T.D. 2/93
Decision Rendered on January 8, 1993

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

HUMAN RIGHTS TRIBUNAL

IN THE MATTER OF the complaint filed under Section 5
of the Canadian Human Rights Act

BETWEEN:

HAMEED AND MASSARAT NAQVI

Complainants

and

CANADA EMPLOYMENT AND IMMIGRATION COMMISSION
AND DEPARTMENT OF EXTERNAL AFFAIRS

Respondents

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

DECISION

TRIBUNAL:

RONALD W. McINNES Chairperson
KEN H. NG Member
PATRICIA M.Y. WEBER Member

APPEARANCES:

ANNE L. MACTAVISH For the Canadian Human
SHARI FRENETTE Rights Commission

JACQUELINE OTT For the Respondents
CHERYL MITCHELL

DATES & PLACE June 22,23,24,25,26, 1992
OF HEARING: Toronto, Ontario

INDEX

THE COMPLAINANTS

The Complainants in this case are Hameed and Massarat Naqvi, Canadian citizens residing in Pickering, Ontario. The alleged discriminatory practice relates to the refusal by the Canadian Consulate General in Chicago to grant a visitor's visa to Miss Naz Sultan (now Mrs. Jaffery) in August, 1982.

Massarat Naqvi was born in India in 1948 but moved with her family to Karachi, Pakistan in 1949 after the partition of India and Pakistan. She married Hameed Naqvi in 1970. She came to Canada in 1971 and became a Canadian citizen in 1972.

Mrs. Naqvi testified that she is an older sister of Naz Jaffery (Sultan) and that their parents still live in Karachi. Their father is now retired but had been the Superintendent of Police in Pakistan responsible for West Pakistan. This was regarded as an important position in Pakistan and the family is very well off financially. The family belongs to the Shia sect of Islam.

Hameed Naqvi was born in India in 1944 and moved to Karachi, Pakistan in 1951. He came to Canada in 1964 and became a Canadian citizen in 1972.

While not a complainant in these proceedings, Naz Jaffery (Sultan) is a central figure. She was born in Karachi, Pakistan in 1955 and, prior to the events of concern here, had lived her entire life in Karachi. She obtained a Bachelor of Arts degree in 1980 from P.E.C.H.S. College in Karachi and subsequently became employed as an assistant teacher with the Montessori Children's Centre in Karachi.

She lived with her parents and her younger sister together with her brother, his wife and their daughter. In 1982, she was unmarried. In addition to another sister in Pakistan and Massarat Naqvi in Canada, she had sisters in London, England and Chicago. In 1982, she obtained a leave of absence from her employment in order to travel for one year visiting her sisters abroad.

THE COMPLAINTS

In the course of this matter, three complaints were filed with the Canadian Human Rights Commission ("CHRC"). In all cases, the Complainants were Hameed Naqvi and Masarrat Naqvi.

The first complaint was filed against the Canadian Employment and Immigration Commission ("CEIC") on March 12, 1983. It alleged that the Respondent had engaged in a discriminatory practice because of race, colour and national or ethnic origin. The complaint was based on the fact that the Complainants were denied the right to have their sister-in-law/sister, Naz Sultan, visit them in Canada. They stated that it

was their belief that they were denied this right because of their race/colour (Indo/Pakistani) and national or ethnic origin (Pakistani).

An amended complaint, naming the same Respondent, was dated April

29, 1984 and specified marital status in addition to the previous grounds for discrimination. The particulars as stated in this complaint were:

"After inviting our sister-in-law/sister, Naz Sultan, to visit us in Canada, we were informed on September 7, 1982 by Tom Clasper, Immigration Officer, CEIC, Chicago, Illinois, U.S.A. that she was denied a visitor's visa because, among other things, 'she has no husband to go back to'. We believe that we have been denied the opportunity to have our sister-in-law/sister visit because of our race, colour, national or ethnic origin, and her marital status (we are Pakistani, she is single) contrary to section 5(a) and (b) of the Canadian Human Rights Act."

The third Complaint Form was dated August 22, 1988 and names the Department of External Affairs ("DEA") as an additional Respondent. The grounds of complaint and the particulars are virtually identical to the complaint dated April 29, 1984.

EFFECT OF DELAY RE DEPARTMENT OF EXTERNAL AFFAIRS

The fact that DEA was not named as a respondent in this case until 1988 was the basis of a preliminary objection by counsel for the Respondents. It was characterized as an objection to jurisdiction but the basis of the argument was prejudice to DEA resulting from the fact that a complaint was made in 1988 about events occurring in 1982. In 1982 and during the period immediately thereafter, there were apparently no guidelines with respect to the destruction of files. The practice in Chicago was to retain files for only one year. At some time between 1982 and 1988, the file in Chicago with respect to the application by Miss Sultan was destroyed. There is no doubt there was considerable difficulty for both of the

Respondents in responding to the Complaint because of the unavailability of various documents which would presumably have been in this file.

It is the position of CHRC that DEA was sufficiently aware of the development of a contentious situation in early 1983, if not earlier, and that it should have retained the file. There was uncontradicted evidence that the persons employed in the Consulate General in Chicago who made the decisions in this matter were employees of DEA exercising powers delegated by CEIC.

Thomas Clasper was Vice-Consul in Chicago at the relevant time and was the Canada-based employee of DEA most closely connected with the events. He recalls being advised in a telephone discussion with Hameed Naqvi in late September, 1982 that a complaint was being made to CHRC. Mr. Clasper testified that he had already been told of this by somebody at CEIC Case Review and had been advised that CHRC did not have jurisdiction. He was also aware during this time period that Mr. Naqvi was making representations with respect to the refusal to issue a visitor's visa to his sister-in-law to various levels of the Canadian government including the Minister of Employment and Immigration and the Prime Minister. It is clear from documents produced by the Respondents that CEIC was making inquiries of the Consulate and, in particular, of Mr. Clasper at this time as to the reasons for the refusal of the visa in order to respond to Mr. Naqvi. Evidence was given that it would be normal practice for CEIC to keep the Chicago Consulate and, therefore, Mr. Clasper aware of developments of this nature.

In November, 1982 an article appeared in the Toronto Star concerning the refusal to issue a visitor's visa to Miss Sultan. Mr. Clasper was interviewed by the reporter and testified that this was the only time in his career that he can recall being interviewed with respect to the refusal of a visa.

It would certainly appear that this matter was sufficiently brought to his attention for him to realize that it was contentious enough to justify retention of the file beyond the normal destruction time period. However, when Mr. Clasper left the Chicago Consulate in September, 1983 he did not recommend that the file should be retained. A document filed on behalf of DEA entitled Detailed Status Report notes that a Complaint had been filed with CHRC on March 12, 1983 and that CEIC had been notified on May 13, 1983.

It is the view of this Tribunal that any prejudice suffered by DEA by reason that it was not named a Respondent until 1988 is entirely as a result of its own action (or inaction) at a time when it was or ought to have been aware of facts sufficient to put it on notice to retain relevant documentation. The prejudice cannot be attributed to the delay by CHRC.

Of some additional significance, is the evidence that legal counsel at the CEIC was of the opinion that CHRC had no jurisdiction in the matter. The Detailed Status Report referred to above makes reference to correspondence from CEIC to CHRC dated April 29, 1983 and again on December 15, 1983 to the effect that the Canadian Human Rights Act ("CHRA") did not apply to the case and that CHRC had no

authority to investigate the complaint. This issue was not resolved until the decision of the Federal Court of Appeal in 1988 in Re Singh [1989] 1 F.C. 430. Whether or not the legal position being taken by CEIC that CHRC had no jurisdiction with respect to the complaint regarding the refusal to issue a visitor's visa to Miss Sultan played any part in the decision not to preserve the file is only speculation.

VISITOR'S VISAS

Entry into Canada, whether temporary or permanent, is governed by the Immigration Act. In 1982, the relevant legislation was the Immigration Act, 1976, c. 52. Section 5 of that Act provides that only a Canadian citizen and a permanent resident have a right to come into Canada. A visitor may be granted entry and allowed to remain in Canada for a specified period if he or she meets the requirements of the Act and the regulations.

A "visitor" is defined in the Act as a person who is lawfully in Canada or seeks to come into Canada for a temporary purpose.

Except in those cases where the regulations exempt nationals of certain countries, every visitor is required to make application and obtain a visa before entering Canada. Every person making such an application is assessed by a visa officer to determine if they are eligible for entry. Where the visa officer is satisfied that it would not be contrary to the Act or regulations to grant entry, he may issue a visa to that person.

