

T. D. 18/ 88 Decision rendered on December 14, 1988

THE CANADIAN HUMAN RIGHTS ACT (S. C. 1976- 77, C. 33 as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

MEHRAN ANVARI, COMPLAINANT

- and

CANADA EMPLOYMENT AND IMMIGRATION COMMISSION, RESPONDENT

TRIBUNAL: ELIZABETH ANNE GARLAND LEIGHTON

DECISION OF TRIBUNAL

APPEARANCES:

KATHRYN BARNARD Counsel for the Complainant

BRIAN SAUNDERS Counsel for the Respondent

JAMES HENDRY AND PAT LINDSEY- PECK Counsel for the Canadian Human Rights Commission

DATE AND PLACE OF HEARING: April 11 to 13, 1988, Ottawa, Ontario

DECISION

THE COMPLAINT

The complaint in this case is brought by MEHRAN ANVARI; he names the Canada Employment and Immigration Commission as the party Respondent who breached the Canadian Human Rights Act (1976- 77) S. C. c. 33, as amended. Mr. Anvari's complaint was set out, originally, on a Canadian Human Rights Commission complaint form, signed by him on 16 October, 1984, (Exhibit HRC- 1) as follows:

"I have reasonable grounds to believe that I was adversely differentiated against by reason of a disability contrary to Section 5 (b) of the Canadian Human Rights Act."

THE FACTS

MEHRAN ANVARI was born in Iran on 16 December, 1959; he remains a citizen of Iran. At the age of five (5) or six (6), he contracted polio and, as a result of that illness, his legs lost much

of their strength. In his own estimation, his right leg is not functional and the strength of his left leg is below normal.

Mr. Anvari's family was able to send him to Germany when he was a youth in order to attempt to rectify the results of the polio; in addition, he was hospitalized in Iran to fuse his (presumably right) ankle and knee.

A further result of the polio appears to have been the development in Mr. Anvari of a curvature of his spine, a condition exacerbated by the weakness of the muscles around his spinal column. This scoliosis was evident, according to Mr. Anvari, while he was in Iran, but does not appear to have been treated there nor to have been the subject of his parents' medical concerns when he was living with them.

His parents were concerned not only with his medical condition, but also with Mr. Anvari's education as he noted that he had learned English in Iran and that he had studied psychology and sociology when he was a student there. In addition, he had studied music and is able to play all keyboard instruments.

There may have been some suggestion that Mr. Anvari's arrival in Canada in 1981 was based upon his desire to receive medical treatment; however, the fact that his brother was a resident of Ottawa at a time when the political situation in Iran was unstable may also have been a reason for his desire to come to Canada.

Mr. Anvari came by way of England; he had relatives living in London, England and had moved from Tehran, Iran to that city in the spring of 1980, taking with him about \$10,000.00. His parents and the relatives resident in London supported him as he waited for approval of his visa application in order to continue on to Canada. An application for a student visa was turned down; according to Mr. Anvari a second application noted that he wanted to come to Canada for a check-up and treatment. It was based upon this second application that a visa was issued to Mr. Anvari on 28 February, 1981. Mr. Anvari immediately arranged to come to Ottawa, Canada where he could live with his brother whom he described as a landed immigrant and as his sponsor.

Notwithstanding this perception, Mr. Anvari arrived in Canada in the early spring of 1981 on a visitor's visa for four (4) weeks only; that visa was later extended based upon the need for more time to seek medical treatment.

Mr. Anvari did make an appointment to see the family physician presumably his brother's family physician - with regard to his scoliosis and other polio-related medical problems. He was referred to a Dr. Armstrong, an orthopedic specialist at Ottawa Civic Hospital who advised him that an operation could stabilize his spinal curvature and prevent problems which might arise in later middle age based upon the curvature.

In addition, according to Mr. Anvari, he was advised that such an operation would cost a person not covered by the Ontario Health Insurance Plan approximately \$12- 13,000.00.

Mr. Anvari gave evidence that, at that time, he did want the operation. At that time, as well, he thought his father could pay for such treatment. When his father informed him that he could no longer transfer money from Iran to other countries, Mr. Anvari decided to save his personal savings of \$6- 7,000.00 for "more important use".

One of these "more important uses" may have been to go to Buffalo in the United States and to make application there for a student visa. This time, Mr. Anvari was successful and he returned to Canada from Buffalo on May 6, 1981 with status as a "student".

