Federal Court of Appeal  Cour d'appel fédérale

Date: 20150203

Docket: A-413-13

Citation: 2015 FCA 37

CORAM: **STRATAS J.A.**
WEBB J.A.
NEAR J.A.

BETWEEN:

AMIR ATTARAN

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 3, 2014.

Judgment delivered at Ottawa, Ontario, on February 3, 2015.

REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRING REASONS BY:	STRATAS J.A.
DISSENTING REASONS BY:	NEAR J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] Amir Attaran has appealed the decision of Strickland J. (2013 FC 1132), who dismissed his application for judicial review of the decision of the Canadian Human Rights Commission (CHRC) rendered on February 22, 2012 (and sent to Amir Attaran on March 2, 2012). The CHRC dismissed Prof. Attaran's complaint that he had filed under the *Canadian Human Rights Act*, RSC, 1985, c-H-6 (*CHRA*). Prof. Attaran had filed a complaint alleging that Citizenship and Immigration Canada (CIC) was carrying on a discriminatory practice because applications for

permanent resident status for parents would take significantly longer to process than applications for other family members, particularly spouses and children.

[2] The Attorney General has acknowledged that sponsorship applications for parents are treated differently than sponsorship applications for spouses, dependent children and other relatives. However, the Attorney General submits that the finding of the CHRC, that an inquiry into the complaint was not warranted, is reasonable.

[3] For the reasons that follow, I would allow this appeal and refer the matter back to the CHRC.

Background

[4] Amir Attaran is a professor and Canada Research Chair in the Faculty of Law and Faculty of Medicine at the University of Ottawa. He was born in the United States and he and his wife (who was born in Brazil) are now Canadian citizens. They have an infant daughter (who is also a Canadian citizen). In 2009, neither he nor his wife had any family members in Canada (other than each other and their daughter). In 2009, Prof. Attaran started the family class immigration process to sponsor his parents (who are American citizens) under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*). There are two parts to this process – the first is an assessment of the sponsorship application and the second is an assessment of the application for permanent residence. Prof. Attaran's complaint relates to the processing time for the first part of this process – the assessment of the sponsorship application.

[5] While the goal of CIC, at the time of Prof. Attaran's complaint, was to process sponsorship applications for spouses or dependent children within 42 days, the time for processing sponsorship applications for parents and grandparents was considerably longer – approximately 37 months. Prof. Attaran filed his complaint in relation to this different treatment for sponsorship applications for parents and grandparents in 2010. The CHRC designated an investigator as provided in subsection 43(1) of the *CHRA*. The person who was initially designated as the investigator could not finish the investigation. Another person was so designated and that person completed the investigation. The recommendation of the investigator was that the complaint should be dismissed. The CHRC accepted this recommendation and the complaint was dismissed pursuant to subparagraph 44(3)(b)(i) of the *CHRA*.

[6] The basis for dismissing the complaint is that, although CIC did treat sponsorship applications for parents and grandparents differently from sponsorship applications for spouses, dependent children and other relatives, the CHRC was satisfied that an inquiry into the complaint was not warranted based on the submissions of CIC. At the hearing of this Appeal both parties focused on whether there was a *bona fide* justification for such differential treatment.

Decision of the Federal Court

[7] The conclusion of the Federal Court Judge, in dismissing Prof. Attaran's application for judicial review, is set out in paragraph 133 of her reasons:

> **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.

[8] The conclusion of the Federal Court Judge was that the CHRC's rationale for not referring this matter to the Tribunal was based on whether there was a *bona fide* justification for the practice. While both parties, in this appeal, made their submissions on the assumption that the CHRC had based its decision on whether there was a *bona fide* justification for the practice, as discussed below, it is far from clear that this was the basis for the decision of the CHRC.

Standard of Review

[9] The role of this Court is to determine whether the Federal Court Judge selected the appropriate standard of review and then applied it correctly (*Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paragraphs 45 to 47, approving this approach as set out in *Telfer v. Canada Revenue Agency*, 2009 FCA 23, 386 NR 212, at paragraph 18). As a result, this Court is to step into the shoes of the Federal Court Judge and focus on the decision of the CHRC (*Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at paragraph 247; *Kinsel v. Canada (Minister of Citizenship and Immigration)* 2014 FCA 126, [2014] F.C.J. No. 781, at paragraph 23).

[10] With respect to the findings of fact and the discretion of the CHRC to dismiss a complaint, in *Halifax Regional Municipality v. Nova Scotia Human Rights Commission, et al.*, 2012 SCC 10, [2012] 1 S.C.R. 364, Cromwell J., writing on behalf of the Supreme Court of Canada, stated that:

> **17** The resolution of two issues separated the chambers judge and the Court of Appeal in their understanding of the role of the reviewing court in this case. The first relates to the applicable standard of judicial review. This turns mainly on the nature of the Commission's decision. ***My view is that the Commission's***

