Federal Court  Cour fédérale

Date: 20131106

Docket: T-666-12

Citation: 2013 FC 1132

Ottawa, Ontario, November 6, 2013

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

AMIR ATTARAN

Applicant

And

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of the Canadian Human Rights Commission (Commission) dated February 22, 2012 dismissing the Applicant's complaint, made pursuant to Section 40 of the *Canadian Human Rights Act*, RSC, 1985, c H-6 (CHRA), that Citizenship and Immigration Canada's (CIC) processing time for the sponsorship of permanent resident applications for parents or grandparents was discriminatory. This judicial review is brought pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

Background

[2] The Applicant is a Canadian citizen. On July 9, 2009, he filed an application with CIC to sponsor his parents, who are American citizens living in California, to immigrate to Canada. Unsatisfied with CIC's response time, on July 28, 2010, he filed a complaint with the Commission (CHRC Complaint).

[3] The CHRC Complaint made two principal allegations of systemic discrimination based on age and family status:

- CIC discriminates between sponsorship applications on the basis of age. Individuals seeking to enter Canada are required to pass a medical exam, however, this was prejudicial to the Applicant's parents because they could develop an age-related illness during the lengthy processing period and consequently become inadmissible for medical reasons. This is not the situation for other members of the family class who are younger or whose applications are processed more quickly;

- The time CIC takes to process sponsorship applications for parents and grandparents means that the Applicant must wait much longer to be reunited with his parents, his only blood relatives, than would individuals seeking to sponsor other relatives, who are their only blood relatives. This produces discrimination on the basis of family status.

[4] At the time of the Applicant's complaint, CIC aimed to process sponsorship applications for parents and grandparents within 37 months, as opposed to 42 days to process applications for spouses, dependent children and "other relatives" and on a daily basis for adopted children and orphans.

[5] On August 30, 2010, the Commission commenced its investigation into the Applicant's complaint. On November 5, 2010, CIC provided the investigator, Ms. Belanger, with a written response to the complaint which the Commission provided to the Applicant on November 12, 2010. The Applicant provided the investigator with his response to CIC's submissions on December 6, 2010. As Ms. Belanger was unable to continue the investigation, a new investigator, Ms. Murkami was assigned in July 2011. The Applicant provided additional written submissions to the investigator on February 7, 2011 and August 12, 2011.

[6] The Commission delivered a copy of the investigator's report to the parties on November 15, 2011which recommended that the Commission dismiss the complaint pursuant to subsection 44(3)(b)(i) of the CHRA, as, having regard to all of the circumstances, an inquiry was not warranted. The investigator considered two main issues: (1) the alleged differential treatment in the provision of services; and (2) the alleged systemic discrimination.

[7] As to the first issue, the investigator first considered whether CIC had engaged in differential and discriminatory treatment, and, if so, whether there was a reasonable explanation for its actions which was not a pretext for discrimination on a prohibited ground. The

investigator concluded that CIC did appear to be treating the Applicant and others who sponsor parents and grandparents for permanent residency in Canada differently based on family status.

[8] As regards to medical exams, the investigator found that parents and grandparents were required to complete the medical exam later in the sponsorship application process than were other members of the family class. To obtain a permanent resident visa, all applicants are required to have a medical certificate that is valid at the time of landing, medical certificates are only valid for 12 months. Because the sponsorship processing time for parents and grandparents took longer than for other members of the family class, and longer than 12 months, there was no point in having them complete their medicals at the beginning of that process.

[9] As to sponsorship processing times, the investigator found that CIC was treating the Applicant, and others who sponsored parents and grandparents, differently based on family status. However, the investigator accepted CIC's explanation that the Government of Canada sets targets for how many immigrants, and from what groups, it will permit entrance into Canada each year. Further, that the "Immigration Levels Plan", approved by Cabinet, guides CIC's decisions pertaining to coordinating and processing of annual applications. CIC aligns its operations, to the extent possible, with projected admissions, and by extension, the budget allocated to it annually to deliver the immigration program. Given this, and the volume of family class applications, it was necessary for CIC to make a policy decision to prioritize applications within the different subcategories of the family class.

[10] The investigation report found that CIC did not discriminate against the Applicant based on age because age was the personal characteristic of his parents and not of himself.

[11] The investigator also dismissed the Applicant's alleged systemic discrimination complaint as it found that, while it may take longer, CIC's practices did not deprive or tend to deprive the sponsor's parents or grandparents from access to permanent resident visas. Further, the evidence indicated that CIC provided a reasonable explanation for the manner in which it prioritized the processing of family class applications.

[12] The Applicant responded to the investigation report on December 11, 2011 asserting that the investigator had erred by: (1) incorrectly characterizing the service at issue; (2) failing to investigate and report on the prioritization of "other relatives" in the family class; (3) accepting that the Respondent's defence was reasonable without substantiating evidence; (4) failing to infer systemic discrimination based on the Respondent's uncontested admissions; (5) failing to consider discrimination on the basis of age; and (6) violating procedural fairness.

[13] CIC submitted its response on December 12, 2011, reiterating that Parliament, the Minister of CIC and the Department establish processes and procedures that best give effect to the balance required by the Government of Canada to meet the objectives set out in subsection 3(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the IRPA) and the *Immigration and Refugee Protection Regulations* (SOR/2002-227) (the IRPA Regulations). CIC's submissions also noted a plan announced by the Minister on November 4, 2011 to address the backlog of permanent resident applications of parent and grandparents.

[14] The Commission "cross-disclosed" the submissions to the parties on December 21, 2011. The Applicant provided the Commission with his response to the cross-disclosure as required on January 9, 2012. The Commission provided CIC with an extension to provide its response which it did on January 20, 2012, three days after the Commission had released the Applicant's submission to CIC. The Applicant provided the Commission with a final set of written submissions setting out his procedural concerns on January 23, 2012.

Commission's Decision

[15] On February 22, 2012, the Commission, accepted the investigator's report and set out its reasons for dismissing the Applicant's complaint (Decision). That Decision is the subject of the present judicial review.

[16] These were summarized by the Commission in its covering letter dated March 2, 2012 as follows:

- it did not appear that CIC had treated the Applicant in an adverse differential manner based on age;

- CIC had provided a reasonable explanation for its processing of the sponsorship applications of children and spouses more quickly than those for parents or grandparents;

- CIC's practices did not deprive, or tend to deprive, an individual or class of individuals of access to permanent resident visas for parents and grandparents; and

- having regard to all of the circumstances of the complaint, an inquiry by a Tribunal was not warranted.

[17] The Commission found that at the core of the Applicant's discrimination complaint was an allegation that CIC processes applications to sponsor parents or grandparents as permanent residents more slowly than it does applications to sponsor other categories of immigrants such as children or spouses. The Commission found that CIC's practice adversely differentiates against sponsorship applicants such as the Applicant on the basis of family status and age. However, it accepted CIC's explanation that the source of the differential treatment resided in the Minister's exercise of discretion in managing the flow of immigration to Canada by establishing levels for each category of immigrant as being reasonable and non-pretextual.

[18] In response to the Applicant's submission that the investigator incorrectly characterized his discrimination complaint for the provision of a "sponsorship service" as the "processing of permanent residency visa applicants for parents and grandparents of Canadian sponsors", the Commission noted that sponsorship applications or services are not stand-alone services. The sponsorship and permanent resident applications are both steps in processing permanent residency visa applicants.

[19] The Commission acknowledged that the investigator did not address the Applicant's allegation that applications to sponsor "other relatives", such as aunts and uncles, receive priority. However, it found that, as submitted by CIC, "other relatives" may only form part of the family class in certain limited circumstances which did not apply to the Applicant's situation. Furthermore, the number of such applications vis-à-vis the total number of family class applications was so small that a comparison was of limited value. And, in any event, any prioritization, whether within the family class or resulting from age, arises from ministerial discretion.

[20] Similarly, the Commission accepted CIC's explanation in response to the allegation of systemic discrimination resulting from the combined effect of prioritization within the family class and the requirement that all applicants have a medical examination completed in the twelve months prior to their landing. Specifically, this was a result of ministerial discretion in managing the flow of immigrants into Canada by setting levels for the various categories of immigrants. The Commission noted that the Applicant did not directly challenge the Minister's authority to exercise such discretion.

