CANADIAN HUMAN RIGHTS ACT
R.S.C., 1985, c. H-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

JAWAHAR MENGHANI

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADA EMPLOYMENT AND IMMIGRATION COMMISSION
AND DEPARTMENT OF EXTERNAL AFFAIRS

Respondents

DECISION

TRIBUNAL: Sidney N. Lederman, Q.C. - Chairman
Lee Ongman - Member
Jill M. Sangster - Member

APPEARANCES: Daniel Russell/Peter Engelmann
Counsel for Canadian Human Rights Commission

Bruce Logan
Counsel for the Respondents

DATES AND PLACE OF HEARING: December 9 and 10, 1991
January 27 and 28, 1992
Calgary, Alberta

JAWAHAR AND NANDLAL MENGHANI

The Complainant Jawahar Menghani ("Jawahar") is a Canadian citizen who immigrated to this country from India in 1962. He is a professional accountant and is presently self-employed. During the period relevant to this case, he was the owner (through a company called Nectal Sales Ltd.) of two retail shoe stores, one in Aylmer, Quebec which began

operation in 1978 and the other in Hull, Quebec, which began operation in 1979. Because he was engaged in another occupation at the time, he had one full-time employee working in each store and a part-time clerk in the Aylmer store.

His brother, Nandlal Menghani, ("Nandlal") was admitted into Canada in March of 1973 on a student's visa. From 1973 to 1981, he was able to renew his visa while he attended various educational institutions. He would assist in one of his brother's stores during the day while attending school in the evening. In 1981, he was given a 12-month temporary work permit which was extended to October 1982 but not extended further. At that point, he had been working full time for his brother. That ceased when his permit was not renewed. He, however, has remained in the country since that time on a Ministerial permit.

APPLICATION FOR PERMANENT RESIDENCE STATUS

The issues in this case concern Nandlal's attempt to apply for landed immigrant status in 1981 and 1982 and the manner with which his application was dealt with by the Department of External Affairs. Since it is a requirement that a prospective immigrant apply to a Consulate outside of Canada, Nandlal attended at the Canadian Consulate in New York for this purpose.



His application fell within the category of "Family Business - Job Offer to Relatives." To better understand the nature of this application, it is necessary to examine how this category of applicant fits within Canada's immigration policy.

Evidence was adduced indicating that the main features of Canada's immigration policy are:

(1) Social - to encourage the reunification of families;

(2) Economic - to encourage immigrants who will fill labour market needs;

(3) Humanitarian - the resettlement of refugees and other victims of displacement and persecution.

With those objectives in mind, the admissible classes of immigrants include Family Classes, Independent Applicants, Assisted Relatives and Refugees.

In the Family Class, eligible immigrants are limited essentially to close relatives of Canadian residents (i.e. spouses, parents and minor children). They are not subject to occupational selection criteria and are admissible subject only to health and character requirements.

The Independent Applicant Class is made up of people who are able to establish themselves on a self-sufficient basis. Their capacity to establish themselves without help is evaluated in terms of selection criteria which take into account a number of factors including education, vocational preparation, experience, age and the need for their skills in the labour market. Of particular importance is the occupational demand factor in Canada.

A third category is that of Assisted Relatives. These are non-dependent relatives of Canadian citizens and permanent residents (example - brothers and sisters) who will be entering the work force. They are assessed on the basis of a combination of their labour market suitability and the degree of kinship to their Canadian relative sponsor. Therefore, assisted relatives must be awarded points under the occupational factor or have some form of arranged employment, usually a job offer validated by Canada Employment. The Assisted Relative Class is really part of the Independent Class since it does turn upon occupational demands.

Of particular interest to this case is the fact that within the Assisted Relative Class priority is given to job offers to relatives to operate a family business. The labour market requirement may be waived in cases of assisted relatives destined to a family business. A Canadian citizen or permanent resident may bring to Canada a member of his family to work in the family business under the following criteria:

(a) the relationship of the prospective immigrant to the proprietor of the business in Canada must fall within either the Family Class or Assisted Relative definition in the Regulations under the Immigration Act;



(b) there must be a bona fide job offer to work in the business which offers reasonable prospects of continuity;

(c) wages and working conditions are to be normal for the occupation in the area where the family business is located;

(d) the business must have been in a viable operating position for a minimum of one year;

(e) there is an aspect about the job which clearly makes a relative a logical and common sense choice for that position; example - trust, close relationship, a working environment which involves unusual aspects such as long working hours;

(f) the prospective immigrant has in his or her work experience and aptitude sufficient abilities to indicate he or she could successfully fill the position.

In many respects, the Family Business concept is viewed as serving family reunification goals under the Immigration Act.

Also, its unique feature is the trust that exists among family members not readily found among those not bound by family ties. Thus, job offers can be approved by Canada Employment without regard to the availability of Canadians to do the job.