> ***decision was not a determination of its jurisdiction but rather a discretionary decision that an inquiry was warranted in all of the circumstances. That discretionary decision should be reviewed for reasonableness.*** The second issue raises the related question of when judicial intervention is justified at this preliminary stage of the Commission's work. This turns mainly on the ongoing authority of this Court's decision in *Bell* (1971) [*Bell v. Ontario (Human Rights Commission)*, [1971] S.C.R. 756]. In my view, *Bell* (1971) should no longer be followed and courts should exercise great restraint in intervening at this early stage of the process. Further, ***the reasonableness standard of review, applied in the context of proposed judicial intervention at this preliminary stage of the Commission's work, may be expressed as follows: is there a reasonable basis in law or on the evidence for the Commission's conclusion that an inquiry is warranted?*** …
>
> (emphasis added)

[11] In that case the Nova Scotia Human Rights Commission had determined that an inquiry by the tribunal was warranted. In *French v. Nova Scotia (Human Rights Commission)*, 2012 NSSC 395, [2012] N.S.J. No. 638, Muise J. stated that:

> **29** ***H.R.M. v N.S.(H.R.C.)*** dealt with a review of a decision that a BOI should be appointed. However, in my view the same deference is to be accorded to decisions dismissing complaints. That view is supported by the inclusion of the words "or not" in paragraph 21, and of the words "or failure" in paragraph 24.

[12] However, this Court in *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392, stated that:

> **76** At the same time, it is common knowledge that the number of complaints received far exceeds the number that the Commission may be able, due to practical and monetary considerations, to refer to a tribunal for further inquiries. As Décary, J.A. observed in [*Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113]… at para. 38:
>
> > The Act grants the Commission a remarkable degree of latitude when it is performing its screening function on receipt of an investigation report ... The grounds set out for referral to another authority (subsection 44(2)), for referral to the President of the Human Rights Tribunal Panel (paragraph 44(3)(a)) or for an outright dismissal (paragraph 44(3)(b)) involve in varying degrees questions of fact, law and opinion (see *Latif v. Canadian Human*

> *Rights Commission*, [1980] 1 F.C. 687 (C.A.), at page 698, Le Dain J.A.), but it may safely be said as a general rule that Parliament did not want the courts at this stage to intervene lightly in the decisions of the Commission.
>
> In general, at least in the assessment of practical and monetary matters, the Commission is in a better position than the Federal Court to assess whether any given complaint should go further. This consideration thus leans in favour of greater deference.
>
> …
>
> **80** However, when the Commission decides to dismiss a complaint, its conclusion is "in a real sense determinative of rights" (*Latif v. Canadian Human Rights Commission*, [1980] 1 F.C. 687 at para. 24 (F.C.A.) [Latif]). Any legal assumptions made by the Commission in the course of a dismissal decision will be final with respect to its impact on the parties. ***Therefore, to the extent that the Commission decides to dismiss a complaint on the basis of its conclusion concerning a fundamental question of law, its decision should be subject to a less deferential standard of review.***
>
> (emphasis added)

[13] In the recent decision of this Court in *Keith v. Canada (Correctional Service)*, 2012 FCA 117; [2012] F.C.J. No. 505, this Court again addressed the issue of the standard of review applicable in relation to a judicial review of a decision of the CHRC to dismiss a complaint:

> **43** When deciding whether a complaint should proceed or not to an inquiry by the Tribunal, the Commission performs a screening analysis somewhat analogous to that by a judge at a preliminary inquiry in that it must decide if an inquiry by the Tribunal is warranted having regard to all the facts before it. The central component of the Commission's role is thus assessing the sufficiency of the evidence before it: i.e., it must determine whether there is a reasonable basis in the evidence for proceeding to the next stage. Moreover, the Commission's decision is a discretionary one: *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 ("*Halifax*") at paras. 23 to 25; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 at para. 53; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879 at pp. 898-899.
>
> **44** It is well settled that a decision of the Commission to refer a complaint to the Tribunal is subject to judicial review on a reasonableness standard: *Halifax* at paras. 27, 40 and 44 to 53; *Bell Canada v. Communications, Energy and*

Paperworkers Union of Canada, [1999] 1 F.C. 113 (C.A.) at para. 38. In *Halifax*, Cromwell J. recently considered the standard of review which applies in such circumstances, and he concluded that "the reviewing court should ask itself whether there is any reasonable basis in law or on the evidence to support that decision": *Halifax* at para. 53. Though *Halifax* dealt with the screening functions of the Nova Scotia Human Rights Commission, its conclusions also apply to the screening functions of the Commission: *Halifax* at para. 52.

45 In this case, we are not reviewing a decision to refer a complaint to the Tribunal. Rather, the Commission's decision was to dismiss the complaint. ***In my view, where the Commission dismisses a complaint under paragraph 43(3)(b) of the Act, a more probing review should be carried out.***

46 Cromwell J. was careful to point out that the conclusion reached in *Halifax* only extends to cases where the complaint is referred for further inquiry. In such cases, any interested party may raise any arguments and submit any appropriate evidence at the second stage of the process; consequently, no final determination of the complaint is reached by referring it to further inquiry. As noted at paragraph 15 of *Halifax*, "[a]ll the Commission had done was to refer the complaint to a board of inquiry; the Commission had not decided any issue on its merits" (see also paras. 23 and 50 of *Halifax*). In the case of a dismissal under paragraph 44(3)(*b*) of the Act, however, any further investigation or inquiry into the complaint by the Commission or the Tribunal is precluded.

