

Federal Court



Cour fédérale

Date: 20150708

Docket: T-1553-14

Citation: 2015 FC 835

Ottawa, July 8, 2015

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

STEVEN LOVE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] In this application for judicial review, the applicant, Steven Love, seeks to set aside the June 4, 2014 decision of the Canadian Human Rights Commission [the CHRC or the Commission] made under paragraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [the CHRA] in which the Commission determined that an inquiry by the Canadian Human Rights Tribunal [the Tribunal] into Mr. Love's complaint against Citizenship and Immigration Canada [CIC] was not warranted. In making the decision, the Commission issued a form letter that merely advised the parties of its determination. In such circumstances, the Report of the

Commission Investigator that was submitted to the Commission is deemed to constitute the Commission's reasons for the decision: *Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392 at para 37; *Herbert v Canada (Attorney General)*, 2008 FC 969, 169 ACWS (3d) 393 at para 26; *D'Angelo v Canada (Attorney General)*, 2014 FC 1160 at para 24.

[2] While Mr. Love raises several arguments in support of his request to have the decision of the CHRC set aside, I need only consider one of them, namely, his claim that his procedural fairness rights were not respected during the investigation process. I agree with Mr. Love that these rights were not respected and have accordingly determined that the Commission's decision must be set aside and the matter remitted for a fresh investigation and consideration by the Commission.

I. Preliminary Issue

[3] The respondent argues as a preliminary matter that Mr. Love's affidavit and the exhibits to it should be struck from the Applicant's Record as they were not before the Commission when it made its decision and thus are not properly before the Court in this judicial review application. The respondent has produced as its own Record and Supplementary Record the materials that were before the Commission and certain supplemental materials that were before the Commission Investigator, which the respondent concedes are relevant.

[4] Generally speaking, the record before this Court on judicial review is limited to the materials that were before the administrative decision-maker whose decision is being reviewed. Certain exceptions to this general rule have been recognised, namely, where the additional

material is relevant to a procedural fairness claim, where the material is useful to provide background information to the Court or where the material is required to establish the lack of evidence before the administrative decision-maker in respect of an impugned determination: *International Relief Fund for the Afflicted and Needy (Canada) v Canada (National Revenue)*, 2013 FCA 178 at paras 9-10; *Assn. of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22, 428 NR 297 at paras 19-20 and *Love v Canada (Privacy Commissioner)*, 2014 FC 643 [*Love v Privacy Commissioner*] at para 85.

[5] Many of the exhibits to Mr. Love's affidavit appear to have been before the Commission Investigator in this case. Indeed, her Investigative Report specifically refers to Exhibit "B", the Computer Assisted Information Processing System [CAIPS] notes in respect of the sponsorship application that gave rise to Mr. Love's human rights complaint, CIC's OP-2 Policy, extracts of which are appended as Exhibits "O" and "Q" to Mr. Love's affidavit, and the Commission's earlier section 40/41 Report that is annexed as Exhibit "I" to Mr. Love's affidavit.

[6] In my view, in a case such as this, where the CHRC's reasons are deemed to be contained in the Commission Investigator's Report, all the materials that were before the Investigator are properly part of the record before this Court on judicial review as this is the evidence considered in the reasons that are the subject of the judicial review application.

[7] In addition to the exhibits mentioned in paragraph 5 of these Reasons, Exhibits "C", "D", "E", "G", "J", "L", "P", "R", "S", and "X" to Mr. Love's affidavit may well have been before

the Commission Investigator or contain background information that is useful in assessing this application. I therefore find these exhibits to be admissible.

[8] The materials annexed as Exhibits “F”, “H”, “T”, “U”, and “V” of Mr. Love’s affidavit are relevant to his procedural fairness claim as these exhibits constitute evidence that could have been supplied by Mr. Love to the Commission had the Commission Investigator more clearly explained the process she was adopting. They also constitute background information and would accordingly be admissible for this reason as well.

[9] Thus, I find that Exhibits “B”, “C”, “D”, “E”, “F”, “G”, “H”, “I”, “J”, “L”, “O”, “P”, “Q”, “R”, “S”, “T”, “U”, “V” and “X” to Mr. Love’s affidavit are admissible as are the paragraphs in his affidavit that introduce these exhibits. The remaining paragraphs and corresponding exhibits do not fall into one of the exceptions noted above and do not appear to have been before the Commission Investigator in this file. They are therefore inadmissible and have not been considered by me.