Section 8 of the Act specifies that where a person seeks to come into Canada, the burden of proving that his or her admission would not be contrary to the Act or regulations rests on him or her and every such person is presumed to be an immigrant (i.e. someone who seeks to come into Canada to establish permanent residence) until he or she satisfies the immigration officer examining him or her that he or she is not an immigrant.

Visa requirements were imposed on Pakistan on June 22, 1977. Prior to 1972, it had fallen under a blanket exemption for countries which were members of the Commonwealth. When Pakistan left the Commonwealth in 1972, its visa status was not altered. However, in the mid-1970's there was a growing concern about the stability of the government in Pakistan and the potential for a flood of refugee claimants. In the mid-1970's, there was also a high level of removals from Canada per thousand visitors from Pakistan.

Immigration matters are primarily the responsibility of CEIC. However, duties with respect to immigration and visitor's visas outside Canada are delegated to employees of the DEA serving in Embassies, Consulates and High Commissions in foreign countries.

The visa process was described as a screening mechanism designed to prevent entry into Canada by persons whose intention is not to stay for a temporary period or, at least, not the period specified in the visa. Evidence before the Tribunal was that such persons might claim refugee status once in Canada or simply remain in

the country illegally. There was also some discussion of what are commonly described as "marriages of convenience".

There is no issue that Canada is a sovereign country which has a right to determine which foreign nationals will be permitted to enter either for immigration or visitor purposes. There is also no issue that the visa procedure is a legitimate screening mechanism and that decisions as to the nationals of which countries will require visas is a decision made at the highest political level. However, Canadian immigration policy, as set out in Part I of the Immigration Act, 1976, (the legislation in effect at that time) recognized, in section 3, that

the rules and regulations made under the Act were to be designed and administered recognizing the need

"(f) to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate on grounds of race, national or ethnic origin, colour, religion or sex".

The corresponding provision in the present Immigration Act is:

"(f) to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate in a manner inconsistent with the Canadian Charter of Rights and Freedoms".

While the legislation and regulations may be determined at the highest political level, it is recognized within the legislation that they must be administered in a non-discriminatory manner.

VISA APPROVAL PROCESS

During the hearing, the Tribunal was provided with testimony from witnesses for the Respondents as to the importance of interviews in the visa process.

Donald May is Chief of Immigrant & Visitor Programs for CEIC. He made reference to the Immigration Manual, including section 13-25 dealing with the processing of visitor visa applications, which provides:

"Personal Interviews. Visitors will normally be interviewed unless, in the opinion of the Visa Officer, an interview is deemed to be unnecessary. Depending upon local conditions, persons applying outside their country of citizenship or permanent residence should be interviewed and the Visa Officer should normally check with the post in the applicant's country of residence to determine if there is an adverse record on the individual."

John Baker is Program Manager in charge of both Immigration and Consular Sections at the Canadian Consulate General in New York City. He stated that the Consulate dealt with about 50,000 applicants a year and had probably the most diverse immigration program in the world both with respect to visitors and immigrants. Despite the volume of applicants in this office, Mr. Baker spoke of the importance of the interview process. Unless the application was relatively straightforward and the interview was waived, applicants were interviewed by one of four visa officers. He estimated that an average of eight to ten minutes was spent on interviews and determination for each visitor visa. He also stated that there would be a personal interview before a visa application would be refused and that refusals would be conveyed to the applicant in person by the interviewing officer.

Brian Davis is the Director of Immigration Co-Ordination at DEA. He testified extensively about the importance of the interview. He said:

"In other cases where there appear to be problems with it or we have questions about it, then the person will be called to an interview. At the interview, the determination is made.

Q. How significant, then, or how important is the role that you have just described to us that Visa Officers play?

A. It is central. It is crucial to the whole process. I would say that the interview, in fact, is crucial to the whole process.

At the interview, the individual has a certain amount of time to basically satisfy the officer that he or she is a genuine visitor, and the officer brings to bear at that interview all of the knowledge that he or she has acquired, whether through training or through local information gathering, to ask the questions which would hopefully satisfy the officer that the person is a genuine visitor."

Brian Davis is Director of Immigration Co-Ordination at DEA. He described visa officers as having a facilitative role as well as a control function. He described the intensive training program which visa officers undergo including "a fairly intensive training on interviewing techniques and role playing, this kind of thing, so that an officer begins to understand the dynamics that take place in an

interview, as that is often the key part in any visa determination process." He also stated:

"So the officer will look at objective information. The objective information is already on the form usually. We will look at age. We will look at marital status. We look at the size of family. We will look at employment history. We will look at income. We will look at whether or not they have had health problems in the past; criminality; whether they have been refused a visa before; whether they have travelled extensively or not.

One looks at all of these factors and then, in addition, brings to bear one's knowledge of the local environment. For example, what are, as we refer to it, the push and pull factors? What is it about Canada that is so attractive to this person that might make them want to stay there and what is it in their own local environment and circumstance which would, in a sense, be pushing them towards remaining in Canada once they get to Canada?"

JURISDICTION OF THE CANADIAN HUMAN RIGHTS COMMISSION AND THE TRIBUNAL

Counsel for the Respondents gave notice at the outset of the hearing that there would be a challenge to the jurisdiction of the Tribunal. Notice of the objections was given in the opening statement but full argument was reserved until after the evidence had been heard. Apart from the complaint of prejudice with respect to the delay in adding DEA as a respondent, counsel stated that the following two arguments would be put forward on the issue of jurisdiction:

(a) The Tribunal has no jurisdiction to override a decision of a visa officer made outside Canada pursuant to the provisions of the Immigration Act in determining whether a foreign national is to be admitted to Canada;and

(b) Section 40(5) (c) of the CHRA cannot be used as a basis for jurisdiction in that it does not give the Tribunal authority over determinations as to the admissibility to Canada of foreign nationals.

We feel it necessary to set out this argument at some length in order to later appreciate the nature of the evidence adduced by the Respondents.

Counsel for the Respondents began her argument with the Constitution Act of 1982 and the Charter of Rights and Freedoms which provides in s. 6(1) that:

12

"Every citizen of Canada has the right to enter, remain in and leave Canada". In her submission, admission to Canada beyond this constitutional guarantee is to be determined in accordance with the Immigration Act and the regulations thereunder. She described the Immigration Act as a code (presumably an exhaustive code) whereby Parliament has specifically provided for rights of entry to Canadian citizens and permanent residents and specified clearly that no other person has such a right. Any other person seeking to come into Canada has the burden of proving that his or her admission would not be contrary to the Immigration Act or the regulations. The mechanism by which Canada regulates its sovereignty in this regard is through the mechanism of a visa. Citizens of all other countries must obtain a visa in order to enter Canada unless Parliament determines that an exemption from such requirement should apply. Decisions with respect to the imposition of visa requirements are made at the highest political level and are then implemented by individual visa officers.

In issuing a visa, the visa officer is required to assess and determine the bona fides of a visitor applicant. The visa officer is the gatekeeper and the authority for the determinations which he makes is found is s. 9 of the Immigration Act. Particular reference was made to subsections. 9(2) and 9(4) which provide:

"9.(2) Every person who makes an application for a visa shall be assessed by a visa officer for the purpose of determining whether the person appears to be a person who may be granted landing or entry, as the case may be.

9.(4) Where a visa officer is satisfied-that it would not be contrary to this Act or the regulations to grant landing or entry, as the case may be, to a person who has made an application pursuant to subsection (1), the visa officer may issue a visa to that person, for the purpose of identifying the holder thereof as

13

an immigrant or a visitor, as the case may be, who, in the opinion of the visa officer, meets the requirements of this Act and the regulations."

It was emphasized that the determination of the visa officer was a discretionary one.

Reference was also made to s. 9(3) of the Immigration Act which provides:

"Every person shall answer truthfully all questions put to that person by a visa officer and shall produce such documentation as may be required by the visa officer for the purpose of establishing that his admission would not be contrary to this Act or the regulations."

It was argued that this was to be interpreted as meaning that there was no obligation on the visa officer, in making the determination, to make any investigation of anything other than what the visitor applicant put before him.

