Federal Court of Appeal | Cour d'appel fédérale

Date: 20170330

Docket: A-56-16

Citation: 2017 FCA 63

CORAM: **NOËL C.J.**
WEBB J.A.
WOODS J.A.

BETWEEN:

TRUNG KIEN HOANG

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on March 22, 2017.

Judgment delivered at Ottawa, Ontario, on March 30, 2017.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: WEBB J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

NOËL C.J.

[1] This is an appeal brought by Trung Kien Hoang (the appellant) against a decision of the Federal Court (2016 FC 54), wherein Shore J. (the Federal Court judge) dismissed his application for judicial review of a decision of the Canada Human Rights Commission (the Commission) not to refer his complaint against the Minister of Transport, Infrastructure and Communities (the Minister) to the Canadian Human Rights Tribunal (the Tribunal).

[2] The complaint alleges that he was subject to discrimination on a prohibited ground (family status) when the Minister denied his application for security clearance, which was a prerequisite for his continued employment at the Vancouver International Airport.

[3] The Commission was satisfied that there was no need to refer the complaint to the Tribunal because although a *prima facie* discrimination was established, there was *bona fide* justification for considering the appellant's family status in determining whether he should be security cleared.

[4] The appellant maintains that in so holding the Commission misapplied the test for establishing a *bona fide* justification under the *Canadian Human Rights Act*, R.S.C., 1985, c H-6 (the Act), and that the Federal Court judge erred in not intervening on this and various other grounds.

[5] For the reasons which follow, I would dismiss the appeal.

[6] The provisions of the Act which are relevant to the analysis are reproduced in the appendix to these reasons.

Background

[7] The appellant is a Hong Kong native who became a Canadian citizen in 1995. He was hired as a station attendant for Air Canada, contingent on obtaining a Transportation Security

Clearance (TSC) from the Minister. Upon applying for his TSC in October of 2010, the appellant was given a temporary restricted area identification card and was deployed in his position.

[8] While the appellant's TSC application was pending, it was brought to the attention of the Minister that the appellant's father had been found guilty of trafficking in drugs, that his brother had been found in possession of heroin and crack cocaine, and that the appellant was stopped by the police in 2009 with marijuana in the vehicle he was driving. The Minister gave the appellant an opportunity to comment on the accuracy of this information, which he did. A few months later the appellant's TSC application was rejected and he was ultimately terminated.

[9] The appellant sought judicial review of the Minister's decision rejecting his TSC application. On consent, the decision was quashed and the matter was returned to the Minister for reconsideration. In February of 2013, the appellant's TSC application was again denied.

[10] Rather than having this second refusal judicially reviewed, the appellant filed a complaint before the Commission alleging discrimination on the basis of family status under section 5 of the Act.

[11] An investigation officer (the investigator) was appointed to assist the Commission in determining whether further inquiry by the Tribunal was warranted (Appeal Book, p. 210). The investigator performed a two-step inquiry into the appellant's complaint, which she understood to be the denial of a security clearance on the basis of alleged criminal behavior of family members (Appeal Book, p. 211).

[12] Based on the evidence before her, the investigator determined that the appellant's family status, namely his relationship with his father and his brother, was a factor considered by the Minister in rejecting his TSC application (Appeal Book, p. 217).

[13] The investigator went on to consider whether the Minister had a *bona fide* justification for this exclusion. In so doing, she applied – without referring to its origin – the *Meiorin*/*Grismer* test for discrimination set out by the Supreme Court in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 [*Meiorin*] and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R 868 [*Grismer*]. She framed the questions to be answered as follows (Appeal Book, pp. 212-213):

> (i) Was the request for a security clearance and the security clearance carried out pursuant to an established policy?
>
> (ii) Was the policy created for a legitimate security-related purpose related to the job in question?
>
> (iii) Is the policy based upon an honest and good faith belief that it is necessary to fulfill the legitimate security purpose in the context of the job in question?
>
> (iv) Is the policy or standard reasonably necessary to meet the legitimate security purpose in the context of the job in question?