It was under the Assisted Relative category that Nandlal sought landed immigrant status. Jawahar provided a written Confirmation of Offer of Employment to have Nandlal assist him in managing two retail shoe stores in the Ottawa area.

This job offer was approved by Canada Employment. However, when the matter came before the Canadian Consulate in New York, Nandlal's application was rejected ultimately because he could not prove to their satisfaction that he was actually the brother of Jawahar. Without that, Nandlal could not achieve sufficient points to qualify for permanent residency. There was no right of appeal to the then Immigration Appeal Board from this decision.

THE COMPLAINT

Jawahar alleges that he was discriminated against on the basis of national or ethnic origin in that he was not allowed to "sponsor" his brother for landed immigrant status because of discriminatory practices in relation to documentation requirements. In the words of the Complaint:

"I believe that the criteria used by Immigration to establish proof of brotherhood do not take into account the Indian/Pakistani context, i.e. the registration of

birth at that time was not mandatory and the other certificates do not necessarily



contain the information required to sponsor a brother.

Immigration policy and practices on that matter have, consequently, an adverse impact on Indian/Pakistani people. I therefore believe that I have been discriminated against on the ground of my national origin in contravention of section 5 of the Canadian Human Rights Act."

PRACTICE OF CANADIAN CONSULATE IN NEW YORK

As was the practice, Nandlal was called in for an interview in the fall of 1981 with Mr. John Roberge who was the visa officer in New York dealing with Nandlal's file. It was at this meeting that Mr. Roberge indicated that he would require a school leaving certificate as proof of the relationship with Jawahar. Normally, the Department seeks birth certificates as proof of such relationship. However, sensitive to the fact that in Pakistan and India the reporting system of births may not be accurate or complete, the Department requested the production of the school leaving certificates for both Nandlal and Jawahar in order to establish whether they were truly brothers. A school leaving certificate in India normally would indicate place and date of birth and the name of the pupil's father. This is the document commonly sought from Indian applicants by the Department.

However, there is a discrepancy in the evidence as to when school leaving certificates are issued. The Department



operated under the understanding that school leaving certificates are always issued when a student leaves that particular school.

However, Mr. Robinson Koilpillai, an expert in school administration, both in India and Canada, testified that this document is given only when a student transfers to another school and is not automatically issued upon the completion of studies or if the student fails to continue his education. Therefore, not every applicant from India could produce such a certificate.

Neither Nandlal nor Jawahar possessed such a certificate nor was one available from their school.

In any event, in an attempt to satisfy the Department's request, Nandlal and Jawahar did obtain from their former school in India, a type of school leaving certificate for each of them that was issued when the request was made, i.e. February 25, 1982. This was the best they could do. These certificates are for each of Nandlal and Jawahar and after their name in their respective certificates appears the name "Naraindas". They both testified that that is the name of their father and that it is common practice to write the name of a child's father immediately after the first name. These documents, however, were not acceptable to the Department for two reasons. First, it did not expressly indicate that they were the sons of Naraindas. Moreover, since the school certificates were obtained after Nandlal had expressed an interest in immigration to Canada, it was not regarded as a primary document. Apparently, the Department is quite suspicious of documents created after an interest in immigration to Canada has arisen since their experience has been that there has been a significant amount of fraud in connection with such documents emanating particularly from countries such as India, China, Columbia and Ecuador.

In addition, Nandlal did provide other evidence of the fraternal relationship: affidavits of his mother affirmed on February 8, 1982 and December 6, 1982 attesting to the fact that she was married to Naraindas and that out of the marriage two



sons, Jawahar and Nandlal, were born; a statement by the retired principal of the K.J. Khilnani High School in Boribunder, Bombay dated February 8, 1982 attesting to the fact that Jawahar and Nandlal were students at the school and that they were brothers and sons of the same father and mother; Certificates from the Indian High Commission in Ottawa dated August 3, 1982 confirming that according to their information they are sons of the same

father; a letter dated March 11, 1967 from a lawyer in Bombay certifying that he has known Naraindas Menghani for at least 15 years and indicating among other things that Nandlal aged 20 at the time was the son of Naraindas, as was Jawahar and that Nandlal and Jawahar were brothers. Even though the date of the last document was some 15 years before Nandlal's application for landed immigrant status, Mr. Roberge does not recall seeing it at the time. With respect to the others, they carried no weight in Mr. Roberge's mind because they were all created at a time after there was an interest by Nandlal in immigrating to Canada and were, therefore, suspect and not acceptable to Mr. Roberge. In addition, Mr. Roberge had received Nandlal's Indian passport issued in 1972 which indicated that his father's name was Naraindas. This was not considered of value by Mr. Roberge because he did not consider it to be a primary document.