[21] In response to the Applicant's procedural fairness concerns, the Commission found that all administrative irregularities had been corrected and that the Applicant had been afforded every opportunity to put forward his case. Procedural fairness did not require that the Applicant be provided with copies of CIC's documents. Rather that he be made aware of the substance of the evidence and arguments. Throughout the investigation the Applicant had been made aware of CIC's position and was fully able to address it.

[22] Finally, the Commission found that CIC's announcement on November 4, 2011, of its "Action Plan for Faster Family Reunification," squarely addressed the issues raised in the complaint.

Legislative Background

[23] Because this application touches on the IRPA, the IRPA Regulations, the CHRA and their interaction, it is useful at the outset to briefly set out the relevant legislative provisions.

The IRPA

[24] Section 94 of the IRPA requires the Minister to table a report on the operation of the IRPA in the preceding calendar year. The report includes a description of instructions given under section 87.3 and other activities and initiatives taken concerning the selection of foreign nationals, the number of foreign nationals who became permanent residents and the number projected to become permanent residents in the following year.

[25] Section 87.3(2) provides that the processing of applications is to be "conducted in a manner that, in the opinion of the Minister, will best support the attainment of the immigration goals established by the Government of Canada." For this purpose, the Minister may give instructions with respect to processing applications, including:

(a) establishing categories of applications or requests to which the instructions apply;

(b) establishing an order, by category or otherwise, for the processing of applications or requests;

(c) setting the number of applications or requests, by category or otherwise, to be processed in any year; and

(d) providing for the disposition of applications and requests, including those made subsequent to the first application or request.

[26] Subsection 87.3(7) states that nothing in that section in any way limits the power of the Minister to otherwise determine the most efficient means in which to administer the IRPA.

[27] Section 12 creates three classes of immigrants who may seek to become permanent residents in Canada: the economic class, the refugee class, and the family class. A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident. Subsection 13(1) permits Canadian citizens or permanent residents, subject to the regulations, to sponsor a foreign national who is a member of the family class. Section 16(2)(b) requires foreign nationals to submit to a medical examination.

[28] Section 14 permits the making of regulations governing the processing of permanent residency applications:

14. (1) The regulations may provide for any matter relating	**14.** (1) Les règlements régissent l'application de la

to the application of this Division, and may define, for the purposes of this Act, the terms used in this Division.

présente section et définissent, pour l'application de la présente loi, les termes qui y sont employés.

(2) The regulations may prescribe, and govern any matter relating to, classes of permanent residents or foreign nationals, including the classes referred to in section 12, and may include provisions respecting

(2) Ils établissent et régissent les catégories de résidents permanents ou d'étrangers, dont celles visées à l'article 12, et portent notamment sur :

(a) selection criteria, the weight, if any, to be given to all or some of those criteria, the procedures to be followed in evaluating all or some of those criteria and the circumstances in which an officer may substitute for those criteria their evaluation of the likelihood of a foreign national's ability to become economically established in Canada;

a) les critères applicables aux diverses catégories, et les méthodes ou, le cas échéant, les grilles d'appréciation et de pondération de tout ou partie de ces critères, ainsi que les cas où l'agent peut substituer aux critères son appréciation de la capacité de l'étranger à réussir son établissement économique au Canada;

(b) applications for visas and other documents and their issuance or refusal, with respect to foreign nationals and their family members;

b) la demande, la délivrance et le refus de délivrance de visas et autres documents pour les étrangers et les membres de leur famille;

(c) the number of applications that may be processed or approved in a year, the number of visas and other documents that may be issued in a year, and the measures to be taken when that number is exceeded;

c) le nombre de demandes à traiter et dont il peut être disposé et celui de visas ou autres documents à accorder par an, ainsi que les mesures à prendre en cas de dépassement;

(d) conditions that may or must be imposed, varied or cancelled, individually or by class, on permanent residents

d) les conditions qui peuvent ou doivent être, quant aux résidents permanents et aux étrangers, imposées, modifiées

and foreign nationals;	ou levées, individuellement ou par catégorie;
(e) sponsorships, undertakings, and penalties for failure to comply with undertakings;	*e)* le parrainage, les engagements ainsi que la sanction de leur inobservation;
(f) deposits or guarantees of the performance of obligations under this Act that are to be given by any person to the Minister; and	*f)* les garanties à remettre au ministre pour le respect des obligations découlant de la présente loi;
(g) any matter for which a recommendation to the Minister or a decision may or must be made by a designated person, institution or organization with respect to a foreign national or sponsor.	*g)* les affaires sur lesquelles les personnes ou organismes désignés devront ou pourront statuer ou faire des recommandations au ministre sur les étrangers ou les répondants.

The IRPA Regulations

[29] Subsection 30(1) of the IRPA Regulations addresses the requirement for a medical certificate based on the most recent examination within the previous 12 months for foreign nationals applying for permanent residency.

[30] Subsection 70(1) states that an officer shall issue a permanent resident visa to a foreign national if the listed requirements in that subsection are met. It also establishes the three classes for permanent residents being the family class, economic class and Convention refugees.

[31] Section 72 addresses how foreign nationals become permanent residents in Canada. One of those requirements is to meet the selection criteria and requirements for the class in which they applied.

[32] Sections 116 and 117 define and set out the family class as follows:

116. For the purposes of subsection 12(1) of the Act, the family class is hereby prescribed as a class of persons who may become permanent residents on the basis of the requirements of this Division.	**116.** Pour l'application du paragraphe 12(1) de la Loi, la catégorie du regroupement familial est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents sur le fondement des exigences prévues à la présente section.
117. (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	**117.** (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :
(a) the sponsor's spouse, common-law partner or conjugal partner;	*a*) son époux, conjoint de fait ou partenaire conjugal;
(b) a dependent child of the sponsor;	*b*) ses enfants à charge;
(c) the sponsor's mother or father;	*c*) ses parents;
(d) the mother or father of the sponsor's mother or father;	*d*) les parents de l'un ou l'autre de ses parents;
(e) [Repealed, SOR/2005-61, s. 3]	*e*) [Abrogé, DORS/2005-61, art. 3]
(f) a person whose parents are deceased, who is under 18 years of age, who is not a spouse or common-law partner	*f*) s'ils sont âgés de moins de dix-huit ans, si leurs parents sont décédés et s'ils n'ont pas d'époux ni de conjoint de fait :

and who is

(i) a child of the sponsor's mother or father,

(i) les enfants de l'un ou l'autre des parents du répondant,

(ii) a child of a child of the sponsor's mother or father, or

(ii) les enfants des enfants de l'un ou l'autre de ses parents,

(iii) a child of the sponsor's child;

(iii) les enfants de ses enfants;

(*g*) a person under 18 years of age whom the sponsor intends to adopt in Canada if . . .

g) la personne âgée de moins de dix-huit ans que le répondant veut adopter au Canada, si les conditions suivantes sont réunies : . . .

(*h*) a relative of the sponsor, regardless of age, if the sponsor does not have a spouse, a common-law partner, a conjugal partner, a child, a mother or father, a relative who is a child of that mother or father, a relative who is a child of a child of that mother or father, a mother or father of that mother or father or a relative who is a child of the mother or father of that mother or father

h) tout autre membre de sa parenté, sans égard à son âge, à défaut d'époux, de conjoint de fait, de partenaire conjugal, d'enfant, de parents, de membre de sa famille qui est l'enfant de l'un ou l'autre de ses parents, de membre de sa famille qui est l'enfant d'un enfant de l'un ou l'autre de ses parents, de parents de l'un ou l'autre de ses parents ou de membre de sa famille qui est l'enfant de l'un ou l'autre des parents de l'un ou l'autre de ses parents, qui est :

(i) who is a Canadian citizen, Indian or permanent resident, or

(i) soit un citoyen canadien, un Indien ou un résident permanent,

(ii) whose application to enter and remain in Canada as a permanent resident the sponsor may otherwise sponsor

(ii) soit une personne susceptible de voir sa demande d'entrée et de séjour au Canada à titre de résident permanent par

ailleurs parrainée par le répondant.

The CHRA

[33] Subsection 3(1) of the CHRA sets out prohibited grounds of discrimination, which include age and family status. Section 5 states that it is a discriminatory practice to deny or deny access to the provision of goods, services, facilities or accommodations customarily available to the general public to any individual or to differentiate adversely in relation to any individual on a prohibited ground of discrimination.

[34] It is not a discriminatory practice if there is a *bona fide* justification for that denial or differentiation (subsection 15(1)(g)). For any such practice to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs considering health, safety and cost (subsection 15(2)).