It was emphasized that the determination of the visa officer was, in a sense, preliminary in nature in that further sections of the Immigration Act provide that actual entry into Canada is to be ultimately determined by an immigration officer at the port of entry and his decision could not be pre-determined by the visa officer. As we understand this portion of the argument, it is relevant to the remedies which this Tribunal might be able to order if it determined that the decision of a visa officer was made on a discriminatory basis.

In the case of a visitor visa applicant, the function of the vis a officer is to make an assessment of whether the applicant intends to remain in Canada for a temporary period. The bona fides of the visitor applicant is assessed, in part, by standard required documentation and, in part, by assessing the applicant's

substantial ties to his or her home country and motivation for seeking to come to Canada.

Counsel for the Respondents submitted that the CHRA should be interpreted so as to apply solely to individuals in Canada. She submitted that, in order for a Tribunal to assert a jurisdiction over the matters and decisions which relate to the admissibility of aliens

with no right of entry into Canada, the Tribunal would have to find affirmatively in respect of the following propositions:

a) despite the clear intent of Parliament in enacting the Immigration Act, the decision made outside of Canada by a visa officer constitutes a to service";

b) the definition of "public" in s. 5 of the CHRA is to be interpreted as encompassing not only the Canadian public but the public of every country in the world;

c) "victim" in s. 40(5)(c) of the CHRA is to be interpreted as encompassing individuals outside of Canada with no right of entry to Canada and individuals unlawfully present in Canada.

In her submission, such findings would mean that Canadian Human Rights Tribunals would have power to overrule determinations by visa officers and would be asserting a jurisdiction over the inflow of persons with no lawful right of entry to Canada greater than that accorded to the Federal Court of Canada.

In attempting to establish the supremacy of the Immigration Act over the CHRA, counsel for the Respondents relied on certain statements made by the Supreme Court of Canada in Chiarelli v Minister of Employment and Immigration (1992), 135 N.R. 161. This case concerned a Charter challenge to certain sections of

the Immigration Act. Counsel did not rely on the facts of the case but only certain comments in the judgment including that of Sopinka J. at p. 183:

'Thus Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which noncitizens will be permitted to enter and remain in Canada. It has done so in the Immigration Act. Section 5 of the Act provides that no person other than a citizen, permanent resident, Convention refugee or Indian registered under the Indian Act has a right to come to or remain in Canada. The qualified nature of the rights of non-citizens to enter and remain in Canada is made clear by s. 4 of the Act."

The point of referring the Tribunal to this commentary, according to counsel for the Respondents, was to highlight the nature of the Immigration Act and its importance to Canada.

Counsel also referred the Tribunal to the case of Orantes v Minister of Employment and Immigration et al (1990), 34 F.T.R. 184 (F.C.T.D.). In this case, Mr. Orantes was denied permanent residence status in Canada because he was unable to support himself pursuant to the provisions of s. 19(l)(b) of the Immigration Act. This provision was challenged as being discriminatory. In the case, Mr. Justice Muldoon of the Federal Court of Canada stated that not even the Governor-in-Council could supercede or override decisions made pursuant to the Immigration Act.

Reference was also made to the case of Benner v Canada (Secretary of State for External Affairs) (unreported, Federal Court Trial Discussion, July 9, 1991). Mr. Benner was ineligible for citizenship under the lmmnigration Act because of criminal activity in which he had been involved. The case was cited for the proposition that

Parliament has the right to make decisions that govern admissibility to Canada of foreign nationals. Entry to Canada is a fundamental policy decision entrusted exclusively to Parliament to be determined in accordance with implications which are international and national in scope.

The point, according to counsel, was not to say that this Tribunal or the CHRC has no authority in immigration matters but rather that the regulation of entry into Canada must be exclusively entrusted to the political branches and the mechanisms which have been set up in the Immigration Act. Decisions respecting the sovereignty of Canada in the hands of visa officers and other officials given specific authority under the Immigration Act must be respected.

Counsel acknowledged that the remedy of entry into Canada was not being sought in this case as Mrs. Jaffery (Sultan) was now a permanent resident of the United States and entitled to enter Canada without a visa but submitted that the logical extension of granting relief in this case would be for Human Rights Tribunals to assume the authority to second guess the determinations of visa officers and permit foreign nationals to enter Canada without the safeguards that the visa process affords.

With all respect to this very extensive and detailed argument, neither counsel for the CHRC nor this Tribunal take any issue with either the purpose or importance of the Immigration Act or the provision for the visa mechanism to screen visitors to Canada. The only issue in this case is whether a discriminatory practice was involved in the administration of the Immigration Act procedure in

the circumstances of the refusal to issue a visitor's visa to Miss Sultan in Chicago in August, 1982.

The issue of whether the CHRA applies to practices of government officials in making determinations involving the exercise of discretion pursuant to statutory provisions has been fully canvassed in Bailey et al v Minister of National Revenue (1980), 1 C.H.R.R. D/193; Druken v Canada (Employment and Immigration Commission) (1987), 8 C.H.R.R. D 4379; LeDeuff v Canada (Employment and Immigration Commission) (1988), 9 C.H.R.R. D 4479; and Anvari v Canada (Employment and Immigration Commission) (1989), 10 C.H.R.R. D/5816 (upheld in an unreported decision TD2/91, April 23, 1991 by Canadian Human Rights Review Tribunal).

In Druken, the Tribunal considered the case of Insurance Corporation of British Columbia v Heerspink, [1982] 2 S.C.R. 145 where Mr. justice Lamer, delivering reasons for himself and for Mr. Justice Estey and Mr. Justice McIntyre, stated at p. 157:

"When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that jurisdiction then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavors to buttress and protect are, save their constitution laws, more important than all other. Therefore short of that legislature speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code supersede all other laws when conflict arises. As a result, the legal proposition generalis specialibus non derogant cannot be applied to such a code. Indeed the Human Rights Code, when in conflict with "particular and specific legislation" is not to be treated as another

ordinary law of general application. It should be recognized for what it is, a fundamental law."

The application of the CHRA is dealt with in Part IV of the Act. Section 66(1) states:

'This Act is binding on Her Majesty in Right of Canada.....

There are provisions in the CHRA which specifically exclude its application with respect to certain federal legislation. For example, s. 67 states:

"Nothing in this Act affects any provision of the Indian Act or any provisions made under or pursuant to that Act."

Similarly, subsection (15)(d) exempts the terms and conditions of certain pension funds or plans providing for compulsory vesting or locking-in at a fixed or determinable age pursuant to the Pension Benefits Standards Act, 1985. These excepting provisions suggest that the CHRA otherwise applies to federal statutory provisions and administrative actions taken pursuant to them. There is no reference to an exception for the Immigration Act.

In our opinion, given the purpose of the CHRA as expressed in s. 2 and the judicial pronouncements with respect to the special status of human rights legislation, it is clear that the Act applies to the actions of officials under' the Immigration Act. We do not find it necessary to deal with the submission that this Tribunal would, in effect, be either legislating a change in the Immigration Act or providing an appeal mechanism outside of that Act for visitor visa applicants.

The further argument that the jurisdiction of the Tribunal cannot be found in s.40(5)(c) of the CHRA appears bound up with the submissions as to the special status of the Immigration Act and this Tribunal is not at all clear as to the position being taken by the Respondents as to whether the Tribunal would otherwise have jurisdiction under that subsection. However, we will later consider the issues raised in the interpretation of the terms "service" and "general public" and the scope of "victim".

One further issue raised implicitly by counsel for the Respondents is whether this Tribunal must determine that it has authority within

the remedies provided for in s. 53 of the CHRA to overrule the decision of a visa officer and order that a visitor's visa be issued before jurisdiction can be assumed with respect to the complaint. That remedy is not being sought in this case and we do not feel that it is necessary or appropriate for us to rule on that submission. It is, however, our view that an appropriate remedy can be provided under the CHRA to a complainant (who would not be the person denied the visitor's visa) without necessarily ordering that a visitor's visa be granted.

PREPARATION FOR VISIT

Miss Sultan applied for her passport in October, 1981. The application was filled out by her brother and, although she was working as a teaching assistant, her profession was filled in as "household". It appears from the evidence that this was done with the acquiescence (if not on the instructions) of Miss Sultan in that she thought at that time she would have to quit her job to take her proposed trip and

did not feel that she would be able to obtain a leave of absence. However, a leave of absence was subsequently obtained in March, 1982. The passport was issued on November 25, 1981.