[14] Under question (i), the investigator found that the practice at issue was the "exercise of discretion by the Minister relating to the issuance of a security clearance" as provided under section 4.8 of the *Aeronautics Act*, R.S.C., 1985, c A-2 (Aeronautics Act) which allows the Minister to grant, refuse, suspend or cancel a security clearance (Appeal Book, p. 217).

[15] As to question (ii), she held that this practice "was created pursuant to the [Minister's] mandate to serve the public through the promotion of a safe, secure, efficient and environmentally responsible transportation system in Canada" by means of the Transportation Security Clearance Program (TSCP) (Appeal Book, p. 218). She added that the Minister's practice "is in place to mitigate the risk posed by individuals who may be a threat to aviation or maritime transportation" (Appeal Book, p. 218).

[16] In answering question (iii), the investigator found that this practice was established in good faith, in the belief that it is necessary for the fulfilment of a safe and secure transportation system (*Ibidem*). The Minister had argued that the "purpose of the TSCP is to reduce the risk of security threats by preventing unlawful interference with both the civil aviation and marine transportation systems by conducting background checks on airport and marine workers who perform certain duties" (*Ibidem*). In reaching her conclusion, the investigator could not find any evidence to suggest that the Minister was not acting in good faith (*Ibidem*).

[17] Lastly, she held that the issue to be resolved under question (iv) was whether the Minister could justify taking into consideration the conduct of the appellant's family members in the denial of the TSC application (Appeal Book, p. 219). Given the nature of the appellant's position at Air Canada, she found that "the [Minister's] practice is reasonably necessary to ensure, to the extent possible, that airport employees are not prone or induced to assist or abet any person to commit an act that may unlawfully interfere with civil aviation" (Appeal Book, p. 220). She also noted that those victimized by the TSCP had available to them avenues to challenge the Minister's decision (Appeal Book, p. 219).

[18] Following a review of the complaint, the investigator's report and the appellant's response to it, the Commission found that the practice of considering criminal antecedents of family members in determining whether a TSC should be issued was justified as reasonably necessary. The Commission further found that the TSCP did not provide for a blanket disqualification for all applicants whose family members have criminal antecedents, but was rather to be applied on a case-by-case basis. The complaint was therefore screened out, the Commission being satisfied that there was no need for proceeding to an inquiry before the Tribunal (Appeal Book, pp. 207-208).

Decision of the Federal Court Judge

[19] The Federal Court judge dismissed the judicial review application brought against the decision of the Commission. It suffices to say for present purposes that he found the decision of the Commission not to refer the complaint for further inquiry before the Tribunal to be reasonable. He further rejected a procedural fairness argument raised by the appellant, which argument is reiterated on appeal, and further addressed below.

Alleged Errors

[20] In support of his appeal, the appellant alleges that the Commission made a number of errors, which the Federal Court judge failed to correct. Specifically, the "Commission misapplied and improperly considered the test for establishing a bona fide justification where prima facie discrimination was established" (Appellant's Memorandum, paras. 4 and 71-95). According to the appellant, the Commission considered the correct test, but "limited its analysis to the

Minister's broad mandate and considered the importance of the Minister's general role in assessing persons for a TSC without considering the specific issue in front of it: whether the refusal of [his] TSC application because of the identify of his family members was supportable as a [bona fide justification]" (Appellant's Memorandum, para. 74).

[21] The appellant's specific contention is that both the investigator and the Commission "missed the substance of the Complaint and the issue that was before it [namely] whether the Minister's denial of [his] TSC because of the identity of his family members was justified" (Appellant's Memorandum, paras. 75 and 77). In the same vein, the appellant asserts that the Commission erroneously narrowed its jurisdiction in adopting the investigator's flawed analysis (Appellant's Memorandum, paras. 96-100).