II. Background

[10] Mr. Love is self-represented. He self-identifies as a homosexual and as a person who suffers from a disability due to hepatitis C, a chronic liver condition, which he says makes it impossible for him to work. At all material times, Mr. Love was in receipt of provincial disability benefits and some time prior to the events that gave rise to his human rights complaint received a substantial settlement by reason of his having contracted hepatitis C through a transfusion of tainted blood.

[11] Mr. Love claims that at the time of the events which led to his human rights complaint, he was in a conjugal relationship with a Filipino citizen, Mr. Ronie Lumayag, who resided in the Philippines. Mr. Lumayag and Mr. Love met in an online chat room in March 2008 and spent a total of 25 days together over three visits that Mr. Love made to the Philippines between January 2009 and January 2010.

[12] Mr. Love sought to sponsor Mr. Lumayag to immigrate to Canada as a permanent resident as a member of the family class (spousal sponsorship) in April 2010. Mr. Love's sponsorship application was approved on June 10, 2010 and he was notified that Mr. Lumayag's permanent resident visa application had been "found to meet minimum requirements for completeness under the Immigration Act". The application was then forwarded to the Canadian Embassy in the Philippines in Manila for further processing.

[13] In a letter dated July 20, 2010, the visa officer to whom the file had been assigned in Manila informed Mr. Lumayag that he was to attend an interview and to bring additional documents as proof of the relationship with his sponsor. Following the interview on October 21, 2010, Mr. Lumayag's application for a permanent resident visa was denied. In her CAIPS notes, the visa officer indicated that she was not satisfied that Mr. Love and Mr. Lumayag had "established and shared a genuine conjugal relationship which has been in existence for one year", for the following reasons:

- They had only met three times within a span of twelve months and their time together was brief;
- They never cohabitated;

- Mr. Lumayag admitted there was no physical intimacy between them;
- They had never lived together in a “married-like” state nor had they combined their income both economically and socially;
- There was no mutual interdependence;
- Mr. Lumayag had not demonstrated that he was knowledgeable about Mr. Love’s background;
- It appeared that Mr. Lumayag’s concern was to enter Canada but not to live on a permanent basis with Mr. Love; and
- The information provided during the interview “merely confirmed the information on file”.

[14] Mr. Love has filed a number of complaints regarding alleged deficiencies in CIC’s processing of Mr. Lumayag’s permanent resident visa application and its treatment of him.

[15] More specifically, he made several complaints to the Office of the Privacy Commissioner [OPC] claiming that CIC violated his privacy rights. He then made a complaint to the CHRC about the failure of OPC to investigate his complaints and claimed that the failure to investigate amounted to adverse differential treatment based on his sexual orientation and disability. The Commission decided not to deal with this complaint pursuant to paragraph 41(1)(d) of the CHRA on the grounds that the complaint against OPC was trivial, frivolous, vexatious or made in bad faith. Mr. Love then sought judicial review of the CHRC’s dismissal of his complaint. On July 2,

2014, Justice Russell dismissed the application for judicial review in *Love v Privacy Commissioner*.

[16] Mr. Love also appealed the visa officer's refusal of Mr. Lumayag's application for a permanent resident visa to the Immigration Appeal Division [IAD]. During the hearing before the IAD on May 23, 2013, Mr. Love disclosed that his relationship with Mr. Lumayag had ended in December 2011 and withdrew his appeal before the IAD as it appears that he had consulted counsel, who advised him that the IAD no longer had jurisdiction to hear his complaint.

[17] Finally, on July 18, 2012, Mr. Love filed a complaint with the CHRC alleging that CIC treated him discriminatorily in the provision of a service based on his sexual orientation (homosexual) and/or disability (chronic fatal liver condition). It is this last complaint that gives rise to the present judicial review application.

[18] In his human rights complaint, Mr. Love made the following claims:

- The decision to refuse the sponsorship application was discriminatory as CIC failed to accommodate him;
- During the interview in Manila, the visa officer asked Ronie Lumayag questions about Mr. Love's disability, which Mr. Love characterized as a "covert investigation" against him, that violated his human and *Charter*-protected rights;
- The refusal of Mr. Lumayag's application for a permanent resident visa amounted to accusing Mr. Love of fraud, which likewise violated Mr. Love's human rights;

- CIC further evinced a discriminatory attitude and did not respond to Mr. Love's letters about the questions posed to Mr. Lumayag by the visa officer during the interview and about the refusal of Mr. Lumayag's permanent resident visa application; and
- After CIC denied Mr. Lumayag's application, its treatment of Mr. Love's Access to Information and Privacy requests for information about the processing of both his and Mr. Lumayag's applications was inadequate and provides further evidence of discrimination.