Mr. Anvari underlined his student status by enrolling at the University of Ottawa in four (4) courses - psychology and music among them. As a student, Mr. Anvari understood that he was covered by OHIP; however, he did not return to Dr. Armstrong at this time to follow his recommendation of back surgery.

Indeed, by 1982, Mr. Anvari had left his brother's home, had found his own apartment, and realized that he needed to find work. No money was going to be forthcoming from his father in Iran; he had not been highly successful as a student, completing only one of his four (4) University courses.

He was able to receive a work permit, and was successful in finding employment with a taxi service running from the Ottawa Airport to downtown Ottawa. In addition, he taught music to Persian children, and became, by 1983, an active member of the Iranian community in Ottawa.

It was through his friends that he learned of the federally sponsored RAN Programme which provided relief for, amongst other things, Iranians in Canada who were seeking permanent admission to the country. The provisions of this Programme are outlined in Immigration Manual IS 26 (IRAN) Annex IV; the specific provision which interested Mr. Anvari is found in s. 9(i) as follows:

"Iranians in Canada as of March 1, 1983 ... and seeking to remain as permanent residents but not meeting IS 1.39 guidelines, may be considered eligible for landing in Canada via OIC requests provided such applicants have been in Canada at least twelve months ... Applicants are to be assessed individually on the basis of their ability to become successfully established.

In cases where there is some doubt, for example students, CICS may extend the person's status pending further review.

Proposed refusals should be brought to the attention of the Director, Operational Procedures, N. H. Q."

These provisions were implemented by the federal government in the spring of 1983, according to a press release dated March 1983, because of the concern "about the human rights situation in Iran... coupled with the Iran- Iraq war." Indeed, that press release suggests that Iranian persons, in Canada, who apply to be permanent residents could, as such, then "apply to sponsor their dependants in Iran, and thus meet the goal of reunifying families."

Needless to say, Mr. Anvari applied in April, 1983 to become a landed immigrant in Canada. During the interview with the immigration official on the day of his application, he informed the official of his employment as a cab driver, of his earnings from that employment, of his immediate financial condition -apparently worse than the year previous because of medical expenses unrelated to his scoliosis - and, he thought, impressed her with his ability to speak English. Indeed, that official's notes indicate that she was impressed with Mr. Anvari to the extent that the "recommendations are that we process him towards landing - providing his medical condition doesn't interfere with guidelines as such." This official's immediate superior noted "I concur, subject to meds ... appears to be a good candidate."

This interview was followed by other interviews, one of which involved a medical assessment. Such an assessment is required for all applicants for landed immigrant status in Canada. The Immigration Act, s. 19 (1)( a), allows for inadmissibility to Canada based upon specific health-related findings. The portion of that section relevant to Mr. Anvari reads as follows:

No person shall be granted admission if he is a member of the following class:

Persons who are suffering from any disease, disorder, disability or other health impairment as a result of the nature, severity or probable duration of which in the opinion of a medical officer concurred in by at least one other medical officer... their admission would cause or might reasonably be expected to cause excessive demands on health or social services.

The original medical report was made by examining physician, Dr. George J. Fiala on 9 May, 1983. This physician's medical examination profiles a person who has had no serious medical conditions other than "surgery done on leg because of polio" and "abnormalities" also created because of the polio- scoliosis and "paresis both legs." He is noted as "otherwise healthy" with a prognosis of "no deterioration." Presumably acting on information from Mr. Anvari himself, Dr. Fiala also noted that Mr. Anvari "will have surgery by Dr. Armstrong, (orthopedic) surgeon, Ottawa Civic."

Based upon this report, M. J. Ferrari, Director of Immigration Medical Services, requested that Mr. Anvari be seen by an orthopedic surgeon specifically requesting " A prognosis and whether surgery would improve his condition".

Dr. Cyril M. Hradecky, orthopedic surgeon, saw Mr. Anvari on 7 July, 1983 as a result of this request. Mr. Anvari again appears to have indicated that he was to have surgery "for curvature of his spine as well as surgery on an ankle and knee to stabilize these flail joints." Dr. Hradecky however, makes no comment upon whether such contemplated surgery will improve Mr. Anvari's condition; indeed, he notes that such comments would best be answered by Dr. Armstrong himself.