[35] Any person who believes another party has engaged in a discriminatory practice may file a complaint with the Commission (section 40). Once a discrimination complaint is filed, the Commission may designate an investigator to investigate the complaint (section 43). The investigator is required to submit a report of its findings to the Commission (subsection 44(1)). Upon receipt of that report, Commission has the discretion to dismiss a complaint if it is satisfied that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted (subsection 44(3)(b)(i)). That is what occurred in this case.

Issues

[36] The Applicant submits that the issues are as follows:

i) Did the Commission err in not investigating that sponsors of parents have their applications processed more slowly than sponsors of "other relatives" of similarly advanced age?

ii) Did the Commission err in accepting the bald assertion that the discrimination is unavoidable because of scarce resources?

iii) Did the Commission err in reasoning that ministerial discretion exercised in the control of immigration trumps the CHRA?

iv) Does the Commission's withholding of submissions breach procedural fairness?

[37] The Respondent submits that the issues are:

i) Is the Application moot?

ii) If not, then:

(a) Was the Decision reasonable?

(b) Was the Decision procedurally fair?

[38] In my view, the issues should be reframed as follows

i) Is the Application moot?

ii) Did the Commission exceed its jurisdiction?

iii) Was the Decision, including the investigation, procedurally fair?

iv) Was the Decision reasonable?

Standard of Review

[39] Where previous jurisprudence has satisfactorily determined the appropriate standard of review applicable to a particular issue, that standard may be adopted by a subsequent reviewing

court (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paras 57, 62 [*Dunsmuir*]). The standard of review on grounds challenging the Commission's lack of procedural fairness and exercise of jurisdiction is correctness (*Ayangma v Canada (Attorney General)*, 2012 FCA 213 at para 56; *Dunsmuir*, above, at para 59; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 53 [*Sketchley*]). Therefore, the second and third issues are to be reviewed on a correctness standard including the Applicant's submission that the Commission went beyond its screening role which is a question of jurisdiction.

[40] The standard of review applied to the fact-finding and discretion of the Commission to dismiss a complaint is reasonableness (*Tahmourpour v Canada (Solicitor General*), 2005 FCA 113 at para 6 [*Tahmourpour*]; *Wu v Royal Bank of Canada*, 2010 FC 307 at para 20). The Applicant's submission that the Commission exceeded its jurisdiction by dismissing his complaint, on the basis of ministerial discretion, is not a question of jurisdiction. Rather, it involves the Commission's discretion to refer a complaint to the Tribunal or to dismiss it. This is a question of fact and law to be reviewed on the reasonableness standard (*Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corporation*, [1979] 2 SCR 227 (SCC) at 233; *Big River First Nation v Dodwell*, 2012 FC 766 at para 36 [*Big River*]; *Alliance Pipeline Ltd v Smith*, 2011 SCC 7, [2011] 1 SCR 160 at para 36; *Dunsmuir*, above, at para 51).

Argument and Analysis

i) ***Is the Application moot?***

[41] As a preliminary issue, the Respondent submits that this application is moot as there is no longer a live controversy between the parties. That is because on November 4, 2011, subsequent

to the Applicant filing his complaint on August 11, 2010, the Government of Canada announced its intention to significantly change the way it processes applications for sponsored parents and grandparents which includes increasing by 60% the number of sponsored parents and grandparents it will admit in 2012; introducing a parent and grandparent super visa that would allow sponsored applicants to remain in Canada for 24 months at a time without renewing their visa; consulting with Canadians on how to redesign the parents and grandparents program; and, a pause of up to 24 months on the acceptance of new parent and grandparent sponsorship applications. In addition, the Applicant's sponsorship application progressed to the second phase on March 30, 2012, meaning that his sponsorship application had been processed and his parents had been invited to submit their applications for permanent resident visas.

[42] The Respondent submits that the relief sought by the Applicant would amount to an order requiring the CHRC to investigate a practice that no longer exists. Further, that the processing delay effecting the Applicant personally has now lapsed.

[43] When appearing before me, the Applicant submitted that other sponsors of parents and grandparents are still awaiting the processing of their applications. Accordingly, differences in processing times remains a live issue for them. Nor is there evidence to show that the processing times have changed as a result of the November 4, 2011 policy changes.

Analysis

[44] In *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, the Supreme Court of Canada stated that the doctrine of mootness is an aspect of a general policy or practice that a

court may decline to decide a case which raises merely a hypothetical or abstract question. "The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline the case." If, subsequent to the commencement of the proceeding, "events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot."

[45] The Court outlined a two-step approach to determine whether a case is moot. First, it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, then it is necessary to decide if the court should, regardless, exercise its discretion to hear the case. The Court considered a case to be moot if it failed to meet the live controversy test. The Court also set out the factors to be considered in determining whether to exercise the discretion to hear a case in any event.

[46] In this matter, the initial complaint of the Applicant was that the difference in CIC's sponsorship processing times discriminated against his sponsorship of his parents based on age and family status. In my view, because his sponsorship application has now been processed, as between the Applicant personally and CIC, there is no longer a live controversy.

[47] However, the Applicant also submitted in his complaint that this was systemic discrimination. In that regard, while the Government of Canada subsequently made changes to

the manner in which applications for sponsored parents and grandparents are processed, the Respondent has not pointed to any evidence which would indicate that the processing times are significantly changed and that, in turn, these changes significantly affected the difference in processing times as between the various subcategories of relatives within the family class. Accordingly, the substance of the initial systemic discrimination complaint remains a live issue and the application is not moot.

ii) ***Did the Commission exceed its jurisdiction?***

Applicant's Position

[48] The Applicant submits that the Commission made a jurisdictional error by going beyond its screening role and deciding that "the exercise of discretion by the Minister of CIC in managing the flow of immigration to Canada" constituted a reasonable and non-pretextual explanation for the discrimination complaint. According to the Applicant, the Commission acted contrary to *Bell v Canada (Canadian Human Rights Commission)*, [1996] 3 SCR 854 at para 53, *sub nom Cooper v Canada (Canadian Human Rights Commission)* [*Cooper*], which states that adjudicating a question of law is outside the Commission's jurisdiction.

Respondent's Position

[49] The Respondent submits that when the Commission dismissed the Applicant's complaint, it was not determining a question of law. Rather, it made an administrative decision that falls squarely within its jurisdiction pursuant to section 44 of the CHRA. Dismissing a complaint on the grounds that no further inquiry is warranted does not amount to determining a question of law as was intended in *Cooper*, above. That case stands principally for the proposition that an

administrative tribunal such as the Commission does not have the jurisdiction to determine general questions of law, such as the constitutionality of its own enabling statute.

Analysis

[50] In my view, considering the Decision in whole and the role of the Commission as set out in the CHRA, the Applicant's jurisdictional arguments cannot succeed.

[51] The jurisprudence is clear that when deciding whether a complaint should proceed to a Tribunal, the Commission is to conduct only a screening analysis. It is not the function of the Commission to determine if the complaint is made out. Rather, its role is to decide if, under the provisions of the CHRA, an inquiry is warranted having regard to all of the facts. The central component of this role is assessing the sufficiency of the evidence before it (*Cooper*, above, at para 53; *Herbert v Canada (Attorney General)*, 2008 FC 969 at para 16 [*Herbert*]; *Syndicat des employés de production du Québec et de l'Acadie v Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879 at p 899 [*SEPQA*]). Put otherwise, "The Commission's role is very modest: it is not to determine whether the complaint has merit, but, rather, whether an inquiry is warranted having regard to all of the facts" (*Coupal v Canada (Attorney General)*, [2006] FCJ No 325 (TD) (QL) at para 12 [*Coupal*]).

[52] However, the Courts have also repeatedly recognized that in performing its screening role, the Commission has a very broad discretion to decide, having regard to all of the circumstances, whether an inquiry is warranted or to dismiss a complaint under section 43 of the CHRA (*Herbert*, above, at para 18; *Tahmourpour*, at para 6; *Big River First Nation*, above, at

para 82; *Slattery v Canada (Human Rights Commission)*, [1994] FCJ No 181 (TD)(QL), aff'd [1996] FCJ No 385, (CA) (QL) [*Slattery*]).

[53] In this case, having reviewed the allegations and the evidence, the investigator concluded that it did not appear that the complaint warranted further inquiry. Therefore, it recommended, pursuant subsection 44(3)(b)(i) of the CHRA, that the Commission dismiss the complaint. The Commission adopted the investigator's recommendations and also provided its own reasons in the Decision.