47 The decision of the Commission to dismiss a complaint under paragraph 44(3)(*b*) of the Act is a final decision made at an early stage, but in such case - contrary to a decision refusing to deal with a complaint under section 41 - the decision is made with the benefit and in the light of an investigation pursuant to section 43. Such a decision should be reviewed on a reasonableness standard, but as was said in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 59, and recently reiterated in *Halifax* at paragraph 44, reasonableness is a single concept that "takes it colour" from the particular context. In this case, the nature of the Commission's role and the place of the paragraph 44(3)(*b*) decision in the process contemplated by the Act are important aspects of that context, and must be taken into account in applying the reasonableness standard.

48 In my view, **a reviewing court should defer to the Commission's findings of fact resulting from the section 43 investigation, and to its findings of law falling within its mandate. Should these findings be found to be reasonable, a reviewing court should then consider whether the dismissal of the complaint at an early stage pursuant to paragraph 44(3)(b) of the Act was a reasonable conclusion to draw having regard to these findings and taking into account that the decision to dismiss is a final decision precluding further investigation or inquiry under the Act.**

> **49** This formulation ensures that both the decision of the Commission and the process contemplated by the Act are treated with appropriate judicial deference having regard to the nature of a dismissal under paragraph 44(3)(*b*). The pre-*Dunsmuir* jurisprudence of this Court dealing with judicial review of Commission decisions dismissing complaints pursuant to paragraph 44(3)(*b*) of the Act supports such a formulation: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392.
>
> (emphasis added)

[14] In this case, the findings of fact made by the CHRC are to be reviewed on the standard of reasonableness. If such findings are reasonable, then the question will be whether the decision to dismiss the complaint was reasonable, bearing in mind that the decision resulted in a termination of the matter and therefore the range of possible, acceptable outcomes may be narrower.

Issues

[15] Since the focus is on the decision of the CHRC, the issues in this case are the following:

(a) Did the CHRC decide to dismiss the complaint based on whether there was a *bona fide* justification for the practice of CIC in prioritizing sponsorship applications for spouses and children; and

(b) Was the decision of the CHRC to dismiss the complaint reasonable?

Complaint Process and Discriminatory Practices under the CHRA

[16] Before reviewing the decision of the CHRC, it is important to outline the statutory provisions of the *CHRA* related to the complaint process and discriminatory practices.

[17] Prof. Attaran had commenced this process by filing a complaint under subsection 40(1) of the *CHRA*. This subsection provides that an individual who has reasonable grounds for believing that a person is engaging (or has engaged) in a "discriminatory practice" may file a complaint. A discriminatory practice will be a practice as set out in sections 5 to 14.1 of the *CHRA*. Sections 15 and 16 prescribe certain practices that are not to be considered discriminatory practices.

[18] Section 5 of the *CHRA* provides that:

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public	**5.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public:
(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or	a) d'en priver un individu;
(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.	b) de le défavoriser à l'occasion de leur fourniture.

[19] The prohibited grounds of discrimination, as set out in section 3 of the *CHRA*, include family status. The CHRC implicitly accepted that differential treatment based on whether a

person is a parent or a spouse (or child) would be differential treatment based on family status. The Attorney General did not raise any issue in relation to this interpretation of family status.

[20] As a result of the provisions of section 39 of the *CHRA*, a "discriminatory practice" for the purposes of Part III of the *CHRA* (sections 39 to 65) would be a discriminatory practice within the meaning of sections 5 to 14.1 of that Act (therefore excluding section 15). Notably, the *bona fide* justification exception is found in paragraph 15(1)(g) of the *CHRA*.

[21] Paragraph 15(1)(g) and subsection 15(2) of the *CHRA* would not, as a result of the provisions of section 39 of the *CHRA*, be taken into account in determining whether a particular practice is a "discriminatory practice" for the purposes of Part III of the *CHRA*, when that expression is used. Therefore, the filing of a complaint under subsection 40(1) of the *CHRA* is based on the restricted meaning of "discriminatory practice".

[22] The provisions of the *CHRA* that are applicable to the referral of a complaint to the Tribunal or the dismissal of a complaint are found in subsection 44(3):

44(3) On receipt of a report referred to in subsection (1), the Commission	44(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :
(a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied	a) peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and	(i) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,
(ii) that the complaint to which the	(ii) d'autre part, qu'il n'y a pas lieu de

report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or	renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41c) à e);
(b) shall dismiss the complaint to which the report relates if it is satisfied	b) rejette la plainte, si elle est convaincue :
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or	(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,
(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).	(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).

[23] The language used in this subsection is different from the language used in section 40 of the *CHRA*. While a complaint is filed based on reasonable grounds for believing that a person has engaged in a "discriminatory practice" (determined without reference to subsection 15(1) of the *CHRA*), the decision to refer the matter to a tribunal is made based on all of the circumstances of a complaint. The expression "discriminatory practice" (with its meaning as modified by section 39 of the *CHRA*) is not used in subsection 44(3) of the *CHRA*. Therefore, the CHRC could, in having regard to all of the circumstances of the complaint, consider whether there is a *bona fide* justification for the practice (*Sketchley*, at paragraphs 93 to 95).