Dr. Armstrong testified at the hearing that, although orthopedic surgeons recommend surgery for persons with curvature of the spine in excess of 50 degrees, this surgery is purely elective as there is no concern that the curvature will cause trauma to the spinal cord. With regard to proposed surgery on Mr. Anvari's leg( s), Dr. Armstrong testified that temporary support for the left leg in the way of a brace would be adequate treatment for Mr. Anvari's weak leg( s).

Dr. Armstrong, however, was not called upon for this opinion by the Medical Officer who made his recommendation based on the first report and Dr. Hradecky's letter. Drs. P. T. Abear and D. A. Smith signed the medical notification to Mehran Anvari on 2 August, 1983 noting that he "suffers from a condition that will require extensive and expensive surgery, the nature of which is in short supply," and that, consequently he is "inadmissible" under the Immigration Act. Mr. Anvari no longer met the requirements of the RAN Programme.

At this point, an alternative recommendation could be made in order to order a Minister's Permit; this necessitated a further interview.

According to G. Benard, Acting Manager for the Canada Immigration Centre in Ottawa, this interview took place on February 15, 1984 between Jacqueline Haslam and Mr. Anvari.

Based upon her interview( s) with Mr. Anvari and her interpretation of his file, Ms. Haslam wrote the report which was sent to the Director General of the Ontario Region in Toronto, dated July 25, 1984. That report was sent over the signature of G. Benard and was eventually sent on to the Chief of the Case Review Directorate, the Operations Branch of Immigration in Hull, Quebec, with a concurring letter (albeit using incorrect foundation) signed on behalf of D. Conn, Director General of Immigration for the Ontario Region. Based upon the recommendations in these reports/ letters, Mr. Anvari received the letter dated 19 September, 1984 again from G. Benard, which officially and finally informed him that he was "inadmissible to Canada" as a landed immigrant and that his visitor's status having expired on 28 April, 1984 he should prepare to leave Canada.

He appealed under the Canadian Human Rights Act, claiming discrimination in the provision of a service customarily available to the general public because the Immigration officials had differentiated against him adversely when dealing with his application for landed immigrant status based upon a prohibited ground of discrimination, namely, his physical disability.

## ISSUES

1. Did the alleged discriminatory practice take place in Canada, the victim being lawfully present in Canada at the time of the act as is required under s. 32 (5) (a) of the Canadian Human Rights Act?

2. Were Immigration Officials involved in the processing of persons applying for landed status under the RAN Policy providing a service customarily available to the general public as is required under s. 5 of the Canadian Human Rights Act? i. e. In this instance, does the administration and application of the Immigration Act fall under the Canadian Human Rights Act?

3. If #2, is answered affirmatively, did those officers discriminate, without bona fide justification, against Mr. Anvari based upon his disability?

1. S. 32 (5)( a)

There is no evidence that would contradict Mr. Anvari's ability to bring his complaint under the Canadian Human Rights Act based upon the fact that the act occurred in Canada and, Mr. Anvari was lawfully in Canada at that time.

2. S. 5(b) Therefore, the first contentious issue must be whether there is jurisdiction to decide, under the Canadian Human Rights Act, if there has been a discriminatory practice in the provision of a service by the immigration officials in this instance - that service being one which is "customarily available to the general public."

Only if this service can be so defined may the Canadian Human Rights Act be the basis for a decision concerning the alleged discriminatory practice.

S. 5(b) of the Canadian Human Rights Act reads as follows: 5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public...

(b) to differentiate adversely in relation to any individual on a prohibited ground of discrimination.

According to S. 3(1) of the Canadian Human Rights Act, disability is one of the proscribed grounds of discrimination.

It was argued by Mr. Hendry, Counsel for the Human Rights Commission, that services rendered by public servants - in this case officials dealing with the administration of the Immigration Act - at public expense are services to the public and therefore fall squarely under S. 5 of the Canadian Human Rights Act.

Mr. Saunders, counsel for the Canada Employment and Immigration Commission, however, argued that, in this particular case, the service rendered - the administrative process towards being "landed" - was individualistic as it was based upon the RAN Programme, a "one-time" policy created by an Order-in-Council. He noted the need for Tribunals to examine each case on a case-by-case basis.

This Tribunal agrees that it is too simplistic to accept the argument that public servants serve the public and therefore fall within the ambit of the Canadian Human Rights Act.

Therefore, it is necessary to look first at the common definition of "service". Webster's New International Dictionary defines "service" as follows:

Performance of official duties for a - sovereign or state; official function... also, a form or particular duty of such work; as, jury service.