Mr. Brian Davis, Director, Consular Policy and Immigration Co-Ordination for External Affairs and International Trade testified on behalf of the Respondents. He has had a broad experience beginning as a visa officer and now as a Policy Director in the Department. In the course of his career, he spent 3 years in New Delhi. He indicated that in a country such as India, not all births are registered and, therefore, you cannot rely or depend upon one document to definitively prove familial relationship as you could in respect of countries where record keeping is mandatory and reliable. He acknowledged that if the Department had a fixed standard whereby everyone had to produce a birth certificate, it would be unfair. Therefore, he stated that they take a reasonable approach based upon the



reliability of documents in particular locations. The statutory onus is upon the applicant to prove identity and relationship and accordingly, they would ask such an applicant, if unable to supply a birth certificate, what else can be produced to establish the fact. He indicated that the practice is to look at all the documents that can be brought forth but insisted they must at least predate the application for permanent residency.

With respect to India, they have experienced a problem of fraud and misrepresentation. The pressure to immigrate and to fit within the Family Class often resulted in fraudulent documents being made to prove the necessary relationship. Having said that, he did testify that they accepted 75% of the

applications rejecting only 20 to 25%. When documents are submitted to them, they often do their own verification. For example, they will attend at or contact the school to obtain third party verification of the accuracy of the contents of a document submitted to them. Accordingly, one gets the impression from Mr. Davis that the Department looks at each application on a case by case basis and assesses the full extent of the documentation produced by the applicant from India to determine whether he or she has satisfied the onus of establishing the requisite familial relationship.

The practice followed by Mr. Roberge, however, appears at odds with the testimony given by Mr. Davis. Mr. Roberge was single minded in insisting upon a particular kind of school leaving certificate predating the application for immigration and clearly indicating the name of the father. Nothing else would do. Even in the face of the other documents presented by Nandlal and Jawahar as indicated above, his insistence upon the particular document continued. It appears that in the October 1981 interview, a document which predated Nandlal's interest in immigration was also produced. It was the Indian passport of Nandlal dated August 24, 1972. It too was of no interest to Mr. Roberge for on October 13, 1982, Mr. Roberge wrote to Nandlal



stating "affidavits and passports are no substitutes for what we call primary documents in establishing a relationship". On November 30, 1982 Mr. Roberge wrote to Nandlal's solicitors indicating that:

"The document commonly used in our office in Delhi in order to establish primary evidence of relationship is the original School Leaving Certificate issued by a state recognized school. This document shows the date of birth and the father's name of the student. Affidavits are not acceptable for this purpose. School certificates were requested of Mr. Menghani in October 1981 and February 1982."

On December 23, 1982, after a complaint was launched with the Canadian Human Rights Commission, the Commission wrote to Mr. Roberge and enclosed old Indian passports of Nandlal and Jawahar dated 1972 and 1968 respectively both indicating that their father was Naraindas. Mr. Roberge testified that although

he had seen Nandlal's passport earlier, this was the first time that he had seen Jawahar's. Interestingly, Mr. Roberge on January 3, 1983, forwarded to the Delhi Consul the school leaving certificates produced by Nandlal a year earlier and sought their advice as to their acceptability and validity especially in light of these passports. The Delhi office obtained confirmation from the K.J. Khilnani High School that the school leaving certificates as issued by that school were genuine. Mr. Roberge testified that in view of that verification and the cumulative effect of the old passports he was satisfied in 1983 that the two individuals were brothers. However, by that time, Jawahar's business had failed and accordingly, there was no job offer from a family member which would provide Nandlal with sufficient points to permit approval of his application.



It is clear that Mr. Roberge adopted a more flexible approach only after the Canadian Human Rights Commission became involved. His approach in 1983 is consistent with what Mr. Davis has said is the policy of the Department. However, his practice in 1982 was quite rigid. He was absolutely steadfast in insisting upon one particular document only. The nature of his practice was clearly set out in a telex sent from his office to Canadian Immigration Centre in Ottawa on October 21, 1982. It states in part:

(1)..Indian High Commission letters were based on passport which is not primary documents and, therefore, not acceptable as proof of relationship...

...

(3) Documents required to prove relationship would be birth certificate or original school certificates bearing father's name. We would not accept affidavits.

This may explain why he never mentioned to Nandlal that in addition to his passport, production of Jawahar's passport (issued in 1968) would be confirmatory of the fraternal relationship.

PROVISION OF SERVICES

It must first be determined whether the Immigration Officer was engaged "in the provision of ... services ... customarily available to the general public" within the meaning of section 5 of the Canadian Human Rights Act ("CHRA").



Section 5 of the CHRA reads:

"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."

The Canadian Human Rights Tribunal decision in Anvari v. Canada (Cdn. Employment and Immigration Commission) (1988), 10 CHRR D/586 (aff'd by Review Tribunal, April 3, 1991) is of considerable assistance in interpreting the meaning of the phrase in question. The complaint in that case was brought against the Canada Employment and Immigration Commission for breaching s.5(b) of the CHRA by adversely differentiating against the Complainant by reason of a disability. The alleged adverse differentiation on the basis of disability was said to exist in rules for processing persons applying for landed immigration status under a special "RAN Program" which provided relief for Iranians in Canada who were seeking permanent admission to the country circa 1983.