[24] For complaints under the *CHRA* that are referred to the Tribunal, the initial onus is on the complainant to establish a *prima facie* case of discrimination. Once this has been established, in order for the person against whom the complaint has been filed to be successful, that person must either:

(a) provide a reasonable explanation for the practice to establish that a practice that appears to be a discriminatory practice is not actually a discriminatory practice; or

(b) establish that one of the exemptions available under the *CHRA* (e.g. *bona fide* justification) is applicable (*Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360, at paragraph 33).

[25] If the person is able to provide a reasonable explanation for the practice (referred to in paragraph (a) above), the complainant would then have the burden of showing that such explanation was a pretext or a disguise for a practice that is actually a discriminatory practice (*Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, [2004] F.C.J. No. 941, at paragraphs 17, 20 - 23). If the person against whom the complaint is filed is able to provide a reasonable explanation which is not a pretext for an otherwise discriminatory practice, then there is no need to address the exemptions in section 15 of the *CHRA*, as the practice would not be a discriminatory practice.

[26] If, however, there is no such reasonable explanation for the practice, then the question will be whether one of the exemptions available under the *CHRA* is applicable. As noted above, the Federal Court Judge concluded that the CHRC had found that CIC had a *bona fide* justification for the differential treatment of sponsorship applications.

[27] A *bona fide* justification is an exception to what would otherwise be a discriminatory practice. This exception is found in paragraph 15(1)(g) of the *CHRA* and the related subsection 15(2) of the *CHRA*:

15.(1) It is not a discriminatory practice if	15. (1) Ne constituent pas des actes discriminatoires :
…	[…]
(g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or	g) le fait qu'un fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au

accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is bona fide justification for that denial or differentiation.	public, ou de locaux commerciaux ou de logements en prive un individu ou le défavorise lors de leur fourniture pour un motif de distinction illicite, s'il a un motif justifiable de le faire.
…	[…]
15.(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) 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.	15.(2) Les faits prévus à l'alinéa (1)a) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)g), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.

[28] As a result of subsection 15(2) of the *CHRA*, there will only be a *bona fide* justification for a practice if the "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". In this case, the undue hardship would have to be undue hardship imposed on CIC, not undue hardship imposed on third parties, such as applicants seeking to sponsor spouses or children or such spouses or children.

[29] As noted above, the issue of undue hardship only arises where the practice is otherwise discriminatory for the purposes of the *CHRA*. If the practice is not a discriminatory practice within the meaning of sections 5 to 14.1 of the *CHRA*, there would not be any need to consider whether there is a *bona fide* justification for the practice.

The Decision of the CHRC

[30] The justification provided by the CHRC for dismissing the complaint (and therefore not referring this matter to the tribunal), is summarized in the letter from the CHRC dated March 2, 2012:

> • it does not appear that the respondent treated the complainant in an adverse differential manner based on age;
>
> • the respondent has provided a reasonable explanation for processing the sponsorship applications of children and spouses quicker than those for parents and grandparents;
>
> • the respondent's practices do not deprive, or tend to deprive, an individual or class of individuals of access to permanent resident visa for parents and grandparents; and,
>
> • having regard to all the circumstances of the complaint, an inquiry by a Tribunal is not warranted.

[31] While the CHRC notes that "it does not appear that [CIC] treated the complainant in an adverse differential manner based on age", there is no reference to the issue of whether CIC treated the complainant differently based on family status. The CHRC also refers to a reasonable explanation for the different treatment of the sponsorship applications for parents and grandparents. The CHRC, however, does not refer in this letter to *bona fide* justification or undue hardship.

[32] In the decision of the CHRC which accompanied the letter, the CHRC stated that:

> The respondent acknowledges that it processes applications to sponsor parents and grandparents more slowly than it does applications to sponsor other categories of immigrants. However, the respondent explains that the source of this differential treatment resides in the exercise of discretion by the Minister of Citizenship and Immigration in managing the flow of immigration to Canada by

> establishing levels for each category of immigrant. The process of establishing immigration levels in accordance with government priorities and the challenges this imposes on the resource allocation for the respondent are more fully explained in both the Investigation Report and the respondent's submissions. ***The Commission accepts the respondent's explanation as both reasonable and non-pretextual.***
>
> …
>
> The jurisprudence referred to by the complainant (*Canada (Secretary of State for External Affairs) v. Menghani*, [1994] 2 FC 102 and Singh (Re)(F.C.A.) 1988 F.C.J. No. 414) supports his argument that he may be considered a victim of discrimination as a result of the adverse effect that the respondent's practice of giving priority to applications to sponsor other members of the family class such as children and spouses may have upon his parents due to their age. However, presuming that this practice may also constitute discrimination on the basis of age, the respondent's explanation would be equally applicable, that is, it is the result of ministerial discretion. Furthermore, the complainant's allegations of systemic discrimination resulting from the combined effect of this practice and the requirement that all applicants for permanent residency to Canada must have a medical completed in the 12 months prior to their landing may also be explained by the respondent as being the result of ministerial discretion in setting levels within the categories of the family class. ***Regardless of the lens through which one may view the adverse differential treatment of the complainant's sponsorship application, whether as direct, adverse effect or systemic discrimination and whether it be discrimination on the basis of family status or age, it is the result of the exercise of ministerial discretion to manage the flow of immigrants to Canada by setting levels for the various category of immigrant.*** It is to be noted that the complainant has not directly challenged the Minister's authority to exercise such discretion. This issue was before the Federal Court in *Vaziri v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1159 where it was decided that ***despite the discriminatory effect***, it was "within the Minister's power to manage the immigration flow on the basis of social and economic considerations…" (see paragraph 44 of the Investigation Report).
>
> (emphasis added)