The Immigration Act, an Act of the Parliament of Canada, has general scope to provide a service to the public; under this Act and its Regulations, the officials involved in the processing of individuals towards "landed immigrant" status carry out an official duty as agents of the Crown. Thus, each official is providing a service to the public.

Notwithstanding that the officials were dealing with the RAN Programme, in this case, they were providing services in exactly the same manner - pursuant to the Regulations and established policies under the Immigration Act - as they would at any time and in any case of an application made for "landed immigrant" status.

The fact that the RAN Programme applicants, who were to use the services of the Immigration personnel, were a specific and special group does not negate their status as members of the general public. To do so would be to suggest that all persons who fall within the ambit of special groups do so with the loss of status as members of the community at large. This suggestion could be the basis for the flourishing of discriminatory practices.

Therefore, I accept the premise that there is jurisdiction > - 14 in the Tribunal to make a decision under the Canadian Human Rights Act based upon S. 5(b) of the Act.

3. Bona Fide Justification There is no question that Mr. Anvari was discriminated against because of his perceived medical disability - most particularly because of the scoliosis which had been caused by his childhood polio. There is a prima facie case of discrimination under s. 5(b) because Mr. Anvari's refusal for admission to Canada, as a landed immigrant under the RAN Programme, was directly caused by his disability.

This discrimination decision was made, based upon s. 19(1)(a) of the Immigration Act; presumably, that section of the Immigration Act outlines the basis for the bona fide justification for the adverse differentiation which it also creates.

The section's wording anticipates the need for the best possible evidence to differentiate adversely against a person because of a disability. The section demands the opinion of a medical officer "concurring in by at least one other medical officer."

The justification for the adverse differentiation, according to S. 19, is that the disabled applicant's "admission would cause or might reasonably be expected to cause excessive demands on health or social services." Evidence to substantiate this justification must be presented in the form of the various opinions of the medical officers, presumably based upon their expert and thorough evaluation of each individual case.

Section 14(g) of the Canadian Human Rights Act addresses the needs of society, as a whole, which may overcome discrimination practices by bona fide justification for such adverse differentiation.

Therefore, the Canadian Human Rights Act and the Immigration Act appear to be ad idem on this point. The only issue to be addressed is whether, in this case, there was sufficient evidence before the officials of the Immigration Commission to justify the decision made with regard to Mr. Anvari's disability. The Immigration Act is clear that the evidence necessary is that the disability would (I read this to refer "absolute-ness") cause or would reasonably be expected to cause excessive demands on health or social services.

I accept the need for evidence of a reasonable expectation to be the least possible evidence needed under both the Immigration Act and the Canadian Human Rights Act; in this case, the medical evidence before the Tribunal did not meet this test. In fact the statement of Dr. Armstrong that surgery for scoliosis is purely "selective surgery" is the position which I accept. From that point of view, then, it appears that the evidence from the medical officials of the Immigration Department-- whose investigation of this particular case was cursory' at best-- would not justify the discrimination which Mr. Anvari suffered because of his medical disability, either under s. 19 of the Immigration Act or under the Canadian Human Rights Act.

Remedy Given that the Tribunal finds that the complaint of Mr. Anvari is substantiated, s. 41(2)(b) of the Canadian Human Rights Act authorizes the making of the following order:

The Canada Employment and Immigration Commission shall process MEHRAN ANVARI to "landed immigrant" status forthwith.

In addition, Ms. Barnard argued that Mr. Anvari should receive his medical expenses incurred in the time period after he would have been a "landed immigrant" in Canada? I agree. Consequently, the following order:

Mr. Anvari shall receive a sum which represents his personal payment of medical expenses from 19 September, 1984 until the present, upon receipt from him of accounts substantiating those expenses.

As well, Mr. Anvari suffered the shock-- to use his own word- of having his application rejected when he felt he was a fine candidate-- one with more to offer, perhaps, than others he knew who were accepted during the RAN Programme. He has also lived for some time in a state of "limbo" where he could not advance himself educationally or in the work place.

Therefore, the Tribunal makes the following order: MEHRAN ANVARI is awarded the sum of \$3,000.00 as compensation for injury to his feelings and self- respect.

SIGNED in London, Ontario this 23rd day of November, 1988.

ELIZABETH ANNE GARLAND LEIGHTON