Francis and Alexandra Pullano, for the Respondent