[19] When the CHRC first examined Mr. Love's complaint, the officer to whom the file was first assigned prepared a report recommending holding the complaint in abeyance as at that time Mr. Love's appeal before the IAD was still pending and the IAD had jurisdiction to consider Mr. Love's human rights issues and to award Mr. Lumayag the visa he sought. However, before this recommendation could be put before the Commission, Mr. Love withdrew his appeal before the IAD and the issue of whether the investigation should be stayed pending the IAD appeal became moot. The file was therefore sent to a CHRC investigator, Lisa Falconi, for investigation.

[20] Ms. Falconi wrote to Mr. Love and CIC on July 12, 2013, indicating that she had been designated to investigate the complaint and stated that it was her responsibility "to gather the evidence in relation to the complainant's allegations". She also advised them that she would prepare a report to the Members of the Commission which would include a recommendation for the disposition of the complaint and that she could recommend that a referral be made to the

Tribunal “if the evidence supports the allegations made in the complaint”, or that the complaint be dismissed “if the allegations are not supported by the evidence”.

[21] In her letter to Mr. Love, Ms Falconi indicated that she had requested CIC’s position and that, upon receipt, she would forward it to Mr. Love for comment. In her letter to CIC, Ms.

Falconi wrote as follows:

The first step in the investigation process is for the respondent to provide its position in response to the allegations in the complaint form. Please also include relevant information you think is important to this investigation and wish to have considered. I would appreciate if you could explain the process for assessing sponsorship requests. I would appreciate receiving the names and contact information for potential witnesses as well as a brief description of the information you expect them to be able to provide. [...]

[22] CIC provided detailed responding submissions to Ms. Falconi on August 15, 2013, and in its submissions at several points noted that Mr. Love had provided no evidence in support of his allegations. CIC filed excerpts from certain of its manuals as evidence and provided names and contact information for witnesses.

[23] On September 6, 2013, Ms. Falconi wrote to Mr. Love and provided him with a summary of CIC’s submissions. She requested in her letter that Mr. Love provide her with the names of any witnesses Mr. Love “might want her to contact during her investigation” as well as his reply to CIC’s submissions and clarification as to the remedy he was seeking.

[24] Mr. Love replied to Ms. Falconi by letter dated October 1, 2013 and in his letter indicated he was confused by the process that Ms. Falconi was following. He wrote as follows:

Attached you will find my response to the submission made by Citizenship and Immigration Canada that you have requested.

As for the names of people you would like me to provide. I am a little confused as to the process here. Keep in mind the people I was communicating with are either overseas or located in Ottawa and all are employees of CIC. All those communications are contained in print format. So any investigation at this stage would be a paper file review. Can you please advise?

As for Mr. Lumayag who was the only witness to the events of October 21, 2010 I will be happy to provide a sworn affidavit should you have any questions for him. It should be noted that his English is limited and he is profoundly naïve as to the larger implications of the events that occurred at the visa office in Manila.

[25] Ms. Falconi did not respond to Mr. Love's inquiry and drafted her Report without further input from him. She then sent her Report to both parties, who were given the opportunity to provide submissions to the Commission on the Report. Both CIC and Mr. Love did so, and their submissions were cross-disclosed to each other, and each was provided the opportunity to reply to the other's submissions. Both parties filed replies.

[26] In his submissions and reply, Mr. Love mentioned that Mr. Lumayag claimed that the overseas visa officer in Manila was hostile to Mr. Lumayag during the interview she conducted on October 21, 2010 and also that Mr. Lumayag told the visa officer that he and Mr. Love had been sexually intimate with one another. In addition, Mr. Love claimed that the visa officer had before her evidence of financial interdependence between himself and Mr. Lumayag, but that he had been unable to obtain copies of this evidence from CIC. However, he failed to provide a statement or affidavit from Mr. Lumayag to corroborate these claims and likewise failed to

provide details of the evidence he alleged was before CIC regarding the financial interdependence between Mr. Lumayag and himself.