[22] The appellant further takes issue with the Commission's finding that the TSCP is not applied as a "rigid rule" (Appellant's Memorandum, paras. 102-103 referring to the Commission's decision, Appeal Book, p. 207). He submits that the record does not support this finding given that the "Minister presented no such evidence" (Appellant's Memorandum, paras. 101-106). The appellant also maintains that it is immaterial if the Minister considered other factors – such as his own past – in refusing to grant his TSC given that all he had to prove was that discrimination was one of the factors behind the refusal (Appellant's Memorandum, paras. 107-113).

[23] The appellant further reiterates that the Commission breached its duty of procedural fairness by not interviewing his mother, thereby limiting unduly the scope of its investigation.

According to him, her evidence was "obviously crucial evidence" in order to properly understand his relationship to his father and brother (Appellant's Memorandum, paras. 117-118).

Analysis and disposition

[24] In an appeal from a decision of the Federal Court disposing of a judicial review, this Court must determine whether the judge properly identified the standard of review and applied it correctly (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, para. 45 [*Agraira*]). The parties submit, and I agree, that the Federal Court judge properly identified reasonableness as the standard against which decisions of the Commission rendered pursuant to subparagraph 44(3)(*b*)(i) of the Act must be assessed (*Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C.R. 113 (CA), para. 38).

[25] While there is a debate as to the standard of review applicable to the procedural fairness argument (*Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, paras. 79 and 89; *Bergeron v. Canada (Attorney General)*, 2015 FCA 160, paras. 67-71), I am willing to dispose of this argument applying the standard that is most favourable to the appellant and which the Federal Court judge adopted *i.e.* correctness.

[26] The question therefore is whether the Federal Court judge applied these standards correctly. In this respect, *Agraira* invites an appellate court to step into the shoes of the judge and to focus on the administrative decision *de novo* rather than looking for potential errors by the reviewing court (*Agraira*, para. 46 citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, para. 247).

[27] At the screening stage, the question is "whether there is a reasonable basis in the evidence for proceeding to an inquiry" (*Richards v. Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 341, para. 7 considering subsection 44(3) of the Act). The investigator understood that this was the issue which the Commission had to decide, as evidenced by the following passage of her report (Appeal Book, p. 210):

> The Commission members do not determine whether discrimination has actually occurred, but whether a complaint requires further inquiry by the Canadian Human Rights Tribunal. In determining whether or not to refer a complaint for further inquiry, the Commission members take into consideration all of the circumstances of the complaint. (Emphasis added.)

[28] Given the nature of the complaint, the Commission had to consider whether the complaint involved a prohibited ground of discrimination listed under section 3; if so, whether the facts established the existence of the alleged discriminatory practice under section 5; and if so, whether the Minister's practice was justified by a *bona fide* justification as provided for in paragraph 15(1)(*g*) of the Act.

[29] Only the last consideration is at issue in this appeal.

[30] The appellant maintains that the substance of his complaint was not addressed given that the investigator focused her analysis on the Minister's exercise of discretion rather than on the question whether the Minister's practice was supported by a *bona fide* justification. However, this is a distinction without a difference as it is clear from the investigator's report that she found the Minister's exercise of discretion to be justified because there was a *bona fide* justification for the Minister's practice in this case.

[31] This is how the Commission understood her report as evidenced by the following extract from the decision: "[t]he Assessment Report concludes that when assessing an application for a security certificate the Minister considers the identity of an applicant's family members which may be considered a discriminatory practice on the basis of family status", but that "the Assessment Report further concludes that such a practice is justified as reasonably necessary" (Appeal Book, p. 207).

[32] Against this background, it can be seen that the investigator properly applied the *Meiorin*/*Grismer* test. Under the first part of the test, she held that the issuance of the security clearance is rationally connected to the purpose of promoting a safe and secure transportation system.

[33] As to the second part of the test, the investigator found no evidence to suggest that the Minister was not acting in good faith. There is nothing on the record that can alter this conclusion.