[54] The Commission did not do more than screen the complaint and determine that it should be dismissed. The investigation had to consider the sufficiency of the evidence including whether CIC had a *bona fide* justification for the longer processing times for sponsorships of parents and grandparents. The investigation dealt with ministerial discretion because it informed the issue of *bona fide* justification i.e. whether it offered a reasonable explanation for the longer processing times that was not a pre-text for a prohibited ground of discrimination. The investigator recommended dismissing the complaint pursuant to section 43(3)(b)(i), in part, because CIC provided such an explanation.

[55] I do not think that *Cooper*, above, assists the Applicant with its argument that, by accepting CIC's explanation for the differential treatment, being ministerial discretion, the Commission made a decision of law and thereby exceeded its jurisdiction. In *Cooper*, the issue was whether the CHRC or a tribunal appointed by it to investigate a complaint had the power to determine the constitutionality of a provision of their enabling statute, the CHRA. The Supreme

Court found that the Commission has the power to interpret and apply its own enabling statute, but does not have jurisdiction to address general questions of law. The distinction between the two is illustrated by its finding that "The power to refuse to accept a complaint, or to turn down an application, or to refuse to do one of the countless duties that administrative bodies are charged with, does not amount to a power to determine questions of law…" (*Cooper*, above, at para 55).

[56] At para 49, the Court also succinctly described the scheme of the CHRA complaint process:

> [49] …On receiving a complaint the Commission appoints an investigator to investigate and prepare a report of its findings for the Commission (ss.43 and 44(1)). On receiving the investigator's report, the Commission may, after inviting comments on the report by the parties involved, take steps to appoint a tribunal to inquire into the complaint if having regard to all of the circumstances of the complaint it believes an inquiry is warranted (ss. 44(3)(a)). Alternatively the Commission can dismiss the complaint…."

Based on *Cooper*, and sections 43 and 44 of the CHRA, it is clear that the Commission has the jurisdiction to dismiss a complaint if it determines, on the facts, that further inquiry is not warranted and that such a determination is not a question of law.

[57] The Commission adopted the recommendations, including CIC's explanation of the differential treatment. Having regard to all of the circumstances, it dismissed the complaint finding that an inquiry by a tribunal was not warranted. There is no suggestion in the reasons that the Commission weighed the evidence to reach a conclusion on the merits of the complaint or that its determination went beyond the question of whether or not there was a reasonable basis,

on the evidence, for proceeding to the next stage at the tribunal (*SEPQA*, above at p 899-900; *Mercier v Canada (Human Rights Commission)*, [1994] FCJ No 361 (CA) (QL) at para 13 [*Mercier*]). In short, it did not make a final determination about the complaint's ultimate success or failure and it did not adjudicate the claim.

[58] The Decision was an administrative decision that falls squarely within the Commission's jurisdiction. The nub of the Applicant's concerns are, in my view, more closely connected to the reasonableness of the Decision in accepting the CIC explanation of ministerial discretion, rather than the matters of jurisdiction that it has raised.

iii) *Was the Decision, including the investigation, procedurally fair?*

[59] The Applicant submits that the Commission's investigation was flawed for two principal reasons: the investigator made errors in the way it handled document disclosure both before and after the investigation report; and, the investigation was not thorough and neutral. The Respondent submits that the Decision was procedurally fair as it provided adequate disclosure and was based on a thorough investigation.

Disclosure

Applicant's Position

[60] The Applicant submits that the Commission withheld some of CIC's written submissions which deprived the Applicant of his right of reply. At the pre-investigation report stage the documents that were not disclosed were a March 3, 2011, modified version of CIC's

November 5, 2010 original response to the complaint, and, an October 21, 2011, letter from the CIC to the Commission responding to certain questions posed by the investigator.

[61] The Applicant submits that disclosure of actual submissions is mandatory when they contain facts that differ from the facts set out in the investigation report which the adverse party would have been entitled to try to rebut had it known about them at the investigation stage (*Mercier*, above, at para 18). Further, that this is equally applicable to the pre-investigation report stage and that the Commission's operating procedures indicate that its disclosure obligation is ongoing.

[62] The Applicant also submits that at the post-investigation report stage, CIC had a "sneak peak" of his cross-disclosure submissions which it received from the Commission after being provided with an extension to file its own cross-disclosure response. CIC filed its submissions three days after receiving the Applicant's submissions and used this procedural advantage by tailoring its reply to include new evidence in the form of a statistical table showing the number of sponsored "other relatives" as being small compared to other groups within the family class. The lack of disclosure of this table deprived the Applicant of the ability to respond. The Commission clearly relied on this new evidence because it stated in its Decision that the number of applications for other relatives as compared to the whole of the family class applications and to the number of parent and grandparent applications was so small that a comparison was of limited value.

[63] The Applicant also submits that the Court should revisit the Commission's disclosure practices and provide the Commission with guidance.

Respondent's Position

[64] The Respondent submits that procedural fairness does not require the Commission to "systematically disclose" every document to a complainant (*Mercier*, above, at para 18). Disclosure will be found to be adequate when the Commission enables a complainant to be aware of the opposite sides' position. In this case, the Applicant was not deprived of his ability to respond as there was no issue in either of the two questioned pre-investigation report documents that was not fully disclosed in the record available to the Applicant when final submissions were being made to the Commission. Further, the Applicant has not explained how he was impaired in his ability to make his case by not receiving either document.

[65] With regard to the pre-investigation report disclosure, the Respondent submits that CIC's March 3, 2011 modified response contained only a slight variation from its original November 5, 2010 response that was previously disclosed to the Applicant. The modification concerns only two paragraphs that differ and these deal with certain technicalities of the permanent resident application review process and are incidental to the thrust of the Applicant's complaint. The October 21, 2011 letter from CIC to the Commission responding to questions posed by the investigator dealt largely, if not entirely, with an issue raised squarely with the Applicant from the outset of the investigation, i.e. the discretion of the Minister to prioritize among different categories within the family class.

[66] The Respondent submits that the Applicant's allegation that CIC gained an unfair advantage by way of a "sneak peak" of his cross-disclosure is unsupported. It is evident on its face that CIC's cross-disclosure submission is not a response to the Applicant's submission but is limited to commenting on the Applicant's response to the investigator's report.

[67] Regarding the new evidence, the statistical table data responds directly to an allegation raised by the Applicant in his response to the investigation report submission. The data confirms CIC's submissions in its December 11, 2011 response to the investigation report, being, that very few applications within the "other relatives" category are actually received by CIC. Therefore, this early cross-disclosure of the Applicant's submission was not a breach of procedural fairness in the circumstances of this matter.

Analysis

[68] The overall principle of disclosure applicable here is that procedural fairness requires that each of the parties have a fair opportunity to know and to meet the whole of the contrary case. This does not require that the Commission systematically disclose to a party all of the documents it receives from the other party, but it does require that it inform that party of the substance of the evidence gathered by the investigator so that it may reply to that evidence (*Canada (Attorney General) v Cherrier*, 2005 FC 505 at para 23 [*Cherrier*]; *Mercier*, above at para 18).

[69] Generally speaking, the Commission is not required to disclose the actual submissions of the parties. Rather, the submissions are summarized within the investigation report to which the parties have a right of response. As the Applicant notes, a potential exception to this is when the

comments from one party to the investigation report contain facts that differ from those set out in the report which the adverse party would have been entitled to try to rebut had it known about them at the investigation stage (*Mercier*, above, at para 18).

[70] As noted above, the two documents at issue in the pre-investigation report stage are the modified version of CIC's original response to the complaint and a letter from CIC to the Commission responding to certain questions posed by the investigator.

[71] Having compared the content of both the November 5, 2010 original submission of CIC and its modified submission of March 3, 2011, I am of the view that the modified version contains no facts that differ from the facts set out in the investigation report nor was the Applicant deprived of access to the substance of the evidence gathered or the opportunity to rebut that evidence.

[72] The modified response makes only two changes of note. The first is the addition of a paragraph which states that it is responding to the Applicant's submission that the applications of brothers and sisters are processed within 42 days and clarifies that this expedited processing only applies to brothers and sisters who have become orphaned, are under 18 years of age and are not a spouse or a common law partner. In other circumstances, brothers and sisters who are qualified as dependant children may be added to an application of the parent in which case the processing time would be the same as that of the parent. This explanation, in essence, describes subsection 117(1)(f) of the IRPA Regulations.