One of the preliminary issues in the case was whether immigration officials involved in the processing of persons applying for landed status under the RAN policy were providing a service customarily available to the general public as required under s.5 of the CHRA.

The Tribunal examined a dictionary definition of the word "service" and the provisions of the Immigration Act. The

Tribunal found that Immigration Officials who process individuals seeking some status to remain in Canada do so pursuant to the regulations and established policies under the Immigration Act. In so doing they carry out an official duty as agents of the Crown and, by definition, provide a service to the public.

The fact that a specific and special group may be eligible, such as RAN Program applicants, or as in this case applicants with a family business job offer does not negate the applicant's status as a member of the general public.

This view was also expressed in the recent decision of Canada (Attorney General) v. Rosin, [1991] F.C. 391 where, at p. 398 Mr. Justice Linden states:

> In order for a service or facility to be publicly available, it is not required that all the members of the public have access to it. It is enough for a segment of the public to be able to avail themselves of the service or facility. Requiring that certain qualifications or conditions be met does not rob an activity of its public character. The cases have shown that "public" means "that which is not private", leaving outside the scope of the legislation very few activities indeed.

Some courts have gone further in stating all services offered by a government are services offered to the public. This position was taken in Re Saskatchewan Human Rights Commission and Government of Saskatchewan Department of Social Services (1989), 52 D.L.R. (4th) 253 (Sask C.A.) where Mr. Justice Vancise relied on an article by Professor Greschner, "Why Chambers is Wrong: A Purposive Interpretation of 'Offered to the Public'" [1986] Sask. L.Rev. 161:

> The interpretation of 'offered to the public' ... should be as follows: any service offered by a government is a service offered to the public. This interpretation furthers the policy of the Code of eliminating discrimination, for all government services would be covered. It is also consonant with the overall expansive scope of the Code ... A government by its nature has only public relationships with persons ...



Mr. Justice Vancise went on to state:

> It is difficult to contemplate any government or branch of government contending that a service offered was a private one, not available or open to the public. Indeed, it may well be said that everything government does is done for the public, is available to the public, and is open to the public. Moreover, to allow a government to evade the operation of the Code merely by setting up eligibility requirements and then arguing that the program is not open to the public is unacceptable: a program is still offered to the public, even though all members of the public cannot avail themselves of it.

(To the same effect, see Chiang v. Natural Sciences and Engineering Research Council of Canada, unreported, T.D. 3/92, March 18, 1992).

Under this interpretation, all services provided in the immigration process are offered to the public within the meaning of s.5 of the CHRA.

Finally, in Re Singh, [1989] 1 F.C. 430 (C.A.), Mr. Justice Hugessen intimated that services rendered by public servants in administering the Immigration Act might well be considered services customarily available to the public because it is arguable that by definition, services rendered by public servants at public expense are services to the public and within s.5. He then held at pp. 440-441:

> ... it is not by any means clear to me that the services rendered, both in Canada and abroad by the officers charged with the administration of the Immigration Act 1976, are not services customarily available to the general public.

(Also see Le Deuff v. CEIC (1987), 8 C.H.R.R. D/3690) aff'd on this issue by a Review Tribunal, (1988), 9 C.H.R.R. D/4479).

Therefore, we conclude that the visa officer was providing services customarily available to the general public within the meaning of s.5 of the CHRA.

## ADVERSE EFFECT DISCRIMINATION AND DUTY TO ACCOMMODATE

The second issue is whether the complainant has made out a prima facie case of discrimination, and if so, whether Mr. Roberge fulfilled his duty to accommodate the Menghanis.

The type of discrimination being alleged is adverse effect discrimination. McIntyre J. in Ontario Human Rights



Commission and O'Malley v. Simpsons Sears Ltd. [1985] 2 S.C.R. 536 described adverse effect discrimination in the employment context as follows:

"[Adverse effect discrimination] arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force....An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply." (at page 551)

In the instance of adverse effect discrimination, a duty to accommodate is imposed on the originator of the practice. Wilson J. in Alberta Human Rights Commission v. Central Alberta Dairy Pool [1990] 2 S.C.R. 489 in distinguishing direct discrimination from adverse effect discrimination said at pp. 514-515:

"This is distinguishable from a rule that is neutral on its face but has an adverse effect on certain members of the group to whom it applies. In such a case the group of people who are adversely affected by it is always smaller than the group to which the rule



applies. On the facts of many cases the "group" adversely

affected may comprise a minority of one, namely the complainant. In these situations the rule is upheld so that it will apply to everyone except persons on whom it has a discriminatory impact, provided the employer can accommodate them without undue hardship. In O'Malley McIntyre J. clarifies the basis for the different consequences that follow a finding of direct discrimination as opposed to a finding of adverse effect discrimination. He states at p. 555:

The duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer... Where there is adverse effect discrimination on account of creed the offending order of rule will not necessarily be struck down. It will survive in most cases because its discriminatory effect is limited to one person or to one group, and it is the effect upon them rather than upon the general work force which must be considered. In such case there is no question of justification raised because the rule, if rationally connected to the employment, needs no justification: what is required is some measure of accommodation. The employer must take reasonable steps towards that end which may or may not result in full accommodation."