[34] Under the third part of the test, the investigator found that the Minister cannot accommodate persons with the characteristics of the appellant without incurring undue hardship. This is where the investigator puts to rest any suggestion that she did not properly consider the specifics of the appellant's case. In her words (Appeal Book, p. 220):

> 38. […] Based on all of the evidence gathered during this assessment, the [Minister's] practice is reasonably necessary to ensure, to the extent possible, that airport employees are not prone or induced to assist or abet any person to commit an act that may unlawfully interfere with civil aviation.

> 39. Finally the nature of the job in which the [appellant] was employed, needs to be examined. As a station attendant, the [appellant] was responsible for loading and unloading luggage to and from commercial aircrafts. It is therefore reasonable to assume that the [Minister] is required to obtain and consider any and all information available, including associates and family members, when evaluating an individual's suitability for the job. In this particular case, it is reasonable that the [Minister] would have legitimate concerns about the [appellant's] suitability, given both his father and his brother's contact with the law with respect to narcotics. By retaining the [appellant] in his employment, the risk of unlawful interference with civil aviation, either real or perceived, was there. On a balance of probabilities, the [Minister] concluded that the risk was sufficient enough that it could not justify the issuance of a security clearance to him.

[35] The appellant insists that the investigator should have delved further into his relationship with his father and brother in order to determine if the perceived risk was real. I disagree. The investigator fully explained the rationale for the concern, and to the extent that the appellant was aware of facts, circumstances or information which would alleviate the perceived risk, it was incumbent upon him to bring these to the attention of the investigator.

[36] The appellant having failed to do so, it was reasonable for the investigator and the Commission after her, to conclude that a referral of the complaint to the Tribunal was not warranted in this case.

[37] As to the alleged breach of procedural fairness, the appellant had the opportunity to indicate to the investigator why his mother's evidence would have been "obviously crucial", but again did not see fit to do so. This is why the Federal Court judge rejected the appellant's contention on this point (Reasons, para. 60), and I can find no fault in that regard.

[38] For the above reasons, I would dismiss the appeal. The respondent is seeking costs which I would fix at $2,500 inclusive of disbursements.

"Marc Noël"

Chief Justice

"I agree
Wyman W. Webb J.A."

"I agree
J. Woods J.A."

APPENDIX

***Canadian Human Rights Act*, RSC 1985, c H-6**	***Loi canadienne sur les droits de la personne*, LRC 1985, c H-6**
Prohibited grounds of discrimination	**Motifs de distinction illicite**
3 (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.	**3 (1)** Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.
Denial of good, service, facility or accommodation	**Refus de biens, de services, d'installations ou d'hébergement**
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,	**b)** de le défavoriser à l'occasion de leur fourniture.
on a prohibited ground of discrimination.	
Employment	**Emploi**
7. It is a discriminatory practice, directly or indirectly,	**7.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
(a) to refuse to employ or continue to employ any individual, or	**a)** de refuser d'employer ou de continuer d'employer un individu;
(b) in the course of employment, to differentiate adversely in relation to an employee,	**b)** de le défavoriser en cours d'emploi.

on a prohibited ground of discrimination.

Exceptions

15 (1) It is not a discriminatory practice if

(g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or 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.

Exceptions

15 (1) Ne constituent pas des actes discriminatoires :

g) le fait qu'un fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au 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.

Report

44 (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

Rapport

44 (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.

Action on receipt of report

(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied

(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,

it shall refer the complainant to the appropriate authority.

Suite à donner au rapport

(2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :

a) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

b) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.

Idem

(3) On receipt of a report referred to in subsection (1), the Commission

Idem

(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 report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or

(ii) d'autre part, qu'il n'y a pas lieu de 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).

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-56-16
(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE SHORE OF THE FEDERAL COURT DATED JANUARY 19, 2016, NO. T-798-15)	
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PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MARCH 22, 2017
REASONS FOR JUDGMENT BY:	NOËL C.J.
CONCURRED IN BY:	WEBB J.A. WOODS J.A.
DATED:	MARCH 30, 2017

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