[73] In its original November 5, 2010 submission, CIC had explained that priority is given to adopted children or those to be adopted in Canada; the nuclear family or spouses, partners and dependant children are the next priority; followed by other members of the family class, such as brothers or sisters who are orphaned, under 18 years of age and not a spouse of common-law partner. The added paragraph contained no new facts pertaining to this point and is not material to the context of the core complaint. It simply clarifies the priority afforded to brothers and sisters in specific circumstances.

[74] Further, the investigation report subsequently confirmed that, as to sponsorship processing times, CIC did treat the Applicant differently based on family status, but accepted CIC's explanation for this including that it was necessary to make a policy decision to prioritize applications within the subcategories of the family class. This was the crux of the matter and the Applicant had ample opportunity, if so desired, to rebut any aspect of the clarification of prioritizing "brothers and sisters". In that regard, it should be noted that, in fact, he submitted three responses subsequent to receiving the CIC's November 5, 2010 submissions (December 6, 2010, February 7 and August 12, 2011).

[75] The second change to CIC's modified response was the addition of a new paragraph that simply restates, as otherwise set out in both versions of the CIC's submissions, its position that selecting new immigrants involves the federal, provincial and territorial governments as well as employers and educational institutions. CIC must therefore balance its mandate while ensuring alignment with the federal governments priorities for Canada. This paragraph adds no new facts and is, in essence, a restatement of CIC's position as previously expressed in the November 5,

2010 submission which was disclosed to the Applicant and to which he was afforded, and took, the opportunity to respond.

[76] As to the October 21, 2011, letter from CIC to the Commission at the pre-investigation report stage, this answered three questions posed by the investigator which concerned: whether CIC can accept more immigrants from one category or class at the expense of others; CIC's justification for prioritizing applications within the family class; and, seeking statistical information comparing targets and actual numbers by class or category. All of the information received in the October 21, 2011 letter was summarized in the investigation report which was disclosed to the Applicant and who, in turn, submitted responses in reply. The Applicant was therefore not deprived of procedural fairness merely by the non-disclosure of the actual letter.

[77] The information at issue in this case is clearly distinguishable from the situation in *Mercier*, above. There, the new submissions attacked the findings and conclusions of the investigator's report as well as the complainant's credibility on the basis of some information not included in the report or disclosed to the applicant, thereby denying her of the opportunity to know the case to be met. This is unlike the situation before me where the information at issue was ultimately contained in the investigation report or was not material in the context of the core complaint.

[78] At the post-investigation report stage, the investigator did err in providing CIC with a copy of the Applicant's cross-disclosure submissions three days prior to CIC filing its own submissions. The investigator acknowledged this oversight and apologized for the error.

However, this does not warrant the Court's intervention as it does not result in a breach of the duty of procedural fairness owed to the Applicant. Having reviewed the Applicant's submissions of January 9, 2012 and January 23, 2012, as well as CIC's submission of January 20, 2012, it is my view that the Applicant was not prejudiced by the early disclosure.

[79] The January 9, 2012 letter draws the investigator's attention to four "admissions" contained in CIC's letter of December 12, 2011 and comments on same. The January 20, 2012 letter from CIC stated that its submissions were limited to clarifying certain factual misunderstandings contained in the Applicant's response. CIC stated that it would not make any comments on the investigation process or address any perceived errors by the Applicant in the investigator's consideration of the evidence, disclosure or any other area of procedural fairness.

[80] In my view, the only information in CIC's January 20, 2012 letter of potential significance concerns its response to the Applicant's submission that CIC processes other relatives, such as aunts and uncles, with higher priority and years faster than sponsorship applications for parents and grandparents. CIC stated that this was simply not the case and that it believed that the Applicant was referring to subsection 117(1)(h) of the IRPA Regulations, stating:

> This is a rarely used provision that permits an eligible Canadian citizen…with no close relatives in Canada and no one outside of Canada that could be sponsored as a member of the family class, including a parent or a grandparent, to sponsor a relative, regardless of the age or relationship to the sponsor. Because of the special circumstances of these relationships, few sponsorships are accepted in this category. In 2011, only 113 applicants were issued permanent residence visas under this unique provision, as provided in Appendix "A."

[81] The referred to Appendix A is a statistical chart showing that between 2001 and the first half of 2011, between 211 and 705 applications were received annually from other relatives of which between 42 and 153 were granted, for a total of 843 over that ten year period. Appendix "A" itself is new evidence and was not disclosed to the Applicant.

[82] The Decision acknowledged that the investigation report did not address the Applicant's allegation that applications to sponsor "other relatives", such as aunts and uncles, receive priority over parents and grandparents. However, it stated that as had been explained in CIC's submissions, "other relatives" may only form part of the family class in certain limited circumstances which did not apply to the Applicant's situation. Further, the number of such applications vis-à-vis the total number of family class applications and the total number of parent and grandparent applications was so small that a comparison was of limited value. And, again, the priority sequence was the result of ministerial discretion as explained by CIC.

[83] The investigation report itself noted that the family class would make up between 57,000 and 63,000 of new immigrants in 2010, 75% of which would be spouses, partners and children and 25% of which would be grandparents. It attached statistical tables showing the target ranges and actual admitted numbers for the family class between 2000 and 2010. The actual admitted numbers ranged between 61,515 and 68,863.

[84] Upon review of the forgoing, it is my view that the evidence does not support the Applicant's submission that the CIC tailored its reply, or took advantage of, the early disclosure. While it is true that the Appendix "A" table was new evidence, it did not represent a new

concept. For example, in its letter of December 12, 2011, CIC noted that "aunts and uncles" are not a part of the family class, but that it believed that the Applicant in his submission had been referring to subsection 117(1)(h) of the IRPA Regulations. CIC stated that few of those applications are received and because of the unique circumstances of these relationships, they are afforded a higher processing priority. This letter was disclosed to the Applicant who responded to it by way of his January 9, 2012 response quoting, in part, that very submission.

[85] CIC's position on prioritization, which was central to the Applicant's complaint, was clearly identified in the investigation report and elsewhere. While Appendix A provided the actual figures supporting CIC's previously disclosed position that few applications under subsection 117(1)(h) are received, in effect, the document merely served to confirm CIC's previously disclosed position. The Applicant does not explain how his response to the investigation report was affected by not receiving this table. And, as the statistics serve only to confirm CIC's previously disclosed position, it is difficult to see how the Applicant's right of rebuttal was detrimentally effected.

[86] In my view, the lack of disclosure of the statistical table did not serve to withhold new facts nor did it deprive the Applicant of his reply to the evidence. There was, therefore, no breach of the duty of procedural fairness.

Thoroughness and Neutrality

Applicant's Position

[87] The Applicant submits that the investigation was not thorough because the investigation report did not address the difference in processing times between applications to sponsor parents and those to sponsor "other relatives" potentially of a similar age (i.e. aunts and uncles). The Commission's reasons show that it misunderstood its jurisdiction and that allegations of discrimination are not nullified just because the comparator group is small. It was also incorrect to reason that the Commission need not investigate discrimination which is the result of ministerial discrimination. In that regard, the Applicant cites *Singh (Re)*, [1989] 1 FC 430 (FCA) at paras 21-22 as affirming the Commission's jurisdiction to investigate ministerial decisions concerning sponsored immigrants. The Commission's failure to investigate an issue renders the investigation not thorough (*Guay v Canada (Attorney General)*, [2004] FCJ No 1205 (TD) (QL) at para 42 [*Guay*]; *Dupuis v Canada (Attorney General)*, [2010] FCJ No 608 (TD) (QL) at para 11 [*Dupuis*]).

[88] The Applicant also submits that the investigation was not thorough because there was no financial evidence presented concerning the allocation of CIC's resources and, therefore, it is impossible to know if CIC's financial limitation is factual or pretextual. The Commission erred in accepting CIC's bald assertions that limited financial resources cause delays in the processing of sponsorship applications for parents and grandparents and in accepting this explanation as both reasonable and non-precontextual. The Applicant relies on *Coupal*, above, at paras 36, 38 and *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 [*Grismer*] for the proposition that, before statutory human rights

bodies, arguments that limited resources make abating discrimination too costly require real financial evidence. The Applicant states that CIC's lack of financial resources are made suspect by its recent announcement that it will increase the number of sponsored parents and grandparents it will admit to Canada.