Mr. and Mrs. Naqvi were in Karachi, Pakistan in December, 1981. At this time, they discussed the proposed trip with Miss Sultan and invited her to visit them and their family in Canada. Mr. Naqvi assisted her in obtaining an American visa by getting a letter of introduction and recommendation to the American Consul General from a friend who, at that time, was Consul General of Turkey in Karachi. Mr. Naqvi attended at the American Consulate with Miss Sultan to obtain her visa to the United States. This visa was issued January 11, 1982.

There is some discrepancy in the evidence as to what happened next.

Mr. Naqvi testified that, while in Karachi at this time, he telephoned the Canadian High Commission which was in Islamabad and told them that he had a sister-in-law travelling to Chicago who wanted to visit Canada and asked if it was possible to get a visitor's visa from Chicago. He testified that he was advised that it would be possible to make such an application but admitted that he was given no commitment that it would be granted. He stated that he did not give Miss Sultan's name during this discussion because he was not asked for it.

In her testimony, Mrs. Jaffery (Sultan) stated that she had called Islamabad to get information as to whether she could obtain a visitor's visa to Canada from Chicago and was advised that she could make such an application. She stated that she did not leave her name when making this call.

21

We do not attach any great importance to these apparently contradictory versions. The matter is not of great significance.

The explanation given for not wanting to make the application in Islamabad was that the city is approximately one thousand miles from Karachi and the airfare is very expensive. If there was a delay for documentation requirements or because of the number of applicants, it would also be expensive to stay over in a hotel.

After returning to Toronto, Mr. Naqvi called the Immigration Department to confirm that it was possible to make an application for a visitor's visa from Chicago. He stated that he was told it was possible but that it would be preferable if his sisterin-law applied in Pakistan.

In any event Miss Sultan did not obtain a visa for Canada before leaving Pakistan.

Mrs. Jaffery (Sultan) testified that she departed from Pakistan for London, England on March 27, 1982. She flew on British Airways and had a return ticket for Karachi/London/Chicago. She did not apply for a visa to the United Kingdom before leaving Pakistan because it was British policy at the time that visas were obtained at Heathrow Airport in London. She then travelled from London to Chicago on April 7, 1982.

In June, 1982 Mr. and Mrs. Naqvi drove to Chicago to visit Mrs. Naqvi's sisters and, during this visit, Mr. Naqvi telephoned the Canadian Consulate General in Chicago and indicated that he would like to bring his sister-in-law to obtain a

22

visitor's visa to Canada. It was apparently their intention at this point that she would drive back to Canada with them. He was told that her passport would be required but this was not in her possession at the time because she had made an application for an extension to her

U.S. visa and the passport was in the possession of the U.S. authorities. Consequently, they were unable to obtain a visa at this time and Miss Sultan's visit was postponed.

Following the visit to Chicago in June, Mr. Naqvi testified that he telephoned his Member of Parliament for a letter of reference. He felt that this might be of assistance in expediting the visa although there was no evidence that, if such a letter was obtained, it was ever forwarded to Chicago.

EVENTS IN CHICAGO

Miss Sultan applied for a visitor's visa to Canada at the Canadian Consulate in Chicago on August 26, 1982.

She testified that she filled out an application form answering all questions truthfully although she does not now recall what those questions were. She testified that she brought her passport, her return airline ticket to Pakistan and the letter from the Turkish Consul General in Pakistan which Mr. Naqvi had obtained for her to assist in obtaining her visa to the United States. She stated that she took the completed application form to the window and "gave it to the lady" there. She testified that this was the only person that she dealt with at the Consulate. She was asked the purpose of her visit to Canada and whom she was visiting. She did not remember if she was asked why she had not applied for a visa in Pakistan but stated

that she was not asked to provide any documentation with respect to employment nor was she asked for her airline ticket. There was no further mention in her testimony of the letter from the Turkish Consul General. She testified that the entire time that she spent in the Consulate was approximately thirty minutes and that she was advised that her application was refused. She testified:

"Yes, the reasons she gave were that I should have applied for it in Pakistan; I would stay illegally in the country and get married there. Those were the reasons she gave me."

Miss Sultan made no further application to obtain a visitor's visa to Canada and did not visit the Naqvi family in Pickering on that trip.

She returned to the United Kingdom on December 20, 1982.

The respondents produced two witnesses who were employed at the Consulate General in Chicago in August, 1982 and were apparently involved in processing Miss Sultan's application. Unfortunately, neither remembered much of the event and, as discussed above, the file on the application had been destroyed.

Thomas Clasper was Vice-Consul in the Consulate General in Chicago. He was the only visa officer there in August, 1982.

His daily activities in Chicago involved the processing of immigrant and visitor applicants although his responsibility was predominantly with immigration cases. Visitor applications were dealt with to a large extent by an Immigration Program Officer ("IPO") of which there were two in the Consulate General. IPO's

did not have authority to issue visitor visas. In most cases, they were locally recruited employees.

Mr. Clasper is now the Deputy Director, Western Europe Programs, dealing with immigration and has fourteen posts reporting to him. He joined the Foreign Service in July, 1973. Considerable evidence was given with respect to his posting as Immigration Selection and Counselling Officer in Islamabad, Pakistan from 1979 to 1981 and the travelling and observations which he made of Pakistan and Pakistani culture during that time. He stated that, while in Pakistan, he routinely issued visas to single females. He referred to situations where the woman was clearly employed or came from a community where it would be quite acceptable for a woman to travel. It was his perception that the number of single women seen at the Embassy in Islamabad was quite small and that they did not see a large number of single women travelling on their own. Apart from single women travelling with their families, he mentioned only Roman Catholic nuns and female employees of PIA, the state airline, travelling alone outside the country.

Mr. Clasper described the procedure in the office of the Consulate General in Chicago. There was an immigration section receptionist who would first deal with visitor visa applicants and determine that they had their passport and I-94 which is part of the U.S. visitor visa showing how long the person is permitted to stay in the United States. If these documents were in order, the person would fill out an application form. This would then be taken by the receptionist to the Immigration Registry where an index check would be made to see if the

applicant was known to the office or had previously applied for a visa. An index card indicating the result of

25

this check would be attached to the application form which would be placed in a tray. An IPO would take the application, review the information and ask the applicant additional questions to clarify any necessary information. If satisfied, the application would be taken to Mr. Clasper who would look over the application form to satisfy himself that the person appeared to be someone who was eligible for a visitor's visa and, if so satisfied, he would sign the visa and the passport.

The passport would then be returned to the applicant. Mr. Clasper testified that he would rarely be involved in the interview or document review process and would rely on the IPO to establish the bona fides of the applicant. He referred to the IPOs as having delegated authority to conduct interviews. It would have to be a very exceptional circumstance for Mr. Clasper to have personal contact with an applicant because of the volume of visitor traffic. As he stated, "there were just not enough Canada-based officers to do everything else that they did".

Mr. Clasper appeared to regard his position with respect to visitor visas as primarily a consultant for IPO's. The extent to which he reviewed the applications was not entirely clear from his testimony.

Mr. Clasper testified that, in some instances, they might want to verify something at the post responsible for the country of residence of the applicant and the applicant would be advised that the application would be assessed when they received a reply. It would take about five working days to get this information. In situations where there was very little likelihood that the visa would be issued, normal practice would be to advise the applicant at the time.

26

Mr. Clasper testified that he had some recollection of the events in this case and that the incident stood out more in his mind because of the involvement of the Toronto Star. His recollection was that the IPO, Ms. Cyndi Greenglass, brought in the application and passport of Miss Sultan and together they decided that there might be a problem.

He recalls a reference (although he was not sure where it originated) to Miss Sultan having been advised by the Canadian High Commission in Islamabad to apply outside of Pakistan. Having recently served in Islamabad, he felt this statement to be very uncharacteristic of the practice there. He stated that a telegram was sent to Islamabad to check this information but was not certain that the reply received was determinative of the decision not to issue the visa. He had no recollection of having interviewed Miss Sultan.

Mr. Clasper stated that it was the fact that Miss Sultan was not employed which was conclusive. However, he stated that he could not recall whether her application indicated whether she was employed or not. His testimony in this regard was based on a statement attributed to him in the article in the Toronto Star almost three months later that Miss Sultan had no job and this led him to now believe that that was the situation as he viewed it at the time.

During his evidence Mr. Clasper reviewed a copy of the passport of Naz Sultan and noted that the profession of the bearer was listed as "household". He stated that he interpreted this as being the equivalent of "homemaker" in Canadian terms. He did not indicate whether this information was noted by him in 1982.

