

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Keith Jeffers

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

**Citizenship and Immigration Canada
and Canada Border Service Agency**

Respondents

Ruling

Member: Karen A. Jensen

Date: June 16, 2008

Citation: 2008 CHRT 25

[1] The Respondents, Citizenship and Immigration Canada and Canada Border Service Agency, have requested an order preventing certain evidence from being adduced at the hearing into a complaint filed by Keith Jeffers in April of 2004. The complaint involves allegations that between 2002 and 2004, Mr. Jeffers was subjected to discriminatory treatment on the basis of his race and national or ethnic origin at Pearson International Airport when he was sent for questioning regarding his citizenship.

[2] The Respondents are requesting an order preventing the Complainant from introducing the report of Dr. Scot Wortley entitled “Racial Differences in Customs Searches at Pearson International Airport” as evidence in the hearing of the present matter. The Respondents are also requesting an order preventing the Complainant from introducing the report entitled “Canada Customs Visible Minority Study” as evidence in the hearing of this matter. The latter study was conducted by COMPAS Inc, a multi-audience research firm.

[3] There was some uncertainty as to whether Dr. Wortley would be testifying as an expert witness at the hearing. However, that now appears to be resolved; the Commission, rather than the Complainant, intends to call Dr. Wortley as an expert witness and to introduce his report during his testimony.

[4] The Respondents maintain, nonetheless, that Dr. Wortley’s report is inadmissible for a number of reasons. These reasons include the assertion that the report is unreliable, unnecessary and irrelevant. The Respondents further assert that Dr. Wortley’s report has not been accepted by a number of other tribunals and courts. Therefore, this Tribunal should rule, in advance of the hearing, that Dr. Wortley’s report will not be admitted during the hearing into the present complaint.

[5] I am of the view that the admissibility of the Wortley report is a matter that is best left for determination at the hearing. One of the criteria for the admissibility of expert evidence is that the evidence be given by a properly qualified expert. The Commission and/or the Complainant have not yet had the opportunity to attempt to qualify Dr. Wortley. Therefore, a determination

on the admissibility of the Wortley report is not possible at this time. The Respondents are free to raise their objections to the admissibility of the report at the appropriate time during the hearing.

[6] The Respondents argue that the COMPAS report on the Canada Customs Visible Minority Study is inadmissible for the same reasons as the Wortley report and for an additional reason: the author of the study will not be testifying. Therefore, the COMPAS report will be no more than hearsay evidence of a highly prejudicial nature, and for these reasons it is inadmissible, according to the Respondents.

[7] The Commission responds that the COMPAS report is not an expert report, but rather an internal document commissioned by one of the Respondents. The report is relevant and essential for the Tribunal to determine if racial profiling applies in this particular case, according to the Commission. It also argues that the Respondents may call evidence to rebut the material in the COMPAS report should they see fit. The Complainant has not provided any submissions on the issue.

[8] When faced with a pre-hearing objection to the admissibility of evidence, the Tribunal—as master of its own proceeding—is not required to decide the objection at the pre-hearing stage, or exactly as framed. However, there are cases such as the present one, where an advance ruling would significantly assist counsel in preparing for the hearing and would promote an expeditious and fair hearing. In such cases, it is appropriate to assess the evidence as it has been proposed and determine, prior to the hearing “whether its value is worth what it costs”. (See *Morin v. Canada (Attorney General)*, 2003 CHRT 46 at para. 6)

[9] I think that the Respondents’ argument in the present case with respect to the COMPAS report has merit. The Commission is seeking to have the report entered into evidence as proof of the truth of the contents. The report is hearsay evidence unless it is submitted through the testimony of the author of the study or another individual who has direct knowledge of the study and the production of the report.

[10] Although the Tribunal may admit hearsay evidence, it is not required to do so. In determining whether to admit hearsay evidence, it is appropriate for an administrative tribunal to consider the factors of reliability and necessity (*R. v. Khan* [1990] 2 S.C.R. 531; *Telus Communications Inc. v. Telecommunications Workers Union*, 2005 FCA 262 (CanLII) at paras. 26-29). These factors must be applied in a flexible manner and with due regard to the latitude that is afforded to the Tribunal to admit evidence that would not otherwise be admissible in a court of law (s. 50(3)(c) of the *CHRA*; *Telus, supra*, at para. 28; and *R. v. Hawkins* [1996] 3 S.C.R. 1043 at para. 68).

[11] In the present case, the Commission has not indicated why it is necessary to introduce the evidence through someone other than the author of the COMPAS report or another individual with direct knowledge of the study and production of the report. The introduction of the report indicates that the principal investigator for the study and author of the report was Stephen Kiar, a senior partner of COMPAS. Initially, in its Statement of Particulars, the Complainant stated that it would be calling a representative of COMPAS to testify about its report. Later, in a case management conference call, the Complainant told the parties and the Tribunal that it would instead be calling the Executive Director of the African-Canadian Legal Clinic to introduce the COMPAS report. The Tribunal directed the Complainant to provide an amended Statement of Particulars including a revised list of witnesses as well as a summary of their anticipated testimony. The Complainant has not provided the requested document, nor did it provide the reason that Mr. Kiar, or another individual with direct knowledge of the study and the production of the report, could not be called as a witness. Therefore, the necessity of introducing this evidence through the Executive Director of the African-Canadian Legal Clinic has not been established.

[12] Moreover, there are questions about the reliability and probative value of the conclusions in the COMPAS report. Two of the conclusions in the report are that Black people in Toronto tended to be subject to more delays or searches, particularly when returning from the Caribbean, and this group felt they were treated unfairly by Customs officers. However, at page 3 of the report, the author states: “This research was qualitative in nature, not quantitative. As such, the

results provide an indication of participants' views about the issues explored, but cannot be generalized to the full population of visible minority travelers." At page 6 of the report, the author states that "readers should not view this research as statistically representative of visible minority travelers".

[13] Does this mean that the conclusions provided in the report such as the ones set out above cannot reliably be applied to the case at hand? If that is the case, then the probative value of the COMPAS report may be minimal. Moreover, given that the conclusions are central to the inquiry in this case and are prejudicial to the Respondents' case, it would be unfair to admit the evidence without providing the Respondents with an opportunity to cross-examine the author or another individual with direct knowledge about the study and the report about the statements.

[14] For these reasons, the COMPAS report shall not be admitted into evidence through the testimony of a representative of the African-Canadian Legal Clinic. This order is without prejudice to the right of the Commission or the Complainant to request that the report be admitted through another witness.

Signed by

Karen A. Jensen
Tribunal Member

Ottawa, Ontario
June 16, 2008

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1255/6707

Style of Cause: Keith Jeffers v. Citizenship and Immigration Canada
and Canada Border Service Agency

Ruling of the Tribunal Dated: June 16, 2008

Appearances:

Cecil Norman, for the Complainant

Ikram Warsame, for the Canadian Human Rights Commission

David Cowie, for the Respondents