And at page 517 Wilson J. stated "...where a rule has an adverse discriminatory effect, the appropriate response is to uphold the rule in its general application and consider whether the employer could have accommodated the employee adversely affected without undue hardship."

Although both O'Malley and Central Alberta Dairy Pool were cases of employment, these principles by analogy apply to the provision of services and the defence of bona fide justification.

The practice being impugned in this case was an insistence by Mr. Roberge on a particular kind of school leaving



certificate (i.e. one which is pre-dated and clearly identifies the name of the pupil's father) when he had before him other ample evidence to prove the fraternal relationship. He conceded in his evidence that the production of the two Indian passports which predated Nandlal's interest in immigration to Canada was sufficient to prove that fact and it is clear from the evidence that Mr. Roberge had one of these documents in his possession since at least October 1981 and could have simply made a request for the other. He didn't because passports were unacceptable to him for the purpose of proving familial relationship. Instead, Mr. Roberge demanded production of the requisite school leaving certificate and nothing else would do.

This practice of requiring only certain documentation, i.e. birth certificates or school leaving certificates from applicants of Indian origin constitutes in the submission of CHRC counsel, differentiation in the provision of services on the prohibited ground of national origin and has an adverse impact on



Nandlal and Jawahar in contravention of section 5 of the CHRA. Although they were capable of providing other kinds of evidence, they could not provide this one particular document because of the nature in which school leaving certificates are issued in India and because their school had not issued such certificates to them contemporaneously with their departure from the school.

The Department of External Affairs was concerned about fraudulent documents coming from countries such as India to establish familial relationship and that is the reason for a general policy preferring predated documents, i.e. documents created before any interest in immigration to Canada had arisen. The problem with insistence on such documentation is that

although the policy or practice is neutral on its face, it may have an adverse effect upon people whose country of origin may not have a proper record keeping system. If Mr. Roberge had insisted only upon birth certificates, for example, it would certainly adversely affect most Indian and Pakistani (Jawahar and Nandlal were in fact born in what is now Pakistan) nationals in that it was acknowledged that there is no reliable central Registry for births.

Accordingly, this Tribunal finds that the policy of requiring school leaving certificates was discriminatory in that it had an adverse effect on Nandlal's attempt to gain lawful status in Canada. The adverse effect of the practice discriminated on the prohibited ground of national origin.

Continuing with the scheme of analysis as set out by Wilson, J. in Central Alberta Dairy Pool, supra, in the face of this discrimination, we must examine Mr. Roberge's duty to accommodate the Menghanis short of undue hardship. Apparently, some accommodation was attempted by Mr. Roberge in that as an alternative to birth certificates, he would accept a certain kind of school leaving certificate. He insisted, however, that the school leaving certificate predate the application for



immigration and that it expressly state the name of the father.

Unfortunately, Mr. Roberge had a misconception about the issuance of school leaving certificates in India. He mistakenly thought that they were automatically issued every time a student left school when in fact, according to the evidence of Mr. Koilpillai they were only issued contemporaneously with a student transferring to another school. Otherwise, as in this case, no school leaving certificate is issued contemporaneously with the pupils' graduation or cessation of studies. The Menghanis' school leaving certificates came into existence only after the request was made which was at a time after Nandlal had applied to immigrate to Canada.

There was a clear failure to sufficiently accommodate Nandlal by refusing to authenticate and to give credit to the school leaving certificates that he did produce (which were subsequently shown to be authentic) and more importantly, by failing to give credence in a timely way to the passport of

Nandlal (and by failing to request its counterpart, Jawahar's passport) as well as to the other evidence (although some of it was admittedly subjective). In the opinion of the Tribunal, such steps would not have caused undue hardship to the Immigration authorities.

Although some Indian nationals obviously would be able to produce the school leaving certificates that Mr. Roberge had in mind, there were others such as Nandlal who could not, by reason of the existing state of affairs in India. The number of people who might be affected for adverse discrimination to take hold is of no consequence. The words of Wilson J. in Alberta Dairy Pool at page 514 bear repeating in this context:

"On the facts of many cases the "group" adversely affected may comprise a minority of one, namely the complainant."