[33] There is no reference to undue hardship in these paragraphs or elsewhere in the decision of the CHRC. There is a reference, though, to the justification being ministerial discretion and a general reference to challenges being imposed on "the resource allocation for" CIC.

[34] In *Vaziri v. Canada*, 2006 FC 1159, [2006] F.C.J. No. 1458, which is referred to by the CHRC above, the Federal Court only addressed the provisions of the *IRPA* and the *Immigration and Refugee Protection Regulations*, SOR/2002-227. There is no reference to the *CHRA* in that case and therefore no determination of whether this practice was in violation of the *CHRA*. Therefore, while this case did confirm the right of the Minister to prioritize applications, it did not address the issue of whether such prioritization would result in the practice being a discriminatory practice for the purposes of the *CHRA*.

[35] The reference to an explanation that is "reasonable and non-pretextual" in the decision of the CHRC implies that the explanation would support a finding that the practice was not a discriminatory practice within the meaning of sections 5 to 14.1 of the *CHRA*. However, the CHRC, in the part of its decision referred to above, appears to acknowledge that the practice is a discriminatory practice, justified based on ministerial discretion. Ministerial discretion, however, is not one of the recognized exceptions under the *CHRA*. Since undue hardship must be established "considering health, safety and cost" (subsection 15(2) of the *CHRA*), ministerial discretion, without more, could not support a finding that undue hardship would be imposed on CIC if it were to process the sponsorship applications for parents more quickly.

[36] The CHRC appears to adopt the investigator's report as support for its decision to dismiss the complaint. Therefore, this report should also be reviewed. In the report of the investigator, under the heading *"The investigation process"*, it is stated that:

> **Step 1:**
>
> 4. The investigation will examine whether the complainant was adversely differentiated in the provision of services by considering the following questions:

> i What is the service at issue in this complaint?
>
> ii Does the complaint involve a service that is customarily available to the public?
>
> iii Is the complainant a member of a group possessing a characteristic that is protected as a prohibited ground of discrimination?
>
> iv Did the complainant request the service?
>
> v Did the differential treatment in the provision of the service have adverse consequences for the complainant?
>
> vi Was the complainant treated in a different manner than others requesting or receiving the service who do not share the complainant's grounds based characteristics?
>
> **Step 2**
>
> Depending upon the investigator's findings in Step 1, the investigation may also consider:
>
> i Can the respondent provide a reasonable explanation for its actions that is not a pretext for discrimination based on a prohibited ground of discrimination?

[37] There is no Step 3. The rest of the report only addresses the submissions and findings related to these two steps. The only reference to "undue hardship" appears to be in paragraph 65 when the investigator is addressing submissions made by Prof. Attaran.

[38] While there is no reference to undue hardship in the decision of the CHRC or in the covering letter of the CHRC accompanying its decision, and only limited reference to "undue hardship" in the investigation report, CIC, in its letter dated March 3, 2011, refers to the following questions that were posed to it by the investigator designated by the CHRC:

> *Question 2: Would undue hardship [health, safety, cost implications] be incurred by CIC if it shortened the time to process applications for parents and grandparents? If yes, please explain and provide details of the undue hardship involved.*

Question 4: Has consideration been given to shortening the length of processing time for parents and grandparents? If yes, please provide details of the options considered and why they were rejected.

[39] The response provided by CIC to these questions was as follows:

> Each year, as part of the Annual Report planning process, CIC considers processing times for parents and grandparents as one of the many competing priorities to be dealt with in arriving at the Annual Report. Solutions for addressing these processing times are to raise the overall levels of admissions or increase the volume of parent and grandparent cases processed on an annual basis. CIC's current funding base limits the department's ability to increase levels and any increase to the parent and grandparent category would displace cases in other categories, putting at risk the department's ability to meet its overall economic, family reunification and humanitarian objectives.
>
> The time it takes to process immigrant applications is a function of the volume of applications received and the resources available to assess those applications. Even if an exponentially large amount of money were devoted to process the applications, CIC would still be only able to process a certain number of applications, given the range approved by Cabinet.

[40] These submissions are included in the investigator's report at paragraphs 61 and 62.

However, the conclusion at the end of this section does not refer to undue hardship:

> Conclusions:
>
> 69. The respondent acknowledges that processing times for applications to sponsor parents and grandparents are significantly longer than those for other members of the Family Class. Solutions for addressing these processing times are to raise the overall levels of admissions in this category, increase the volume of parent and grandparent cases processed annually, or limit the number of applications from parents and grandparents. According to the respondent, its current funding base limits its ability to increase levels, and any increase to the parent or grandparent category would displace cases in other categories. This would put its ability to meet its overall economic, family reunification and humanitarian objectives at risk.
>
> 70. The evidence indicates that:
>
> • Annually, the respondent receives an "Immigration Levels Plan" approved by Cabinet and tabled in Parliament.