He admitted:

"We would have had to have been aware of the fact that she was a Pakistani national, that she was in her twenties, that she was a woman and single. We would have been aware of all of those things".

However, he went on to state that, in this particular case, marital status was not particularly germane.

Mr. Clasper was unable to assist the Tribunal as to how the refusal to issue the visa was communicated to Miss Sultan if there was no refusal on August 26, 1982. It was his feeling that, at the time the passport and application was reviewed, no final decision was made with respect to her application. He thought that they would have waited to see what information came back from Islamabad. He thought she might have been advised of the refusal by telephone at some later date.

However, he also stated:

"There were no assurances that I can recall that would have satisfied me that she would have been a bona fide visitor at the time."

Mr. Clasper testified that a refusal to issue a visa would not necessarily be indicated on the passport. A stamp was placed on Miss Sultan's passport on August 26, 1982 indicating that she had applied for a visitor's visa and Mr. Clasper testified that it was common practice to underline the words "applied for" where there was a refusal but that this practice was not invariably followed. In the majority of cases, the passport would be returned to the applicant if they were awaiting further information or documentation and might never come back into their possession after the decision to refuse a visa had been made. There was nothing underlined on Miss Sultan's passport.

The evidence given by Ms. Cyndi Greenglass was inconsistent with that of Mr. Clasper in a number of areas. Ms. Greenglass worked at the Canadian Consulate General in Chicago from March, 1982 to June, 1983.

She held the position of Social Affairs Program Officer dealing primarily with employment and labour issues but spent two mornings a week acting in the capacity of an IPO and reviewing visitor visa applications.

Visa applications were taken only in the mornings. Another IPO took the applications for the other three days of the week. Ms. Greenglass was classified as a locally-recruited employee although she was a native of Hamilton, Ontario and only moved to Chicago in July, 1981. Prior to being employed at the Consulate, she worked as a TV and film coordinator. There was no evidence that she had received training in interviewing techniques or had exposure to the cultural diversities emphasized as important by other witnesses for the Respondents.

Ms. Greenglass described her duties as an IPO as taking the visitor visa applications, checking over the documentation, including the applications, and making sure that everything was in order for the visa officers. If additional information was required, she would go out and request it from the applicant directly. She emphasized that she did not like to disappoint or inconvenience visitors with respect to their travel plans and always wanted to give everyone the benefit of the doubt and ask for as much information as possible to help make the decision. She stated:

"But if there was any question, the Visa Officer would always go out and talk to them and see what was missing and what they could do to get a more definite answer".

She also confirmed that she did not have authority to either issue or deny visas. She described her function as doing "the leg work up front for the documentation" but stated that the final decision was that of the Visa Officer.

Ms. Greenglass described the volume of visitor visa applications as quite heavy during the summer months. She stated that they might get several hundred in a day but that, in the entire time that she was there and for the mornings that she assisted with visa applications, she thought that they might have refused four or five visas. This testimony with respect to the number of refusals is somewhat difficult to accept in light of the Respondents' Exhibit R-11, which indicates that there were 404 visitor visa refusals in Chicago for the following year, 1983 and Exhibit R-9 which shows 176 refusals for 1980. No figures were available for 1982.

Ms. Greenglass candidly admitted that she had no specific recollection of the application of Miss Sultan. She recalled only circumstances surrounding a file involving an applicant with family in Chicago and family in Canada who had received a U.S. visa from the home country but not a Canadian visa and was making application in Chicago for a visitor's visa. She stated that she recalled what she did of this particular file because so few visitor visa applications were refused.

Her recollection was that this person had received a U.S. visa in sufficient time to have applied for a Canadian visa from the home country. She recalled that the visa officer determined that assistance should be requested of the home visa

issuance office for their recommendation and that the reply had come back negative. She stated that she would have asked an applicant who could have applied at their home office as to whether they had applied and, if not, why not. She also recalled that the only visa officer in Chicago at that time was Tom Clasper.

On cross-examination, she admitted that she had no other recollection of this case and that she had told the Commission Investigator in May, 1989 that she had no recollection of the Naz Sultan file. She presumed that the file that was being discussed was one of the four files that had been refused during her employment at the Consulate General but had no recollection of Miss Sultan specifically. She admitted that there could have been other people with similar circumstances.

In response to questions from the panel, Ms. Greenglass stated that, after Mr. Clasper signed visas, she would take them out to the applicants and explain them. Any that remained outstanding because of questions would be dealt with by Mr. Clasper directly with the applicants. It was also up to Mr. Clasper to discuss refusals directly with the applicants. She stated that she never took back any applications that had been refused.

The evidence of the parties with respect to the timing of the refusal is inconsistent. Mr. Clasper and Ms. Greenglass conveyed their impression that no final decision was made on August 26, 1982 but nothing in their testimony, other than the reference to the enquiries to Islamabad, or any other evidence of the Respondents was of assistance as to when the refusal was made or how it was conveyed. There is nothing in any subsequent written material supplied to the

Tribunal to indicate that there was not in fact a refusal or that that refusal occurred other than on August 26, 1982. Mrs. Jaffery (Sultan) was clear that her application was denied on that date. Considering the nature of the evidence on this point, we have no reason not to accept the version given by Mrs. Jaffery (Sultan).

The evidence with respect to the telegram or telex to Islamabad is troubling. Mr. Clasper per testified that he did not recall where the information came from that Miss Sultan had received advice to apply in Chicago rather than Islamabad. He conceded that it may very well have come from Mr. Naqvi. If so, the information could not have come to him until after a telephone discussion on September 7, 1982 approximately twelve days after the application. The information was also contained in a letter sent by Mr. and Mrs. Naqvi to the Minister of Employment and Immigration dated September 10, 1982 which led to inquiries at the Chicago Consulate General. Apparently in response to these inquiries, Mr. Clasper telephoned the Minister's office and, according to a note produced by CEIC dated September 23, 1982, he

"advised that he had had reps from Mr. Naqvi which said that Miss Sultan had been advised by the Canadian High Commission in Islamabad that it would be easiest to obtain her visa in Chicago."

(emphasis added).

The note continues

"He telexed Islamabad & they have no record of any communication regarding Miss Sultan & said they would not give out that advise [sic]. They also advised that given the fact that Miss Sultan was 27/28 years old, unmarried and had no employment in Pakistan they would not recommend a visitors visa based on past experience".

From this testimony and this document, we are prepared to draw the conclusion that the telex was sent in response to CEIC inquiries after the visa application was refused. The information from Islamabad played no part in the decision. If this note accurately reflects the response from Islamabad and if, as is the evidence, there was no file on Miss Sultan there, the Tribunal wonders about the origin of the information in the final sentence quoted and the "past experience" on which the recommendation was based.

SUBSEQUENT REPRESENTATIONS

Although Miss Sultan made no further attempts to obtain a visitor's visa after August 26, 1982, Mr. and Mrs. Naqvi were very active over the next few months in attempting to have her application reviewed. Most of the activity was initiated by Mr. Naqvi.

Mr. Naqvi testified that, on August 26, 1982 or within a few days thereafter, either he or his wife was telephoned by Miss Sultan and advised that her application for a visitor visa had been refused. He telephoned Mr. Clasper on September 7, 1982. He stated that he wanted to find out what had happened and whether he could help in getting a visa for his sister-in-law. He was informed by Mr. Clasper that the visa had been denied because Mr. Clasper did not consider her to be a bona fide visitor. On September 10, 1982 Mr. and Mrs. Naqvi wrote to the Minister of Employment and Immigration complaining that "bureaucrats in Chicago" were refusing to grant Miss Sultan a visitor's visa and thereby denying her an opportunity to visit her sister who was a Canadian citizen. The letter continued:

"The only apparent [sic] reason for this denial seems to be based on race and national origin, which we believe is not consistent with your government's policies. This unfortunate decision by your officials in Chicago is a tragic mistake and an assault on human rights."

There was no reference to marital status in this letter. Mr. Naqvi testified that, at the time, he thought that the compelling reason for the refusal was the race and national origin of Miss Sultan.

On September 28, 1982 Mr. Naqvi telephoned Louise Chagnon in the office of the Minister of Employment and Immigration to get some assistance in having the matter reviewed. He stated that he was told that Miss Sultan should re-apply and that he should provide certain guarantees and give assurances and ask them to reconsider. On that same day, he sent a mailgram to the Consulate General in Chicago giving assurances that Naz Sultan was his wife's sister and that he and his wife would be responsible for her stay in Canada; that they would purchase a return ticket from Chicago to Toronto and ensure that she returned after her visit; and that Miss Sultan was a bona fide visitor.