Accordingly, there was a duty on the part of Mr. Roberge to in fact accommodate Nandlal by examining alternative documentation and proof that he submitted. This would not be totally foreign to the Department because as Mr. Davis testified, applicants are to be treated on a case by case basis. Although it is preferred that certain kinds of predated documentation be tendered, Mr. Davis made it clear there should be no impediment to reviewing other evidence in the absence of the preferred documentation which might cumulatively establish to the satisfaction of the visa officer that the requisite relationship exists. In fact, as Mr. Roberge conceded, after he did examine all of this other evidence after the fact in 1983, he did conclude in his own mind that the fraternal relationship had been established.



The Tribunal finds that Mr. Roberge failed in his duty to accommodate the Menghanis in the face of adverse effect discrimination. What remains is to make a determination on the appropriate remedy. Before doing so, there is the question of jurisdiction on which the Tribunal had reserved judgment.

## JURISDICTION OF THE CANADIAN HUMAN RIGHTS COMMISSION AND THE TRIBUNAL

Mr. Logan on behalf of the Respondents, brought a preliminary motion challenging the jurisdiction of the Tribunal on the basis that the only aggrieved person in this matter is Nandlal who was subjected to practices outside this country and accordingly, outside the jurisdiction of the Commission and this Tribunal under the CHRA. The focus of the argument came down to the interpretation of Section 40(5)(c) of the CHRA which reads as follows:

"(5) No complaint in relation to a discriminatory practice may be dealt with by the Commission under this Part unless the act or omission that constitutes the practice
(c) occurred outside Canada and the victim of the practice was at the time of the act or omission a Canadian citizen or an individual lawfully admitted to Canada for permanent residence."

Section 40(5) creates a nationality exception to the territorial principle of international law. i.e. statutes are not presumed to have extraterritorial application. In other words, Canadian statutes such as the CHRA may have extraterritorial application where Canadian nationals are involved. Section 40(5) therefore grants jurisdiction to the Canadian Human Rights Commission to investigate complaints in relation to a discriminatory act or omission that occurred outside Canada where "the victim" of the practice was at the time of the act or omission a Canadian citizen or an individual lawfully admitted to Canada for permanent residence. The Respondents go one step further, however, by reading into section 40(5) the word "directly". Counsel for the Respondents argues that it is only open to Canadian citizens or permanent residents "directly" discriminated against to bring a complaint of discrimination under the CHRA.

In applying this "direct discrimination" interpretation of Section 40(5) to the present case, the Respondents argue that the only direct victim of the alleged discrimination is the potential immigrant, Nandlal. Both parties agree that the alleged discriminatory act took place in the New York office of the Canadian Consulate, and therefore consisted of an act or omission that occurred outside Canada. The Respondents argue, however,

that because Nandlal is the only direct victim of the alleged discrimination and because Nandlal was, at the relevant time, neither a Canadian citizen nor an individual lawfully admitted to Canada for permanent residence, Section 40(5) operates to bar the jurisdiction of the Canadian Human Rights Commission, and therefore this Tribunal, to hear the case.

This conclusion must be upheld unless it is found that there could be more than one victim and that the other victim is a Canadian citizen or an individual lawfully admitted to Canada for permanent residence.

This case was one of 10 cases that were referred to the Federal Court of Appeal in 1987 for a determination of jurisdictional issues. The within Respondents argued, inter alia, that the "victims" of the alleged discriminatory practices were not Canadian citizens or permanent residents of Canada and, therefore, excluded from the protection of the CHRA by section 32(5)(b) (now 40(5)(c)). The Federal Court of Appeal in Re Singh, supra held that the Canadian Human Rights Commission had jurisdiction to investigate whether acts taking place outside the country might have been discriminatory and might have victimized a Canadian citizen or a landed immigrant.

It was, therefore, acknowledged by counsel that the Tribunal does have jurisdiction to consider this matter so long as Jawahar was in fact a "victim" of a discriminatory practice which occurred outside Canada. Jawahar was at the time a Canadian citizen and it is a question of fact as to whether he was a "victim" of a discriminatory practice. Accordingly, the motion was adjourned for argument until the completion of the evidence. Although Mr. Engelmann advanced an alternative argument that there was some evidence that some discriminatory practices had occurred from the offices of Canada Employment and Canada Immigration in Ottawa, his primary position was that the alleged discriminatory acts took place from the New York office of the Canadian Consulate and, therefore, did consist of acts or omissions that occurred outside Canada.



MEANING OF VICTIM

The Shorter Oxford English Dictionary (1973) defines "victim" as: "In a weaker sense: one who suffers some injury, hardship, or loss, is badly treated or taken advantage of, or the like."

One should also have regard generally to the way in which courts have indicated how provisions of the CHRA should be interpreted. A multitude of cases at the highest levels have indicated that a fair, large, liberal and purposive interpretation should be applied given the "almost constitutional nature" of the CHRA. (See, for example, Robichaud v. Canada (Treasury Board) [1987] 2 S.C.R. 84). Significant to a jurisdiction question is the caution of Chief Justice Dickson with respect to the interpretation of rights under the CHRA: "We should not search for ways and means to minimize those rights and to enfeeble their proper impact:" (Action Travail des Femmes v. C.N.R. (1987) 40 D.L.R. (4th) 193 at 206).