III. Was there a Denial of Procedural Fairness in the Circumstances?

[27] Before me, Mr. Love argued that the visa officer's application of the standard criteria for the existence of a conjugal relationship to him and Mr. Lumayag resulted in discrimination. He contends that it was impossible for him to cohabit with Mr. Lumayag and likewise impossible for him to visit for more than 30 days in a year as the requirements associated with continued receipt of his provincial disability benefits prevented him from being absent from Ontario for more than 30 days per year. Similarly, CIC had denied Mr. Lumayag a visitor's visa. These assertions were not clearly made to the Commission Investigator before she penned her Report. Likewise, she did not have evidence before her of what Mr. Lumayag claimed occurred during the interview with the visa officer.

[28] Had Ms. Falconi, the CIC Investigator, been aware of these facts, she might have reached a different conclusion regarding the lack of evidence in support of a *prima facie* case of discrimination as the requirements for cohabitation or a greater number of visits may have adversely impacted Mr. Love due to his disability. Further, Mr. Love's case before the Commission would have been strengthened had he filed an affidavit from Mr. Lumayag to establish that the visa officer was hostile towards Mr. Lumayag, that Mr. Lumayag in fact told the visa officer that he and Mr. Love had been sexually intimate with each other and that Mr. Love had been providing Mr. Lumayag with financial support.

[29] At least in part, Mr. Love failed to submit this evidence to the Commission because his inquiries as to what was expected of him in the process went unanswered. As a self-represented litigant, he was entitled, in my view, to a clear answer from Ms. Falconi as to the type of information he needed to provide to support his assertions. Contrary to what the respondent argues, the failure to answer Mr. Love's queries cannot be ignored simply because Ms. Falconi mentioned the need to provide evidence in her initial letters to Mr. Love or because Mr. Love did submit some evidence to her.

[30] Courts have often recognised the need to provide clear answers or directions to self-represented litigants in respect of the applicable procedures. For example, Justice Scott for the Federal Court of Appeal in *Lally v Telus Communications Inc*, 2014 FCA 214 stressed that Canadian Human Rights Tribunal members bear a responsibility to be alert to the needs of self-represented litigants and “to ensure that self-represented complainants understand the procedure and rules to be followed from the very commencement of a hearing” (at para 27). Similarly, in the immigration context, this Court has recognized that a failure by the Refugee Protection Division or a visa officer to explain to self-represented applicants the process to be followed constitutes a breach of procedural fairness: *Kerqeli v Canada (Minister of Citizenship and Immigration)*, 2015 FC 475, 253 ACWS (3d) 428 at paras 14-18; *Nemeth v Canada (Minister of Citizenship & Immigration)*, 2003 FCT 590 at para 10; *Turton v Canada (Minister of Citizenship & Immigration)*, 2011 FC 1244, 5 Imm LR (4th) 193 at para 36 and *Zhu v Canada (Minister of Citizenship and Immigration)*, 2013 FC 155, 427 FTR 239 at paras 33-37.

[31] Because the failure to answer Mr. Love's questions as to the process the Commission was following may well have impacted the outcome in this case, it follows that the Commission's decision must be set aside. In the circumstances I believe Mr. Love's complaint should be remitted for reinvestigation by another investigator (if one is available) and that the case should be resubmitted to the Commission for a fresh consideration of whether an inquiry by the Tribunal is warranted.

[32] Mr. Love has requested costs. Given that he has chosen to represent himself before the Court, these are minimal. I thus fix the costs to be paid by the respondent to Mr. Love in the all-inclusive amount of \$250.00.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. Paragraphs 2, 13, 15, 16 and 25 of the affidavit of Mr. Love and Exhibits "A", "K", "M", "N" and "W" to that affidavit are struck;
2. This application for judicial review is granted;
3. Mr. Love's complaint shall be remitted to the Commission for reinvestigation by another investigator (if one is available) and, upon completion of the investigation, shall be resubmitted to the Commission for a fresh consideration of whether an inquiry into Mr. Love's human rights complaint by the Tribunal is warranted; and
4. Mr. Love is entitled to costs from the respondent, which are fixed in the amount of \$250.00.

"Mary J.L. Gleason"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1553-14

STYLE OF CAUSE: STEVEN LOVE v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: APRIL 27, 2015 AND JUNE 29, 2015

JUDGMENT AND REASONS: GLEASON J.

DATED: JULY 8, 2015

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