> • The respondent aligns its operations, to the extent possible, with projected admissions, and by extension the budget allocated to it annually to deliver the immigration program.
>
> • The respondent's intention and general practice is to work within the Levels Plan. Any decision to adjust processing work plans must be carefully weighed to ensure that it reflects the intentions outlined in the Immigration Levels Plan and, that does not exert undue operational pressure on the system.
>
> • Even if the respondent devoted an exponentially large amount of money to the assessment of parent and grandparent applications, it could still only process a limited number, given the range approved by Cabinet.
>
> • The Federal Court of Canada has stated that the Minister of Citizenship and Immigration may decide which group of immigrants (s)he wishes to prioritize.
>
> • When *IRPA* and the Regulations came into effect (June 2002) Family Class applications for immigration to Canada significantly increased and it became necessary for the respondent to prioritize among the different categories within the Family Class.
>
> • Taking into consideration the general nature of family relationships, the circumstances relevant to each category and information gathered from the Canadian public, the respondent committed to reuniting the closest family members (children and spouses) first. The respondent determined that the level of dependency is not generally the same between adult sponsors and their parents or grandparents as it is between parents and dependent children or between spousal partners.
>
> 71. Based on all of the above, it appears that, while the respondent acknowledges processing Family Class applications for permanent resident visas differently based on family status (ie. based on the relationship between the sponsor and the individual(s) he/she is applying to sponsor), it has provided a reasonable explanation for prioritizing the processing of Family Class applications the way it does.

[41] Despite the finding of the Federal Court Judge that the CHRC had based its decision to not refer the complaint to the Tribunal on its consideration of the exemption for *bona fide* justification in subsection 15(1) of the *CHRA*, the Investigation Report, the decision of the CHRC and the covering letter of the CHRC do not support this. There is no indication that the

decision was based on undue hardship. In a judicial review, the reviewing court is reviewing the actual decision that was made. While the CHRC could review the question of whether there was a *bona fide* justification for the practice in deciding whether to refer a matter to the Tribunal, there are no conclusions or decisions made in relation to this issue in the Investigation Report, the decision of the CHRC or the covering letter of the CHRC.

Was the Decision of the CHRC Reasonable?

[42] Other than simply ministerial discretion, which was addressed above, CIC offered two other explanations that can be gleaned from the Investigation Report that were accepted by the CHRC:

(a) CIC determined that in aligning its operations to deliver the immigration program with the budget allocated to it, it would reunite "the closest family members (children and spouses) first" as CIC "determined that the level of dependency is not generally the same between adult sponsors and their parents or grandparents as it is between parents and dependent children or between spousal partners" (Investigator's Report, page 80 of the Appeal Book); and,

(b) the "Immigration Levels Plan" approved by Cabinet and the budgetary limits imposed on CIC constrain the ability of CIC to process the sponsorship applications for parents or grandparents more quickly.

[43] Both of these explanations provided by CIC confirm that the practice was discriminatory – CIC was differentiating adversely based on family status in processing sponsorship

applications for parents more slowly than those for spouses and children. The second explanation, however, suggests that perhaps there is a *bona fide* justification for this different treatment. However, there is no indication that either the investigator or the CHRC determined that the matter should be dismissed based on a *bona fide* justification for the practice of CIC in treating sponsorship applications for parents differently. Since the CHRC did not make this finding, it would not be appropriate for this Court to make that finding.

Conclusion

[44] The decision of the CHRC to dismiss the complaint is not reasonable. The explanations provided by CIC confirm that it was differentiating adversely based on family status by treating sponsorship applications for parents more slowly than sponsorship applications for spouses and children. As a result, CIC was carrying on a discriminatory practice within the meaning assigned by sections 5 to 14.1 of the *CHRA*. With respect to the exemptions available under the *CHRA*, the only one that could be applicable is the *bona fide* justification but there was no indication that the CHRC relied on this exemption in making its determination to dismiss the complaint.

[45] As a result I would allow the appeal, with costs, set aside the Judgment of the Federal Court, grant the application for judicial review and refer the matter back to the CHRC for redetermination including such further investigation and explanation as may be necessary.

"Wyman W. Webb"

J.A.

STRATAS J.A. (Concurring reasons)

[46] I agree with the facts set out by my colleague, Justice Webb. I also agree with the result he reaches. I reach it, however, on narrower grounds.

[47] I agree with Justice Webb that the standard of review is reasonableness. Standing in the shoes of the Federal Court, as we are required to do (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 45-47), I find that the Commission did not reach a reasonable outcome. Its decision is outside of the range of acceptability and defensibility on the facts and the law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 47.

[48] As is well-known, the range of acceptable and defensible options or "margin of appreciation," as some prefer to call it, takes its colour from the context, widening or narrowing depending on the nature of the question and other circumstances: *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at paragraphs 37-41; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at paragraphs 17-18 and 23; and *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 at paragraph 44.