Mr. Naqvi testified that, on October 4, 1982 he again telephoned Mr. Clasper to follow up on his mailgram. During this telephone discussion, Mr. Clasper stated that he was not prepared to change his decision because Miss Sultan was not married and, if she went to Canada, she could get married and stay there and that he could not give her a visa for a short period of time because "it only takes two hours to get married". Mr. Naqvi was asked:

"Q. Did you ask Mr. Clasper what it would take to get Naz into the country?

A. Yes, I did. He said the only way she could get entry into Canada is if she goes back to Pakistan, gets married and has a few children."

Mr. Naqvi testified that there was no discussion with respect to Miss Sultan's employment. He further stated that, as a result of this subsequent telephone discussion with Mr. Clasper, the issue of the marital status of Miss Sultan became an issue in his mind.

Mr. Naqvi testified that he was so upset by the comments made by Mr. Clasper that he sent a telegram on the same day to the Minister of Employment and Immigration which stated, inter alia,:

"Now I have been advised by Mr. Clasper that the only way Naz' situation would change if she goes back to Pakistan and gets married and have children."

Mr. Naqvi testified that he made further telephone calls to the Chicago Consulate General but received no reply. On November 9, 1982 he and his wife wrote to the Prime Minister stating:

"Your officials are preventing my wife's real sister from visiting us in Canada on the grounds that she is not married and she does not have any children."

and complaining that they had been unable to obtain a satisfactory reply from the Minister of Employment and Immigration. Sometime in November, Mr. Naqvi contacted the Toronto Star and provided them with the information which led to the newspaper article printed on November 17, 1982. Also towards the end of November, 1982 he contacted the Toronto Regional Office of the Canadian Human Rights Commission.

Finally, on February 8, 1983 he received a response from the Ministry of Employment and Immigration over the signature of the Departmental Assistant Immigration which stated in part:

"Miss Sultan was interviewed in Chicago in accordance. with her application for a visitor's visa and failed to satisfy the Visa Officer that she was a genuine visitor to Canada. She does not have strong connections with Pakistan and very little reason to return there. Since she was unable to establish that she would leave Canada at the end of her proposed visit, her request for visiting privileges was refused."

It was shortly after receipt of this letter that Mr. Naqvi and his wife filed the first complaint with the Canadian Human Rights Commission.

Mr. Clasper only recalled one telephone conversation with Mr. Naqvi but conceded that there might possible have been two if they occurred in a relatively short period of time. The major discrepancy

between his recollection of the telephone discussion or discussions and that of Mr. Naqvi was his assertion that, towards the end of the telephone conversation, Mr. Naqvi proposed a hypothethical situation of whether Miss Sultan could get a visa if she were to return to Pakistan, marry and have children. Mr. Clasper responded that she should apply at such time, they would consider the application then. In reply evidence, Mr. Naqvi denied "most definitely" that he gave this hypothethical example to Mr. Clasper.

Mr. Clasper also testified that the Toronto Star reporter had taken his comments out of context. He testified that it was the reporter who emphasized Miss Sultan's marital status whereas he referred to it only as one of the factors related to what he considered her lack of ties to Pakistan. He also testified that the issue of

marriage and the question of the length of time for a visit was discussed separately and denied that he made the statement attributed to him in the article to the effect that "he wouldn't consider even a one-day visa because a person planning to marry and stay in Canada doesn't need any more time to accomplish their goal."

In the opinion of the Tribunal, it is not essential to decide who initiated the discussion of Miss Sultan returning to Pakistan, getting married and having children before being eligible to visit Canada either in the telephone discussion or the newspaper article. It is clear from the evidence throughout that marital status was a consideration in making the decision.

Mr. Clasper's evidence was of little assistance to the Tribunal. He was testifying to events about which he admitted he had, at most, a vague recollection and his testimony was primarily as to what his usual practice would have been. He was also without any contemporaneous documentation to help refresh his memory. However, his evidence as to whether it was the information from Islamabad and the failure of Miss Sultan to make application there or whether it was Miss Sultan's employment status which was the conclusive factor in the decision was confusing and sometimes contradictory. His evidence was also unclear as to what information he had with respect to employment at the time the decision was made.

The one thing which is clear throughout is the fact that Miss Sultan was a young, single female from Pakistan. Mr. Clasper stated in his testimony that they would have been aware of these facts and

similar statements appear in a number of contemporaneous documents, including those filed on behalf of CEIC as exhibit R-1.

37

EVIDENCE OF DR. ALVI

The Commission called Dr. Sajida Sultana Alvi as an expert witness on the role of women in contemporary Pakistani society. She is a professor with the Institute of Islamic Studies at McGill University and, throughout her teaching career, has taught courses on modern issues in Indo-Pakistani culture and his given numerous lectures on the role of women in Islam and in Pakistan, in particular. She testified that there were predominantly two sects of Islam in Pakistan of which the Shias constituted a substantial minority. Dr. Alvi considered the Shia sect as being more progressive and liberal. However, she qualified this by stating that this would vary from region to region and the degree of liberalism could vary from family to family.

Education and socioeconomic factors would come into play with highly educated and more affluent families tending to be more liberal. She also stated that Karachi was the most cosmopolitan city in Pakistan.

In her experience, it would not be unusual for a single Pakistani woman to travel to visit other family members. However, it would be unusual for such a woman to travel as a tourist. She also testified as to the close relationship between adult children and their parents in Pakistani society. Adult daughters would normally live with their parents until they married. An unmarried woman would be unlikely to live with a married sister unless she had no other choice.

Dr. Alvi testified that marriages of convenience are a foreign concept in Pakistan. There would be a stigma attached to a woman who got married solely for immigration purposes and, if a woman was subsequently divorced, her chances of

38

getting remarried would be very slim. Arranged marriages are much more common and involve strict formalities including a long process of investigation and checking of family background. Parents are intimately involved in the entire process and try to have their daughters married before age 25, or earlier if they are not attending university or college.

On cross-examination, Dr. Alvi freely admitted that it was impossible to generalize about women from Pakistan and it would be essential to know some details about the individual; such as her culture, education, marital status, sect of Islam and the community from which she came.

SERVICES AND THE GENERAL PUBLIC

It was the position of the Respondents that a determination governed by a code of immigration law made by a visa officer stationed outside Canada did not constitute a "service" within the meaning of s. 5 of the CHRA. That section, which is the section under which this complaint is brought, states:

"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."

The issue of provision of services in this context was dealt with by a Canadian Human Rights Tribunal in Menghani v Canada Employment and Immigration

Commission and Department of External Affairs (unreported, T. D. 4/92, May 22, 1992). While we are not bound by this decision, we find the reasoning persuasive on this issue and adopt it together with the authorities on which it is based. That Tribunal concluded at p. 14:

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

"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."

Section 5 of the CHRA does not just provide that it is a discriminatory practice to differentiate adversely in relation to any individual with respect to the provision of services. Such services must be "customarily available to the general public". It has been argued in this case that, even if the provision of visitors' visas can be characterized as a service, it is not customarily available to the general public because the public for the purpose of these decisions by visa officers is made up solely of persons outside of Canada who have no right to enter Canada. It was argued by counsel for the Respondents that such an interpretation would give the CHRA an extraterritorial effect not intended by Parliament and contrary to the principles of international law.

The Menghani decision concluded that the services at issue there were customarily available to the general public within the meaning of s. 5 of the CHRA without having to deal with this particular issue.

40

In Attorney General of Canada v Mark Rosin and Canadian Human Rights Commission (unreported, Federal Court of Appeal, December 7, 1990, Court File No.: A-211-89), Linden J.A. provides a thorough and detailed discussion of the interpretation of the words "customarily available to the general public" in s. 5 of the CHRA . Unfortunately, the analysis does not deal with the issue of whether or not "public" extends to persons outside Canada. We have been referred to no authorities which do deal with this issue.

In Re Singh, [1989] 1 F.C. 430 (C.A.), Mr. Justice Hugessen stated at pages 440-441:

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

As pointed out by Respondents' counsel, this comment is not conclusive of the question.