Respondent's Position

[89] The Respondent submits that the investigation was thorough despite not specifically addressing the difference between applications to sponsor parents and those to sponsor "other relatives" such as aunts and uncles. It notes that this allegation was not part of the Applicant's original complaint and appeared first in an email sent to the investigator on August 12, 2011.

[90] The Respondent submits that the mere fact that an issue was not explored by the investigator does not automatically mean that the report was not thorough. Here, the Applicant raised the question of processing times for "other relatives" directly with the Commission in his December 11, 2011, response to the investigator's report and his January 9, 2012 cross disclosure submission. The Commission then dealt with the omission and provided a reasonable response to the Applicant's arguments concerning other relatives in its Decision. Where the parties have the opportunity to raise an issue that was not dealt with by the investigator directly with the Commission, the omission in the investigation can be rectified (*Slattery*, *Herbert*, both above) by the Commission as was the situation in this case. The Applicant was not denied procedural fairness.

[91] The Respondent submits that the Commission did not err in accepting statements from CIC concerning its inability to increase application processing within the scope of its current funding. The Commission has a broad discretion in exercising its fact-finding mandate and it was not unreasonable for it to accept the statement that a government department works within a defined budget.

[92] Further, the Applicant's reliance on *Coupal* and *Grismer* is misplaced. Both of those cases concerned the question of whether an employer's discriminatory practice amounted to a *bona fide* occupational requirement. The test in that regard includes requiring the employer to prove that the impugned practice is necessary and that it cannot otherwise accommodate the complaint without undue hardship. In that context, the courts have held simple assertions regarding financial consequences associated with accommodation to be insufficient. Here, however, there is no evidentiary burden on the CIC which can be used to require the production of financial evidence.

Analysis

[93] To determine whether this Court's intervention is warranted, it must first be determined what the Commission was obliged to do in this case in order to fulfill the duty of procedural fairness it owed to the Applicant.

[94] In that regard, the obligations of the investigator and the Commission are interrelated but distinct. The investigator must prepare a report in a thorough and neutral manner. The Commission must disclose this report to the parties, provide them the opportunity to make all

relevant representations in response to the report, and consider those representations in coming to its decision (*Tse v Federal Express Canada Ltd*, 2005 FC 599 at paras 20-22). In this case, the Commission disclosed the investigator's report and accepted comments from both parties. Therefore, the issue related to procedural fairness is limited to whether the investigation was thorough and neutral.

[95] In *Slattery*, above, the leading case on procedural fairness in a Commission investigation, Justice Nadon (as he then was) held that judicial review is warranted where an investigator fails to investigate obviously crucial evidence. Minor omissions in an investigator's report will not be fatal, as the parties can point out such omissions to the Commission in their comments.

[96] However, where complainants are unable to rectify omissions in the investigator's report through rebuttal comments to the Commission, judicial review is warranted. This situation may arise where an investigator's report contains an omission of such a fundamental nature that drawing the Commission's attention to it will not compensate for the omission (*Slattery*, above, at para 57). Similarly, where rebuttal comments allege substantial and material omissions in the investigation and provide support for that assertion, the Commission must provide reasons explaining why those discrepancies are either immaterial or insufficient to challenge the investigator's recommendation (*Herbert*, above, at para 26).

[97] In *Slattery*, above, at para 55, Justice Nadon commented on the factors to be considered in assessing the completeness of an investigation:

> [55] In determining the degree of thoroughness of investigation required to be in accordance with the rules of procedural fairness,

> one must be mindful of the interests that are being balanced: the complainant's and respondent's interests in procedural fairness and the CHRC's interests in maintaining a workable and administratively effective system […]

[98] There, the applicant alleged that some of the information required to support her complaint, which included a claim of systemic discrimination, was difficult to obtain because it was protected by secrecy, and, that the investigator failed to interview relevant witnesses. As noted above, Justice Nadon held that judicial review is warranted where an investigator fails to investigate obviously crucial evidence. He further stated the following at para 69:

> [69] The fact that the investigator did not interview each and every witness that the applicant would have liked her to and the fact that the conclusion reached by the investigator did not address each and every alleged incident of discrimination are not in and of themselves fatal as well. This is particularly the case where the applicant has the opportunity to fill in gaps left by the investigator in subsequent submissions of her own. In the absence of guiding regulations, the investigator, much like the CHRC, must be master of his own procedure, and judicial review of an allegedly deficient investigation should only be warranted where the investigation is clearly deficient […]

[99] In *Miller v Canada (Human Rights Commission)*, [1996] FCJ No 735 (TD) (QL) at para 10, Justice Dubé stated the test with respect to a thorough investigation as follows:

> [10] The SEPQA decision has been followed and expanded upon by several Federal Court decisions. These decisions are to the effect that procedural fairness requires that the Commission have an adequate and fair basis upon which to evaluate whether there was sufficient evidence to warrant the appointment of a Tribunal. The investigations conducted by the investigator prior to the decision must satisfy at least two conditions: neutrality and thoroughness. In other words, the investigation must be conducted in a manner which cannot be characterized as biased or unfair and the investigation must be thorough in the sense that it must be mindful of the various interests of the parties involved. There is no obligation placed upon the investigator to interview each and every person suggested by the parties. The investigator's report need not

> address each and every alleged incident of discrimination, especially where the parties will have an opportunity to fill gaps by way of response.

[100] In considering the merits of the Applicants' submissions, it is important to note that the standard set out in *Slattery*, above, does not require that the investigator's report be perfect. This Court is concerned, not with perfection, but with ensuring that the Applicant was treated fairly in the investigation and his discrimination complaint was considered. The Court should not dissect the investigator's report on a microscopic level or second-guess the investigator's approach to his task (*Guay*, above at para 36; *Besner v Canada (Attorney General)*, 2007 FC 1076 at para 35). The Applicant can only succeed if the alleged deficiencies render the investigator's report "clearly deficient".

[101] As is evident from the investigation report, CIC's position is that the Minister has discretion to prioritize between members of the family class. Sponsorship applications are prioritized with orphans, dependant children without family, provided with top priority. The next priority is to the nuclear family which includes spouses, partners and dependant children. The following group in priority includes orphaned brothers and sisters who are not spouses or common law partners, parents and grandparents, as well as those who fall within subsection 117(1)(h), being a relative of the sponsor, regardless of age, if the sponsor does not have a close relative in Canada or one outside Canada who would fall within the family class. The latter is, essentially, sponsorship of a less closely related relative, or "other relative" when the sponsor is alone in Canada. The Applicant submits that this latter group may include "aunts

and uncles" of similar age to parents and grandparents and who, he submits, are given priority to parents and grandparents who are more closely related to their sponsor.

[102] While it is true that there was no specific investigation into processing sponsorship applications for "other relatives," in my view, the investigation was still thorough as this omission was not fundamental. The substance of the Applicant's complaint was that CIC discriminated between sponsorship applications on the basis of family status and age. The investigator concluded that CIC treated the complainant, and others sponsoring parents and/or grandparents, differently based on family status. However, even if the investigation had delved deeper into the processing of "other relatives," it would not have affected the investigator's ultimate finding that the Minister had discretion to prioritize sponsorship applications in accordance with immigration target levels and policies.

[103] Furthermore, where the parties have the opportunity to raise an issue that was not dealt with by the investigator directly with the Commission, the omission can be rectified (*Herbert*, above, at para 26). Here, the omission was rectified as the Decision acknowledged and directly responded to the issue when it was identified by the Applicant in his December 11, 2011 post investigation report submission. The Commission accepted CIC's position that "other relatives" may only form part of the family class in certain limited circumstances which did not apply to the Applicant's situation. Furthermore, that the number of family class applications vis-à-vis those for parents and grandparents was so small that a comparison was of limited value. Most significantly, the Commission concluded that the priority sequence for family class application was the result of ministerial discretion. Thus, while the Applicant may not agree with this

reasoning, it was sufficient to address the investigator's omission. The explanation demonstrated that the omission was, in these circumstances, immaterial and insufficient to challenge the investigator's recommendation.

[104] Further, while the Applicant points to "other relatives", such as uncles and aunts, as a comparator group because it is possible that aunts and uncles could be the same age as one's parents, the investigator found that advanced age was the personal characteristic of the Applicant's parents, not the Applicant himself. As such, the investigator did not find a link to the ground of age and the Applicant did not establish *prima facie* discrimination on the basis of age. Therefore, on this basis, there was also no lack of thoroughness by failing to further investigate this aspect of the complaint.