[49] A number of particular factors can constrain the margin of appreciation that we allow an administrative decision-maker in any given case. Examples of this include cases where the importance of the matter to the individual is heightened and sounds in the concept of the rule of law (*Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56 at

paragraphs 88-95), where there are statutory recipes to be followed (*Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 at paragraph 38) and where relevant case law has supplied legal standards that the administrator must follow (*Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at paragraphs 13-14 and *Canada (Attorney General) v. Abraham*, 2012 FCA 266 at paragraphs 37-50).

[50] Applying these authorities, I do agree with Justice Webb that the margin is somewhat constrained owing to the importance to individuals applying for permanent residency, the obligation on the Commission to properly follow the methodology set out under the Act and certain standards in the case law. These standards include the obligation on the Commission to conduct investigations as thoroughly as required by the circumstances and not to accept at face value explanations that are hollow: *Slattery v. Canada (Human Rights Commission*, [1994] 2 F.C. 574 at paragraph 49 (T.D.), aff'd (1996), 205 N.R. 383 (C.A.).

[51] Before the Commission, the appellant complained that Citizenship and Immigration Canada ("CIC") has placed Canadians who apply to sponsor their parents to immigrate under the family class program at the back of the processing queue, while those who apply to sponsor other family members, *e.g.* children, spouses, aunts and uncles, have much faster processing. This, the appellant alleged, was a discriminatory allocation of processing resources by CIC.

[52] CIC offered two main explanations. These explanations, and some observations on each, are as follows:

(1) CIC said its processing resources were scarce. Because of that, it "committed to reuniting the closest family members (children and spouses) first" based on its determination that "the level of dependency is not generally the same between adult sponsors and their parents or grandparents as it is between parents and dependent children or between spousal partners." This looks like a blanket statement based on stereotypical views of roles within families and family relationships. Far from being an explanation casting a benign light on the matter, it underscores that in this case CIC made distinctions based on family status. The Commission needed to investigate this further.

(2) CIC said that it was forced to do what it did by an "Immigration Levels Plan," approved by Cabinet as well as resource limitations. However, CIC offered that bald statement, nothing more. There is no data and information supporting it. There is also no data and information showing that CIC had no alternatives other than doing what it did. But we see in the record before us that after the complaint was made, there were alternatives: somehow CIC was able to address some of the processing disparity despite the Plan and resource limitations. The Commission was aware of this post-complaint fact. In the circumstances, CIC's explanation that it was forced to do what it did rang hollow. It could not be taken at face value. It needed further investigation.

[53] In short, CIC's explanations aren't really explanations at all. Perhaps this is because there really are no explanations and the complaint has merit. Perhaps this is because there are more

explanations available but, contrary to *Slattery*, the Commission has not investigated enough to get them. Perhaps this is because the Commission's reasons and the record before us do not contain enough information to permit us to assess the reasonableness of the conclusion it has reached: *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227, [2014] 1 F.C. 766 at paragraphs 100 and 116-120. Regardless of the reason, the Commission's decision is unreasonable and cannot stand.

[54] Here, rather than conducting further investigation or seeking better and more detailed explanations in accordance with *Slattery*, *supra*, the investigator basically pasted CIC's explanations into the investigation report, nothing more. Then the Commission simply adopted the investigator's report with the pasted explanations in it. As is evident from my own reasons, I do agree with Justice Near that normally the Commission's decisions are entitled to deference. But here, there is nothing yet to defer to. The Commission has not completed the task the Act requires it to do.

[55] Therefore, for these reasons, I agree with Justice Webb that the Commission's decision must be quashed. I agree that the Commission should be permitted an opportunity to investigate CIC's explanations further until the job is done in accordance with the standards set out in *Slattery*, *supra*. Then it should re-do its decision, offering explanations that would permit this Court to assess, with confidence, whether, bearing in mind the margin of appreciation to which the Commission is entitled, the outcome reached is acceptable and defensible.

[56] Therefore, I agree with Justice Webb's disposition of the appeal.

"David Stratas"

J.A.

NEAR J.A. (Dissenting reasons)

[57] I have read the reasons of my colleagues, and I respectfully reach another conclusion. For the reasons that follow, it is my view that the appeal should be dismissed.

[58] Like Justice Stratas, I agree with Justice Webb's recitation of the facts. I also agree with my colleagues that the role of this Court is to determine whether the Federal Court judge properly applied the standard of reasonableness to the Commission's decision (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 47, [2013] 2 S.C.R. 559 [*Agraira*], *Keith v. Correctional Service of Canada*, 2012 FCA 117 at para. 47, 431 N.R. 12). Where I part company with my colleagues is in the application of the reasonableness standard.

[59] As my colleague Justice Webb states (at paragraph 41), this Court must review the actual decision that was made. The decision of the Commission was to dismiss the appellant's complaint under subparagraph 44(3)(*b*)(i) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA), because "having regard to all the circumstances of the complaint, an inquiry into the complaint [was] not warranted".

[60] In my view, this decision was reasonable and should not be interfered with by this Court.