Initially, the argument with respect to extraterritoriality has some attraction. However, in the opinion of the Tribunal, the CHRA does not violate presumptions against extraterritorial application of laws. Section 40 limits the Act to victims lawfully in Canada or

Canadian citizens. However, this does not necessarily mean that section 5 and the word "public" therein must be so limited as well.

Considering the objectives as stated in section 3 of the Immigration Act regarding non-discrimination together with the broad interpretation to be given to the remedial provisions of the CHRA, the Tribunal concludes that a proper interpretation of the legislation requires that Canadian immigration officials

exercise their discretionary powers in accordance with the CHRA whether they are doing so within Canada or abroad. Foreign service officers posted in other countries are representatives of Canada. There is no reason why the principles of the CHRA should not apply to their activities. Whether or not there is a remedy for a discriminatory practice exercised outside of Canada will depend on the interpretation to be given to s. 40(5)(c) of the CHRA and this question is more appropriately dealt with in that context.

PROOF OF DISCRIMINATION

The allegation in this case is one of direct discrimination. It is alleged that the Respondents have taken an action which on its face discriminates on a prohibited ground. As specified in the Complaints, those grounds are race, national or ethnic origin and marital status.

The Tribunal attaches little importance to the fact that the formulation of the various complaints would give the impression that it was the race and origin of Mr. and Mrs. Naqvi which was at issue rather than of Mrs. Jeffery (Sultan) since the case was argued and the evidence presented on the basis of the correct interpretation. However, the Tribunal cannot treat these particular grounds in isolation. If Mrs. Jaffery (Sultan) was discriminated against, it was because she was a young, single woman of Pakistani origin. The true complaint goes beyond the grounds specified in that gender and age are included and the basis on which the case was presented and argued was that it was the combination of all of these factors which was the basis of the alleged discriminatory action.

In Andrews v Law Society of British Columbia (1989), 36 C.R.R. 193 (S.C.C.) at page 228, McIntyre J. provides the following definition of discrimination which was accepted by counsel for all parties:

"... I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."

It is the position of the Complainants that the Respondents differentiated adversely in relation to Miss Sultan solely on the basis of personal characteristics attributed to her on the basis that she was a member of a group; namely, young, single women of Pakistani origin rather than on her own merits and capacities as an individual.

It is clear law that, in complaints under the CHRA, the complainant bears the initial onus of establishing a prima facie case of discrimination. Ontario Human Rights Commission v Borough of Etobicoke, [1982] 1 S.C.R. 202; Ontario Human Rights Commission and O'Malley v Simpsons-Sears Limited , [1985] 2 S.C.R. 536; Holden v Canadian National Railway Co. (1990), (May 4, 1990, Federal Court of Appeal, unreported). A prima facie case has been defined as one which covers the allegations made and which, if the evidence is believed, is complete and sufficient to

justify a verdict in the Complainant's favour in the absence of an answer from the respondent. The burden of proof is on the basis of the balance of probabilities.

The Tribunal finds that the Commission and the Complainants here have made out a prima facie case which calls on the Respondents for an explanation.

There was no evidence adduced by the Respondents which directly contradicted that of Mrs. Jaffrey (Sultan). No doubt the Respondents were disadvantaged by the unavailability of the file dealing with the application of Miss Sultan. The evidence of Mr. Clasper and Ms. Greenglass was admittedly largely speculative and based upon what they could recall of their usual practices rather than upon any specific recollection of the events of this incident. Other evidence, (including some of the evidence of Mr. Clasper) presented by the Respondents dealt primarily with the importance of immigration procedures to the sovereignty and security of Canada without attempting to show that there was any specific danger posed by Miss Sultan.

Some evidence was presented to the effect that a young, unmarried Pakistani female travelling alone was sufficient to arouse suspicion because this was not a common occurrence. However, this evidence was impressionistic and unsupported by expert or statistical evidence apart from a study undertaken by CHRC of visa application files in Islamabad for 1984 and 1985 which were the years available closest to 1982.

Results showed that only one file in a random sampling of 75 related to a single woman travelling alone. We were invited to draw the inference that single Pakistani women do not travel alone abroad for legitimate purposes. This

evidence is not of sufficient weight for us to do so. The files relate only to applications for Canadian visas. We must also consider the evidence of Dr. Alvi and the inconvenience for many Pakistanis of making visa applications in Islamabad, especially from the cosmopolitan centre of Karachi. In any event, it was the position of the Respondents that the refusal to issue a visa to Miss Sultan was not made on this basis.

The explanation offered by the Respondents was that the decision was primarily based on Miss Sultan's employment status as well as the fact that she had not made application in Islamabad. For the reasons set out in the discussion of the evidence above, we do not, on the balance of probabilities, accept that these were the reasons for the refusal. We do not feel that we need to rely on the following principle as stated by the Divisional Court in Foster Wheeler Ltd. v Ontario Human Rights Commission (1987), 8 C.H.R.R. D/4179 at D/4179:

"It is well established that even if only one of the grounds for failing to refer or recruit an individual is a prohibited ground

under the Code, the presence of that prohibited ground, even where there are other non-prohibited grounds, is sufficient to establish a breach of the Code provided it is a proximate cause of the refusal to recruit."

The Tribunal finds it significant that, despite the evidence of witnesses for the Respondents of the importance of the interview process in assessing applicants, there is no evidence that Mrs. Jaffery (Sultan) was interviewed at the Consulate General in Chicago. The evidence of Mrs. Jaffery (Sultan) was that she was not asked any questions with respect to any concerns about her application. Mr. Clasper has no recollection of having interviewed her and believes that he did not do so.

The evidence of Ms. Greenglass was to the effect that any interview would have been conducted by Mr. Clasper.

Had there been an interview, any concern with respect to the employment status of Miss Sultan might have been resolved and it might have been learned that she came from a relatively well-to-do family of Shia Muslims, was well educated and that her trip involved visiting her three sisters living abroad. There might also have been an explanation of the inconvenience involved in her obtaining a visa from Islamabad.

We accept the evidence of Mrs. Jaffery (Sultan) and Mr. Naqvi over that of Mr. Clasper and Ms. Greenglass. Admittedly, these events took place almost ten years prior to the evidence being given and it is questionable to what extent memories can be relied upon over that length of time. However, the testimony of Mrs. Jaffery (Sultan) and Mr. Naqvi was given without reservation while that of Mr. Clasper and Ms. Greenglass was, by their own admission, largely speculative. The nature of the occurence was something that was more likely to have impressed itself more clearly upon the minds and memories of the Complainants than the Respondents. We also take some comfort from the statement of Mclntyre J. at p. 558 in Ontario Human Rights Commission v Simpsons-Sears Limited, (supra):

"... experience has shown that in the resolution of disputes by the employment of the judicial process, the assignment of a burden of proof to one party or the other is an essential element. The burden need not in all cases be heavy - it will vary with particular cases - and it may not apply to one party on all issues in the case; it may shift from one to the other. But as a

practical expedient it has been found necessary, in order to insure a clear

result in any judicial proceeding, to have available as a 'tie-breaker' the concept of the onus of proof."

In this case the onus shifted to the Respondents to provide an explanation. They have not done so to the satisfaction of the Tribunal.

It was also open to the Respondents to establish a bona fide justification for the refusal. Section 15(g) of the CHRA provides:

"It is not a discriminatory practice if,

(g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is a bona fide justification for that denial or differentiation."

Although some of the evidence was relevant to this defence, the Respondents chose not to rely on it or adduce specific evidence to justify visa refusals to young, unmarried women of Pakistani origin. What evidence there was was ambiguous. Instead, the Respondents chose to rely on the argument as to the special status of the Immigration Act and the inapplicability of the CHRA outside Canada. Nevertheless, since there was some evidence, the Tribunal considers it necessary to deal with the issue of bona fide justification.

In considering whether there is a bona fide justification, the Tribunal agrees with the admonition of the Tribunal in Druken v Canada (Employment and Immigration Commission) (1987), 8 C.H.R.R. D/4379 at paragraph 34342:

"Where a service otherwise available to the general public is being denied, the justification for such denial must be based on the strongest possible

evidence. The justification must be a question of fact in each situation and not merely a blanket application to a particular group of individuals."

In Central Alberta Dairy Pool v Alberta (Human Rights Commission), [1990] 2 S.C.R. 489, Wilson J. stated at p. 513:

"The essence of direct discrimination in employment is the making of a rule that generalizes about a person's ability to perform a job based on membership in a group sharing a common personal attribute such as age, sex, religion, etc. The ideal of human rights legislation is that each person be accorded equal treatment as an individual taking into account those attributes. Thus, justification of a rule manifesting a group stereotype depends on the validity of the generalization and/or the impossibility of making individualized assessments."