The Tribunal also has the benefit of the opinion of Mr. Justice Hugessen on the meaning of "victim" in Section 40(5)(c) of the CHRA as expressed in Re Singh, supra. At p. 442 he examined the meaning of the word "victim" and refused to limit its scope to only those persons who are the direct targets of the discriminatory practice:

"In my view, a person who, on prohibited grounds, is denied the opportunity to sponsor an application for landing is a "victim" within the meaning of the Act whether or not others may also be such victims.

I would, however, go a great deal further. The question as to who is the "victim" of an alleged discriminatory practice is almost



wholly one of fact. Human rights legislation does not look so much to the intent of discriminatory practices as to their effect. That effect is by no means limited to the "target" of the discrimination and it is entirely conceivable that a discriminatory practice may have consequences which are sufficiently

direct and immediate to justify qualifying as a victim thereof persons who were never within the contemplation or intent of its author".

This decision makes it clear that there may be more than one victim of a discriminatory practice. The analysis is also in keeping with decisions in other human rights cases acknowledging that there may well be other persons who have been adversely affected or suffered consequences as a result of discriminatory acts directed against third parties and are entitled to seek relief under human rights legislation: see, for example, Tabar v. West End Construction (1984) 6 C.H.R.R. D/2471 (Ontario Board of Inquiry); New Brunswick School District (No. 15) v. New Brunswick (1989) 10 C.H.R.R. D/6426 (N.B.C.A.). "Victim", therefore, simply means someone who has suffered the consequences of adverse differentiation whether direct or indirect. On this meaning, Jawahar may be the direct victim because of his status under the Immigration Act, or a victim indirectly because he suffered the consequences of an adverse discriminatory practice against his brother.

The passage from Singh case quoted above also suggests, however, that the alleged discrimination must have consequences which are sufficiently direct and immediate to justify qualifying as victims thereof persons who were never within the contemplation or intent of its author. This passage seems to put some boundaries on the limits of who can claim under human rights legislation that a discriminatory practice had an adverse effect



upon them. This is crucial given the uncertainty of the Complainant's technical status as a "sponsor" within the meaning of the Immigration Act.

In the Singh case the Court dealt with two streams of cases, those dealing with "sponsorship" and those involving visitors' visas. The case before us was classified as a sponsorship case given the allegations set out by the Complainant in his complaint form. Mr. Justice Hugessen held that a "sponsor" under the Immigration Act is a victim within the meaning of the CHRA. This conclusion is based on the recognition

of a sponsor's interest in s.79 of the Immigration Act, and on the objective of the Act as stated in s.3(c):

"3(c) To facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relative from abroad."

Mr. Justice Hugessen went further and allowed that relatives of an applicant denied a visitor's visa could also be victims under the CHRA.

In the case of Jawahar, however, there is no actual sponsorship status. He signed a Confirmation of Job Offer for Nandlal and this form of support is not defined as sponsorship in the Immigration Act. In the opinion of the Tribunal, the Singh case should not be read to limit potential victims to only those who formally qualify as sponsors within the meaning of the Immigration Act. It would include anyone in Canada who suffers consequences which are sufficiently direct and immediate. As to whether the consequences are sufficiently direct and immediate, a Tribunal should take into account factors such as:

1. Degree of consanguinity of the Canadian relative to the prospective immigrant;



2. The dependency (financial, emotional) of the Canadian relative on the prospective immigrant;

3. Deprivation of significant commercial or cultural opportunities to the Canadian relative by the absence of the prospective immigrant;

4. The historical closeness of the relationship between the two persons;

5. The degree of involvement of the Canadian relative in supporting the application for immigration under the Immigration Act and Regulations.

The Complainant is the natural brother of Nandlal and would thereby qualify as a "close relative" by blood. The brothers also spent considerable time together in Canada prior to the application. Jawahar had supported Nandlal's application for

student visitor status in the 1970's by providing an undertaking for responsibility for his educational costs including tuition, maintenance and transportation. The Complainant shared his house with his brother and provided employment to him. In this sense, the brothers were close relatives in an emotional and economic sense as well. The Complainant attributes the failure of his shoe business largely to the fact that he was unable to have his brother work in and supervise the business.

Jawahar was integrally involved in Nandlal's application for permanent residence status. He provided the Confirmation of Offer of Employment which was treated as a family business job offer. The essence of this offer and the reason it is given priority in the immigration process is that it serves as a means of assisting the Canadian relative by permitting him or her to have in Canada a close relative that he or she can trust and can work closely with in the family business. It is based on the notion that a family member would be more committed to the



success of the business than would an outsider. In this way, Jawahar's interests were inextricably tied to Nandlal's application. In addition, Jawahar supported Nandlal's application by attending at the Canadian Immigration Centre in Ottawa to make representations on behalf of Nandlal and writing to the Minister of Employment and Immigration. He provided the Canadian Consulate in New York with further documents and attempted to convince the officer of the disasterous consequences that would befall him and his business if Nandlal's application were rejected. In this sense, Jawahar suffered the consequences of the discriminatory practice against his brother.