[61] The Commission is a specialized administrative body. Its screening function is clearly one of its core responsibilities (*Halifax v. Nova Scotia (Human Rights Commission)* 2012 SCC 10 at paras. 19-25, [2012] 1 S.C.R. 364 [*Halifax*]). After considering the record before it,

including submissions from the respondent specifically addressing the issue of undue hardship (as described at paras. 38-40 of the Reasons of Justice Webb), the Commission determined that an inquiry into the complaint by a Tribunal was not warranted. In my view, it was entitled to do so.

[62] I agree with the Federal Court judge that when one looks at the decision of the Commission as a whole, as courts performing judicial review are required to do (*Agraira, supra* at para. 53, *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708), the decision was reasonable.

[63] In my view, this Court should be deferential to the decision of a specialized administrative body exercising one of its central functions - a function which Parliament has delegated to the administrative body to give it control over its own process - and should only intervene in the clearest of cases. This is not such a case.

[64] I accept that given the context of the decision, the margin of appreciation this Court must give to the Commission may be narrower than if the Commission had decided to refer the matter to a Tribunal. However, based on the extensive record before us, it is my view that the Commission's decision still falls within the range of possible, acceptable outcomes, defensible in respect of the facts and the law (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190).

[65] In essence, my colleagues seek greater precision in the language used by the Commission to render its decision. They both conclude that it was not reasonable for the Commission to dismiss the appellant's complaint on the grounds that the respondent had provided an adequate, non-pretextual explanation for the allegedly discriminatory treatment.

[66] My colleague Justice Webb states that there is "no indication" that the Commission's decision was based on undue hardship, and that as such, the Commission made no conclusions or decisions in relation to the issue of *bona fide* justification under subsection 15(1) of the CHRA (at para. 41). This is in contrast to the conclusion of the Federal Court judge, who found that "the Commission reasonably accepted [the respondent's] 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" (at para. 133).

[67] Even if I accept that the language in the Commission's decision and covering letter makes very little reference to the concept of undue hardship, I cannot agree that there is "no indication" that this formed the basis of the Commission's decision. Moreover, this Court is required to consider the Commission's decision as a whole, in the context of the record.

[68] At paragraph 41 of his Reasons, Justice Webb finds that the Commission is entitled to consider the issue of *bona fide* justification in performing its screening function. I agree. In particular, when the Commission dismisses a complaint under subparagraph 44(3)(*b*)(i) of the CHRA, it does so having regard to "all the circumstances". The possibility that a *bona fide*

justification exists for an allegedly discriminatory practice is certainly a relevant circumstance for the Commission to consider.

[69] We must also, however, bear in mind that the Commission cannot adjudicate the merits of a complaint (*Halifax*, *supra* at paras. 23-24), and therefore cannot make a final determination on the issue of *bona fide* justification. This must be taken into account when assessing the reasonableness of the Commission's decision to dismiss the appellant's complaint in light of "all the circumstances".

[70] In my view, in the context of the record, it cannot be said that the Commission's decision lacked the transparency, intelligibility, or justification necessary to meet the standard of reasonableness (*Dunsmuir*, *supra*, at para. 47).

[71] In making its decision, the Commission had before it the investigator's report, as well as the parties' submissions from both before and after the issuance of the report. In her report, the investigator accepted and reproduced many of the respondent's submissions, including the respondent's responses to questions about undue hardship. This report was ultimately adopted by the Commission in its decision to dismiss the complaint.

[72] While I accept that the language the Commission used in its final decision could have been more precise, I do not accept that "there is no indication that either the investigator or the [Commission] determined that the matter should be dismissed on a *bona fide* justification"

(Reasons of Justice Webb, at para. 43). Furthermore, in my view, it could have reasonably done so based on the record before it.

[73] To that end, I respectfully disagree with my colleague Justice Stratas that a negative inference should be drawn from the respondent's later conduct in redressing the processing disparity (at para. 52). The Minister of Citizenship and Immigration, in the management of his portfolio, made efforts to deal with a backlog that existed. I cannot see how this makes the respondent's submission to the Commission - that the distinctions drawn between applications in the family class are the result of the Minister's responsibility to manage immigration levels - "ring hollow". Moreover, the changes which the Minister announced in November 2011 were not "alternatives" to the priorities which he had established within the family class or the way in which targets are set in the immigration levels plan. The Minister introduced a one-time increase to the number of planned admissions from the parent and grandparent category, and a more efficient manner of receiving applications from this category.

[74] I also have difficulty with some of my colleague Justice Stratas' comments on the respondent's submissions to the Commission, found in paragraphs 52 and 53 of his Reasons. It is the role of the Commission to assess the adequacy of the parties' submissions when determining whether or not to dismiss a complaint. This includes, within the scope of the Commission's screening function, an assessment of the sufficiency of the evidence from both parties (*Halifax*, *supra* at para. 24). While this Court must ensure that the Commission's ultimate decision remains within the bounds of reasonableness, this Court must be deferential to the Commission's assessments in these respects.

[75] For the foregoing reasons, it is my position that the Commission's decision, when read as a whole, was reasonable.

[76] I would therefore dismiss the appeal, with costs to the respondent.

"D.G. Near"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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