In our opinion, the same principle is applicable to the provision of immigration services. The individualized assessments are made during the interview process. We have already found that Miss Sultan did not have an interview.

A bona fide justification requires consideration of both subjective and objective factors. We have no doubt that at least some immigration authorities hold an honest and sincere belief that the marital status of young persons, particularly women from Pakistan, are relevant factors in determining the bona fides of intention to be a visitor. However, this must be true from an objective standpoint as well in order to justify refusal of a visa. It is the finding of this Tribunal that there has been no objective evidence of bona fide justification.

VICTIMS OF DISCRIMINATORY PRACTICE

The Complainants in this case are Hameed and Massarat Naqvi. They must qualify as "victims" of the discriminatory practice against Mrs. Jaffery (Sultan) in

order for this Tribunal have jurisdiction. The basis of such jurisdiction must be found in s. 40(5)(c) of the CHRA which provides:

"(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."

As stated by the Tribunal in Menghani (supra) at page 21:

"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 meaning of "victim" is thoroughly canvassed in the Menghani decision commencing at page 23 and, as we are in agreement with the reasoning insofar as it deals whether a person may be a victim indirectly because he or she suffered the consequence of an adverse discriminatory practice against another, we will not repeat what is stated there. That Tribunal concluded:

" 'Victim' therefore simply means someone who has suffered the consequences of adverse differentiation whether direct or indirect." (emphasis added)

Other cases in which complaints of discrimination have been upheld in situations where the complainant was recognized as a victim of a discriminatory practice against another person include New Brunswick School District No. 15 v New Brunswick (Human Rights Board of Inquiry) (1989), 10 C.H.R.R. D/6426, (N.B.C.A.); Tabar et al v Scott and West End Construction Ltd. (1985), 6 C.H.R.R. D/2471; and Jahn v Johnstone (September 16, 1977 Ontario - Eberts unreported).

We agree also with the Tribunal in Menghani that there are boundaries to the limits of who can claim under human rights

legislation that a discriminatory practice had an adverse effect upon them. Relatives of an applicant denied a visitor's visa can be victims under the CHRA but only if they suffer consequences which are sufficiently direct and immediate as expressed in Re Singh (supra) at p. 442 where Mr. Justice Hugessen states:

"... 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".

Massarat Naqvi is an older sister of Mrs. Jaffery (Sultan). She testified that she was very close to her sister. She travelled to Pakistan almost every year. In addition, she wrote letters and made phone calls to her sister and sent birthday gifts and photographs of Canada and of her family. She testified that she was very hurt and very upset and insulted when advised that her sister was not going to be allowed into Canada. Subsequent to 1982, she had invited her brother-in-law to

visit in Canada and, because Mrs. Jaffery (Sultan) had been refused entry into Canada, he had declined her invitation and stated that he would not try to come because he was not confident he would be allowed into the country. Mrs. Naqvi testified that she was very hurt by this event as well.

In addition to losing face with her family, it was personally offensive culturally to Mrs. Naqvi to have her sister refused entry to Canada on a basis which she perceived to be suggesting that Pakistani women were likely to enter into marriages of convenience.

Although it appeared from the evidence that Mr. Naqvi was the initiator of the various activities with respect to obtaining a visa for Mrs. Jaffery (Sultan) and subsequently making representations and complaints concerning the refusal, Mrs. Naqvi was also a party to the correspondence.

Hameed Naqvi is the brother-in-law of Mrs. Jaffery (Sultan). Evidence detailed above shows that he was very closely involved in inviting her to Canada, making inquiries as to visa applications in Pakistan, Canada and Chicago and initiating the various telephone discussions, correspondence, telegrams and the newspaper article in the Toronto Star. Mr. Naqvi incurred expenses in these efforts.

The affront to the dignity of the Complainants must be regarded as more severe where many of the personal characteristics which comprise the grounds of the discriminatory practice are shared by the Complainants - i.e. race, national and ethnic origin and gender (Mrs. Naqvi).

51

In our view, the consequences to Mr. and Mrs. Naqvi were sufficiently direct and immediate to qualify them as "victims" of the discriminatory practice against Mrs. Jaffery (Sultan) within the meaning of s. 40(5)(c) of the CHRA.

REMEDIES

Although there was evidence that Mr. Naqvi incurred expenses for telegrams and long distance calls, he stated that he was not seeking compensation for any financial loss attributable to the discriminatory practice. In argument, counsel for the Commission sought an order for such compensation. However, no evidence was led as to the amount of these expenses. For both of these reasons, we make no award in this regard.

Likewise, no award was sought by Mr. and Mrs. Naqvi for compensation under s. 53(3)(b) of the CHRA although counsel for CHRC sought a nominal award on their behalf. There was evidence as to hurt feelings on the part of Mr. and Mrs. Naqvi both as a result of the refusal to issue a visa to Miss Sultan and the subsequent reluctance of other family members to try to visit Canada. The evidence of the Complainants' hurt feelings is, of course, less than the level of hurt feelings, humiliaton and embarrassment suffered by persons who suffer direct or personal discrimination but would, in our opinion, justify a nominal award. However, since Mr. Naqvi stated that the Complainants were not seeking a monetary award, we also make no award under this heading.

The remedy sought by the Complainants is an apology from the government and we feel that such a remedy would more appropriately satisfy the Complainants

52

than any monetary award. The Complainants have clearly demonstrated that they still have strong feelings with respect to this matter even ten years later. It was not contended that DEA would not be responsible and liable for the conduct of their employees at the Consulate General in Chicago. Similarly, it was not contested that CEIC would not be liable in circumstances where it had delegated its authority to make visa decisions to employees of DEA. It is clear that the decision of the DEA employees was adopted by CEIC by responding to Mr. and Mrs. Naqvi as it did in the letter of February 8, 1983.

Therefore, an apology from the Minister of each of the Respondent Departments is ordered.

CHRC counsel requested that a letter of apology should be sent to Mrs. Jaffrey (Sultan) as well. While our jurisdiction with respect to remedies may permit such an order, we feel that an apology to Mr. and Mrs. Naqvi is sufficient in this case.

We have given careful consideration as to whether the order should include a term that DEA cease the discriminatory practice. Such orders are customary where there is a finding of discrimination. However, there was no evidence that it was a general practice of DEA visa officers to routinely refuse visas to young, single females of Pakistani origin. In fact, there was some evidence to the contrary, including evidence by the Complainants that single female relatives had been able to obtain visas for the purpose of visiting the Naqvi family in Canada. We accept the evidence of the Respondents that the age, gender, national or ethic origin and marital status may, in the proper case and when adequately assessed, be relevant factors in determining the bona fides of a visitor visa applicant. Although these factors are prohibited grounds of discrimination under the CHRA and although, in

53

order to establish discrimination, it is only necessary to show that one of the causes, albeit a proximate one, for the refusal is a prohibited ground, there were indications in the evidence in this case that bona fide justification for consideration of these factors might

have been established had the proper evidence been presented. Evidence would, of course, have been required as to the relevance of such grounds to the visa application of Miss Sultan and to her as an individual and not just to the group to which she belonged. This would have required a more individualized assessment or interview than the evidence indicated she received. It is also the feeling of the Tribunal that, based on all the evidence, there very well may have been an element of misunderstanding with respect to this visa application.

Accordingly, considering all of the circumstances, including all the various factors which a visa officer is required to weigh in determining the bona fides of a visitor, we are inclined not to make such a formal order on the evidence in this case.

Considerable evidence was given during the hearing as to the training of visa officers in interviewing techniques and the cross-cultural perspective which they gain from rotational postings.

However, we also heard evidence that the persons with this training and experience are very often too busy with other duties to actually conduct interviews with visa applicants and that interviews are delegated to locally recruited IPO's with little training and no foreign experience. We also heard evidence that visa officers received human rights training but that such training was in the area of international human rights conventions rather than the requirements of the CHRA. In light of our findings about what happened to Mrs.

Jaffery (Sultan), we make a strong recommendation that visa officers and any other persons conducting interviews receive training in the requirements of the CHRA.

Dated at Toronto, Ontario this day of November, 1992

Ronald W. McInnes
Chair

Ken H. Ng

Patricia M. Y. Weber