[105] As stated in *Slattery*, above, at para 56, deference must be given to administrative decision- makers to assess the probative value of evidence and to decide whether or not a further inquiry is warranted. Given this, and because here the failure to address sponsorship applications of "other relatives" was not a failure to investigate obviously crucial evidence, the investigation report in this case did not lack thoroughness and there was no resultant breach of the duty of fairness.

[106] The Applicant also argues that the investigation was not thorough because it accepted CIC's explanation, without evidence, that limited financial resources caused delays in the processing of parent and grandparent sponsorship applications and precluded the abating of that prioritization.

[107] While the Applicant cites *Coupal*, above, in support of his submission that the Commission cannot accept broad statements of financial hardship without supporting evidence, in my view that decision can be distinguished. Not only was that case decided in the employment context, the evidence that was not considered was a relevant and decisive factor in determining whether the employer had other options pertaining to the use of a mandatory fitness test pursuant to a new workplace policy.

[108] *Grismer*, above, involved an individual who suffered a condition affecting his peripheral vision. The BC Superintendent of Motor Vehicles cancelled his driver's license without conducting an individual assessment of his vision. The Supreme Court, in the course of its decision, stated that the *Meiorin* test applies the adjudication of claims of discrimination under human rights legislation. The Court found that the Superintendent had not established that the risk or cost associated with providing individual assessments amounted to undue hardship.

[109] According to the *Meiorin* test, the defendant must prove that (1) it adopted the standard for a purpose or goal rationally connected to the function being performed; (2) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purposes or goal; and (3) the standard is reasonably necessary to accomplish its purpose or goal, because the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship, whether that hardship takes the form of impossibility, serious risk or cost.

[110] The third branch of the test is essentially reflected in subsection 15(2) of the CHRA which states that for any differential practice described in 15(1)(g) to be considered to have a *bona fide* justification it must be established that accommodation of the needs of an individual or class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

[111] In my view, if the Minister's application of the IRPA is governed by the CHRA, then this requirement and attendant analysis is not a neat fit in these circumstances. Here the class of individuals concerned could potentially encompass the sponsors of all and each class of immigrants seeking sponsorship into Canada. If every sponsor of a potential immigrant could argue that the differentiation imposed by the Minister's immigration policy required accommodation, this would not only contravene the framework of the IRPA, but would derail Canada's immigration policy. This, in my view, would amount to undue hardship.

[112] In *Grismer*, above, the critical issue in applying the third branch of the test was held to be whether the Superintendent's non-accommodation standard was reasonably necessary to achieve reasonable highway safety. Here, the critical question may be whether the Minister's non-accommodation was reasonably necessary to achieve Canada's immigration policy goals. In my view, it was.

[113] CIC's budget is necessarily finite. The investigator concluded that even if CIC devoted an exceptionally large amount of money to the assessment of parents and grandparent applications, it could still only process a range approved by Cabinet. Given that the Commission was satisfied

with CIC's explanation that differential treatment was a result of the exercise of ministerial discretion to manage the flow of immigration to Canada by setting levels for the various immigration classes and prioritizing as between and within those classes, financial evidence of CIC's budget or of how this was or could otherwise have been allocated is not relevant and would not have changed the outcome. Therefore, the investigator's failure to require such financial evidence did not, in these circumstances, result in the investigation lacking thoroughness.

[114] While there were also other minor procedural deficiencies in the investigation, these do not suffice to invoke the Court's intervention despite the lack of deference to the Commission on issues of procedural fairness. The flaws were incidents inherent to the process and inconsequential in the context of the whole investigation. As was stated by the Federal Court of Appeal in *Uniboard Surfaces Inc v Kronotex Fussboden GmbH and C KG*, 2006 FCA 398, [2007] 4 FCR 101 at para 48:

> [48] […] They constituted at best a breach of some of the procedural rules and in no way can they be said to have breached the requirements of the duty of procedural fairness owed to the applicant. The applicant participated in all the phases of the investigation, and its views were sought throughout. Put simply, the applicant had a full opportunity to be heard. Although the hearing was perhaps imperfect, it was nevertheless on balance fair, reasonable and appropriate in the circumstances. To repeat the words of Chief Justice McLachlin in *C.P.R. Co. v. Vancouver (City)*, "what is required is fairness, not perfection" (at para 46).

iv) ***Was the Commission's Decision reasonable?***

Applicant's Position

[115] The Applicant's submission is that the Commission had no jurisdiction to dismiss his complaint on the basis of the exercise of ministerial discretion. The CHRA applies to decisions taken by immigration officials, as confirmed in *Naqvi v Canada (Employment and Immigration Commission)*, [1993] CHRD No 2 at 10, which the Applicant submits is binding on the Commission. Although the Commission did not explicitly state that there is no human rights jurisdiction over immigration decisions, this was the effect of its reasoning.

Respondent's Position

[116] The Respondent submits that the fact that immigration officials must abide by the provisions of the CHRA is not support for the proposition that the Commission cannot dismiss a complaint of discrimination within the immigration context. The Commission has a broad discretion in determining whether an inquiry into a complaint is warranted pursuant to its function under subsection 44(3) of the CHRA (*Herbert*, above, at para 18; *Tahmourpour*, above, at para 6; *Slattery*, above, at para 78).

[117] The Commission recognized that the core of the complaint was an allegation of discrimination because CIC processes applications to sponsor parents or grandparents as permanent residents more slowly than it does for applications to sponsor other categories of immigrants which adversely differentiate on the basis of age or family status. However, the differential treatment was a result of the exercise of ministerial discretion to manage the flow of immigrants to Canada by setting levels for the various immigration categories. Based on its view

that the Minister had acted within the scope of his lawful discretion in prioritizing the review of the subcategories of the family class, the Commission concluded that the complaint should be dismissed as a further inquiry was not warranted. The Commission's assessment of the scope of Ministerial discretion in prioritizing family class applications accords with the jurisprudence of the Federal Court (*Vaziri v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1159 at para 36 [*Vaziri*]; *Liang v Canada (Citizenship and Immigration)*, 2012 FC 758 at para 40-41 [*Liang*]; *Li v Canada (Citizenship and Immigration)*, 2011 FCA 110 at para 37 [*Li*]).

[118] In view of this, the Respondent submits that it was a reasonable outcome for the Commission to conclude that establishing different processing times for the various family class subcategories fell within lawful ministerial discretion. It was also reasonable for the Commission to conclude that an investigation into the Applicant's complaint was unwarranted.

Analysis

[119] The Applicant frames his submission as one of jurisdiction, being that the Commission had no jurisdiction to dismiss his complaint on the basis of the exercise of ministerial discretion. However, in my view, the Applicant is really challenging the Commission's decision to dismiss the complaint. Therefore, the heart of his complaint is whether the Commission reasonably accepted that the Minister had the discretion to prioritize sponsorship applications within the family class.

[120] As to the Applicant's submission that the Commission, in effect, found that it had no jurisdiction over the human rights issues in immigration matters, this is not supported by the

record. Rather, the Commission conducted an investigation of the complaint pursuant to the CHRA process. And, having found that the Applicant was adversely differentiated against in the provision of services based on family status, it then proceeded to consider whether CIC could provide a reasonable explanation for its actions that was not a pretext for discrimination based on a prohibited ground. While the Applicant may not agree with the Commission's reasons for concluding that the explanations offered were acceptable, it is clear that the Commission both accepted that it had, and exercised, its jurisdiction.

[121] The appropriate question to ask at this stage is whether there is any reasonable basis on the law or the evidence for the Commission's Decision not to refer a complaint to a Tribunal (*Halifax (Regional Municipality) v Nova Scotia (HRC)*, 2012 SCC 10, [2012] 1 SCR 364 at para 45).

[122] In my view, it was reasonable for the Commission to dismiss the complaint on the basis that CIC offered a bona fide explanation for the discriminatory effects of the processing of sponsorship applications for parents and grandparents.

[123] In *Vaziri*, which was referred to in the Decision, one of the issues was, in the absence of regulations enacted under subsection 14(2) of the IRPA, whether the Minister had acted without authority in setting targets for visa approvals by class and establishing procedures that prioritize sponsored applications within the family class.