Moreover, the Complainant's interest in assisting his brother's application for permanent status in Canada is recognized by the Assisted Relative category under Immigration Regulations, s.8(1)(d), where special selection criteria are set out. S.10(1)(i) makes a further distinction between criteria for assisted relatives in the close relative category of paragraph (a) in the definition section 2(1), e.g. brother, sister, grandparents etc. and that of the more distant relatives in subsection (b) of the definition, aunts, uncles etc. These provisions suggest that there is a recognized status to the Complainant as the applicant's natural brother assisting the

immigration application in the hopes of being reunited with him thereby fulfilling the purpose of the Immigration Act.

The purpose of the CHRA and of s.5 is to prevent adverse differentiation on a prohibited ground by entities providing service to the public. The purpose of government is to serve the public. In fulfilling duties as agents of the government under the Immigration Act, an Immigration Officer is providing services, not just to the applicant, but in the context of assistance and sponsorship, to the family, relatives and sponsor of the applicant. The officer provided services pursuant to established policies under the Immigration Act and Regulations which accord an interest and a role to the "assisting



relative". Such a role may include the requirement to provide a written undertaking to the Minister, to make provision for lodging, care and maintenance for the assisted relative or in the provision of a family business job offer.

The expressed purpose of the Immigration Act of reuniting close relatives does not aim to benefit only the immigration applicant. It is as much a benefit to the assisting or sponsoring relative to be re-united with family from their home country in their new country, Canada. Any act or omission which impedes the ability of an assisting relative to take a role in the application process infringes on the rights and benefits accorded to the assisting relative under the Immigration Act. If the act or omission is found to be discriminating, the assisting relative in Canada would be as much the victim as the applicant. On this interpretation, Jawahar was personally discriminated against by the Immigration requirement and can be classified as a direct victim.

Accordingly the Tribunal finds that Nandlal had imposed upon him restrictive conditions (documentation requirements) that had a disproportionate impact on him because of the special characteristic of national origin (unavailability of documentation) contrary to section 5 of the CHRA. We would conclude that Jawahar was a victim of this discriminatory practice as well and consequently, that this Tribunal has the jurisdiction to make a determination on the Complaint under the CHRA.

REMEDY

Given the assessment of the documentation that was made by Mr. Roberge in 1983 and his conclusion that in fact Nandlal and Jawahar were brothers, there is no doubt that had he made that assessment in 1982 when Nandlal's application was current, Nandlal would have been admitted into this country as a permanent



resident. The failure to do so arose from the adverse effect discrimination as described earlier in these Reasons.

Accordingly, counsel for the Canadian Human Rights Commission has sought by way of remedy an Order that Nandlal be admitted to this country as he would have been had this discrimination not have occurred in 1982. In other words, he is seeking that we make an Order directing the Immigration authorities to confer upon Nandlal permanent residency status on an immediate basis.

At the material time in 1982, Nandlal's immigration was also subject to passing an appropriate medical test. He was not given one since he did not accumulate sufficient points to pass the first hurdle primarily because Mr. Roberge was not satisfied that Nandlal and Jawahar were brothers. Nandlal does now suffer from a medical condition known as Crohn's disease. It was diagnosed in May 1983 well after his rejection for permanent residency in May of 1982. It is possible, however, that Nandlal may have been suffering from the disease in 1982 which might have been diagnosed at that time had he been administered the appropriate medical test. Of importance now is the fact that Nandlal's present status in this country is based on a Minister's permit which is renewed each year for a period of five years. As it presently stands, he will be admitted to Canada as a permanent resident in 1996 unless for some unforeseen reason, his medical condition deteriorates to such an extreme that he would be considered inadmissible. Thus, the fact that he has Crohn's disease of and by itself is not sufficient to prohibit his becoming a permanent resident. Therefore, there is no immigration impediment to preclude an Order by this Tribunal directing the requisite authorities to permit permanent residency for Nandlal. In effect this Order will be expediting the present immigration process. It is justified in the circumstances and we, therefore, make the Order.

No compensation has been sought by Jawahar for any financial loss attributable to the discriminatory practice. As



for compensation under Section 53(3)(b) of the CHRA, we award $2,500.00 for hurt feelings as there has been evidence that the discriminatory practice has resulted in detriment to Jawahar's health, family and business interests.

The Complainant has also requested an apology from the Minister. In view of the fact that the passage of ten years has not abated the strong feelings that the Complainant and his brother have over this matter, we feel that an apology is appropriate and it will be part of the remedial Order herein.

Dated this day of 1992.

Sidney N. Lederman, Chairman

Lee Ongman

Jill M. Sangster