[124] There, the applicant had applied to sponsor his father to Canada. Subsequently, the Minister had established target levels for immigration to Canada that incorporated a 60:40 ratio between economic and non-economic classes, and, effected restrictions for the processing of applications for parents and grandparents by giving priority to spouses and dependant children within the family class. This resulted in delays of processing sponsorship applications for parents and grandparents. The applicant argued that the Minister had no legal authority to establish targets or to put in place a process that seriously detracted from rights of parents and grandparents to become sponsored permanent residents unless authorized by regulation made under the IRPA and that there was no such regulation.

[125] The decision is of interest as it sets out an overview of the immigration system in Canada including the statutory authority of the Minister pursuant to the IRPA. With respect to the need for policies and procedures, Justice Snider stated the following at para 20:

> [20] […] Policies such as the setting of the 60:40 ratio and the establishment of targets by category and the procedures for allocating departmental resources to meet the overall and category targets are necessary. These policies and procedures provide for the orderly and efficient processing of applications and, at the highest level, ensure that a wide variety of interests are addressed […]

[126] Justice Snider noted that the Minister is charged with administrating the scheme created by the IRPA and carrying out the powers conferred by the IRPA and the IRPA Regulations. The Governor in Council has the authority to enact regulations and could pass regulations setting targets for immigration and establishing procedures to deal with targets. Justice Snider concluded that:

> [35] Taken together, *Carpenter Fishing*, *Capital Cities*, and *CTV* provide direction in this case. The Minister is responsible for the administration of *IRPA*. In the absence of enacted regulations, he has the power to set policies governing the management of the flow of immigrants to Canada, so long as those policies and decisions are made in good faith and are consistent with the purpose, objectives, and scheme of *IRPA*. The Governor in Council retains the power to direct how the Minister should administer *IRPA* through regulations, and may oust the Minister's powers. However, where there is a vacuum of express statutory or regulatory authority, the Minister must be permitted the flexible authority to administer the system. Without the policies and procedures impugned by the Applicants, the system would fail. Parliament could not have intended that the system fail.
>
> *Specific Authority to Prioritize within the Family Class*
>
> [36] The Applicants also argue, in conjunction with their main thrust, that the Minister lacked any specific authority to prioritize or discriminate between different groups of family class applicants. I note that such discrimination is recognized in the provisions of *IRPA* and the *Regulations*; see for example special privileges conferred only on spouses and partners, set out in Division 2 of the *Regulations*. It would seem that the kind of discrimination that the Applicants find upsetting is inherent in *IRPA*, but even if it were not, I am convinced that the power to draw this distinction would fall within the Minister's power to manage the immigration flow on the basis of social and economic policy considerations. It could be said that this kind of discrimination was the same kind of distinction made by the MFO in *Carpenter Fishing*, above, based upon vessel length and historical performance of the licence owner. There is nothing in *IRPA* or the *Regulations* that appears to detract from such a power; again, this is reflective of the "framework" nature of the *Act*.

[127] Similarly in *Liang*, above, Justice Rennie considered an allegation that the Minister had unreasonably delayed processing applications for permanent residence by choosing to accord a higher priority to applications submitted more recently and according to different criteria. The decision discusses the introduction of subsection 87.3(1) of the IRPA and finds that the provision

confirms ministerial authority to set policies regarding processing that will best attain the government's goals, and, created a tool to exercise that authority being ministerial instructions.

[128] In the context of delay, Justice Rennie described ministerial obligations as follows:

> [40] Canadian jurisprudence has long recognized that Ministers have an obligation to perform their legal duties in a reasonably timely manner. This legal duty has long coexisted with the understanding that Ministers are accountable for the management and direction of their ministries and have the authority to make policy choices and to set priorities. These two seemingly conflicting propositions have been reconciled by according the Minister considerable leeway in determining how long any kind of application will take to process, based on his policy choices. Thus, if the Minister has determined that Canada's immigration goals are best attained by processing spousal sponsorships in 4 years on average, it is not for the Court to say that it believes the Minister could, or should, process those applications in 2 years. It is for the Minister, and not the Court, to run the department.
>
> [41] It is for this reason that projected processing times emanating from the Minister and the department are accorded so much weight. The Minister is not only best placed to know how long an application will likely take to process, but he has also been granted the authority by Parliament to set those processing times in a way that balances the various objectives of the *IRPA*. However, once an application has been delayed past those processing times, without a satisfactory justification, the Court is authorized to intervene and compel the Minister to perform his duty. This approach is consistent with the principle that the Minister is accountable to Parliament for his policy choices, and those choices are not to be gainsaid by the courts: *Li v Canada (Citizenship and Immigration)*, 2011 FCA 110. Thus, deference is accorded to the Minister in setting policies, but the limit of that deference is his legal duty under the *IRPA*.

[129] In *Li*, above, the Court of Appeal also addressed the issue of prioritization. It noted that the processing times for family class sponsorship applications concerning parents and grandparents had significantly increased since the IRPA first came into force in 2002. The

additional delays were, in part, the result of the government's decision to prioritize applications within the family class through a so-called "Family Class Re-Design Initiative" under which the applications of spouses, common-law partners, conjugal partners and children are prioritized so as to significantly reduce the overall processing time for both sponsorship and permanent resident visa applications. The Initiative contributed to a longer average processing time for applications related to parents and grandparents, which were not prioritized within the family class. As of March 2010, the average processing time of sponsorship applications related to parents and grandparents stood at 34 months.

[130] In the context of that application, the Court of Appeal held that:

> [36] The underlying rationale of the appellant's argument seems to be that it is unreasonable for the government to collect the permanent resident visa application processing fees some 34 months in advance of the service they relate to when it would be easy for the government to amend the *Regulations* in order to address the issue. The appellant submits at paragraph 42 of his memorandum "that the Minister should be required to notify an applicant when he is prepared to provide the service of determining an application for permanent residence and to then provide the applicant with the opportunity to pay the applicable fee for the service of determining an application for permanent residence if he wishes to proceed with that application."
>
> [37] The problem with this rationale is that it implies that the Court may enter into the realm of policy decision making. There are often competing demands on government services and it is the role and responsibility of government to address these competing demands. Sometimes hard choices need to be made, such as prioritizing the administrative processing of the applications of spouses and children within the family class. These choices may impact others competing for the same or similar government services. However, it is the responsibility of government, not of the courts, to determine the appropriate corrective regulatory measures, if any, to address such impacts. In the absence of a legislative or constitutional constraint on the regulatory choices made by government, courts will not interfere to compel their own regulatory preferences: *Thorne's Hardware Ltd. v. The Queen*,

> [1983] 1 S.C.R. 106 at p. 111; *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R. 655 at para. 26.

[131] These cases are significant because they demonstrate that the Minister acts within his authority when choosing to prioritize the processing of sponsorship applications for the purposes of the administration of the IRPA. While these cases do not consider that authority in the context of the CHRA, in my view the question is captured by sections 5 and 15(1)(g) of the CHRA. That is, while in the normal course it may be a discriminatory practice in the provision of the service of sponsorship application processing to differentiate adversely in relation to any individual or class, this is not the case if there is a *bona fide* justification for that differentiation.

[132] Here, the investigation report concluded that the Applicant appeared to be treated differently based on family status, but accepted CIC's evidence that it relies on the Government of Canada to set targets for how many immigrants and from which groups it will allow into Canada each year and, to the extent possible, aligns its resources accordingly. CIC's evidence was that any differential treatment of those who sponsor their parents and grandparents falls within the Minister's obligation to manage immigration processes based on social and economic policy considerations.

[133] In my view, based on the foregoing, the Commission reasonably accepted this evidence as sufficient to establish that CIC had a *bona fide* justification for the differentiation and reasonably relied on this evidence in concluding that no further investigation was warranted.

[134] In conclusion, the Commission's Decision to dismiss the Applicant's complaint was transparent, justifiable, and intelligible. Based on the evidence, it was within a range of acceptable outcomes for the Commission to find that the Applicant's complaint did not warrant further inquiry before a Tribunal.

[135] For these reasons I would dismiss this application for judicial review.

[136] The parties jointly submitted that costs would be appropriate at $2,500.00. I accept that submission and award the Respondent costs in that amount.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the Application for Judicial Review is denied; and

2. the Respondent shall have its costs in the amount of $2,500.00

"Cecily Y. Strickland"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Amir Attaran	FOR THE APPLICANT (ON HIS OWN BEHALF)
David Cowie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Amir Attaran Ottawa, Ontario	FOR THE APPLICANT (ON HIS OWN BEHALF)
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT