Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2023 CHRT 27
Date: July 4, 2023
File No.: T2163/3716

Between:

Amir Attaran

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Immigration, Refugees and Citizenship Canada (formerly Citizenship and Immigration Canada)

Respondent

- and -

Chinese and Southeast Asian Legal Clinic

Interested party

Decision

Member: David L. Thomas

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I. THE INQUIRY

[1] This is the final decision on an inquiry before the Canadian Human Rights Tribunal (the “Tribunal” or “CHRT”) for a complaint that was filed more than a decade ago. The matter was before the Tribunal for over 6 years, with a hearing of 22 days and extensive written submissions that took place over a 13-month period in 2021 and 2022.

[2] This inquiry concerned the complaint of Dr. Amir Attaran (the “Complainant”) against Immigration, Refugees and Citizenship Canada (“IRCC” and formerly known as Citizenship and Immigration Canada or “CIC”) filed with the Canadian Human Rights Commission (“CHRC” or the “Commission”) on July 28, 2010. The Complainant alleges that discriminatory practices by the Respondent contributed to the significant delay in the processing of his application to sponsor his parents for immigration, as well as delays for other similar applicants, compared to other immigration categories under the Family Class (as defined in the Regulations to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27) (“*IRPA”*), contrary to section 5 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the “*CHRA*” or the “*Act*”).

[3] The original prohibited grounds of discrimination alleged were the age and family status. Upon a written motion, I also permitted Dr. Attaran to amend his complaint to add the prohibited grounds of race, and national or ethnic origin (see 2017 CHRT 21).

[4] Initially the Commission declined to refer Dr. Attaran’s complaint to the Tribunal for an inquiry. The Commission dismissed his complaint on the basis that, although it appeared IRCC processed applications for parents and grandparents differently from sponsorship applications for spouses and dependent children, they were satisfied that it was the result of the exercise of ministerial discretion and that the complainant had not directly challenged the Minister’s authority to exercise such discretion.

[5] Dr. Attaran made an application for a judicial review of the Commission’s decision. The Federal Court dismissed Dr. Attaran’s application for judicial review. Dr. Attaran appealed the decision to the Federal Court of Appeal which, in their decision dated February 3, 2015, overturned the Federal Court’s finding and referred the matter back to the Commission (2015 FCA 37).

[6] The Commission eventually referred Dr. Attaran's complaint to the Tribunal, where it was received on September 7, 2016. Case management before the Tribunal went on for a long time. There were numerous issues raised about the disclosure of documents. Many thousands of documents were eventually released by IRCC to Dr. Attaran through the disclosure process. Over the course of the pre-hearing period, 15 case management conference calls (CMCCs) were held and I wrote four rulings in response to written interlocutory motions.

[7] In August of 2017, the Chinese and South Asian Law Clinic ("CSALC") in Toronto brought a motion to be added as an interested party to this complaint. CSALC is a not-for-profit organization incorporated under the laws of Ontario. It provides free legal services to and acts as an advocacy group for non-English speaking, low-income members of the Chinese, Vietnamese, Cambodian and Laotian communities living in Ontario. CSALC is also involved in law reform and has appeared before the Parliamentary Standing Committee on Citizenship and Immigration to make submissions on various topics, including family reunification and family class sponsorship applications. CSALC also engages in test case litigation from time to time. I concluded that CSALC possessed expertise that might assist the Tribunal in this matter. Their acceptance as an interested party was limited in accordance with wishes stated by the Complainant (see 2018 CHRT 6.)

[8] Unfortunately, the COVID-19 pandemic delayed the start of the hearing, which had originally been scheduled to start in-person in Ottawa in April 2020. Eventually, the hearing began on-line in February 2021, using the Zoom teleconference platform. There were two unplanned interruptions to the hearing (discussed below) resulting in hearing days re-scheduled to April and September 2021. Final oral arguments were scheduled to be heard in early 2022. However, the Complainant requested the cancellation of the oral hearing for personal reasons, and I approved that request after consultation with the other parties. In total, there were 22 hearing days in addition to written final arguments and then further written submissions in lieu of oral final arguments.

II. DISPOSITION

[9] For the reasons that follow, I have concluded that the Complainant and the Commission have not substantiated this complaint. They have failed to establish a *prima facie* case demonstrating adverse differential treatment in the provision of a service by the Respondent.

III. THE PARTIES

[10] The Complainant, Dr. Amir Attaran, testified that he was born and raised in California, as the only child to parents who immigrated there from Iran. He received a bachelor's degree in neuroscience from University of California at Berkeley, and a master of science degree in biology from the California Institute of Technology (Caltech) in Pasadena. Dr. Attaran went on to complete his PhD in a biology-related discipline at the University of Oxford in England. Dr. Attaran then completed a bachelor of laws degree at the University of British Columbia. Before becoming a professor at the University of Ottawa, in both the Faculty of Law and the Faculty of Medicine, Dr. Attaran held academic positions at Harvard University and Yale University.

[11] Counsel for the Commission changed over the course of the long case management period. Long-time CHRC counsel, Maitre Daniel Poulin, reached his retirement before the matter went to hearing. He was replaced by Ms. Caroline Carrasco who was based abroad, for the early portions of the hearing. At the same time, the Complainant was in California with his parents, creating a ten-hour time zone difference between all the parties. Notwithstanding the great distance, the on-line platform allowed us to finish many hearing days and the Tribunal thanks Ms. Carrasco for keeping such late hours during that phase. The Commission was also ably represented throughout the preliminary and evidence portions of the inquiry by Ms. Sasha Hart.

[12] Counsel for the Respondent also changed over the course of the pre-hearing stage. Korinda McLaine and Abigail Martinez from the Department of Justice originally represented the Respondent. During the pre-hearing case management, they were eventually replaced

by their colleagues, Sean Stynes and Kelly Keenan, who were also supported by co-counsel Susanne Wladysiuk and paralegal, Courtney Hughes.

[13] The interested party, the Chinese and Southeast Asian Legal Clinic, was represented by Jin Chien and Ada Chan.

IV. THE COMPLAINT

[14] According to his original complaint form, Dr. Attaran filed the first part of his application (the “Part 1” application) to sponsor his parents for immigration in July of 2009. When he filed his complaint with the CHRC, he noted that the Respondent’s website indicated that IRCC was completing the processing of Part 1 applications to sponsor parents and grandparents (“PGPs”) approximately 37 months after their receipt. By contrast, the same website indicated IRCC was completing the processing of Part 1 sponsorship applications for spouses, common-law or conjugal partners, dependant children and certain other relatives (referred to as “FC1s”) in approximately 42 days (see Exhibit 1). Dr. Attaran alleged that the longer processing time constituted adverse differential treatment on prohibited grounds under the *CHRA*.

[15] IRCC ultimately approved Dr. Attaran’s application and his parents landed in Canada as permanent residents approximately a decade ago. However, Dr. Attaran’s final arguments allege multiple discriminatory practices involving systemic discrimination on behalf of all sponsors and their parents or grandparents in the Family Class who are “in a similar situation” to the one he was in when sponsoring his parents (Complainant’s Factum at paras. 3 and 5). As such, he seeks systemic as well as personal remedies for the discrimination he alleges.

[16] It should be noted that since filing his complaint, the regime for sponsorship of parents and grandparents has undergone considerable change, and some of the changes were addressed by parties during this inquiry. As a result, some allegations involve policies that are no longer in effect, and in some cases Dr. Attaran has addressed IRCC actions and adverse effects that did not apply to his own sponsorship application (Part 1 of the sponsorship application process) and his parents’ permanent residency applications (Part 2

of the application process). The other allegations will be addressed in these reasons, but the primary emphasis of the complaint was the long, disproportionate delay endured by the Attaran family and others who wished to sponsor a parent or grandparent to immigrate to Canada at that time.

[17] The length of time IRCC took from receipt to final approval of Dr. Attaran's parents' permanent residency application, and the fact that this time was longer than for applications in the other main Family Class category (FC1s) in the same time period, is not in dispute.

[18] Instead, the cornerstone of the Respondent's position is that the factors which contributed to the longer processing times did not derive from services provided by IRCC or the responsible Minister. In 2019 the Respondent was granted an amendment to the Respondent's Statement of Particulars to put in issue whether the alleged discriminatory practices occurred in the provision of a "service" (2019 CHRT 12). The Respondent accepts that in a general sense, processing applications is a service carried out by the Respondent. However, the Respondent insists that every aspect of the processing practices that are alleged to be discriminatory by the Complainant and Commission stemmed from a government action that was not a service under section 5 of the *CHRA,* and therefore, the complaint should be dismissed at the *prima facie* stage.

[19] In their final arguments, the Complainant and Commission emphasized that they do not take aim at the government actions of legislating *IRPA*, passing regulations, or the Cabinet's approval of the target ranges for how many people may be admitted as permanent residents each year. Instead, the Complainant and Commission have specifically asked the Tribunal to evaluate whether IRCC engaged in a discriminatory practice when it processed the Complainant's application to sponsor his parents and his parents' associated application for permanent resident status. Among the acts that the Complainant and Commission allege were discriminatory practices during the processing of applications included discretionary decisions made by the Respondent, discretionary decisions made by the Minister when granting exemptions under s. 25.2(1) of *IRPA*, and the Minister's issuance of Ministerial Instructions pursuant to s. 87.3. of *IRPA*.

V. STATUTORY CONTEXT

[20] To properly put the complaint into context, it is necessary to describe the statutory, regulatory and policy regimes that affect Family Class applications like Dr. Attaran's. Under *IRPA*, there are three main categories for immigration: Family Class; Economic Immigrants; and Refugees. Within each major group, there are sub-groups of immigrants for which there are different rules and requirements for admission to Canada.

[21] Under the *Immigration and Refugee Protections Regulations* (SOR/2002-227) (the "*IRPA Regulations*"), there is a definition under s. 117 of foreign nationals who potentially make up the Family Class eligible for sponsorship for immigration to Canada. Their eligibility is dependent on their relationship with their relative, who must be a Canadian citizen or permanent resident and otherwise eligible to sponsor them. While there are several different types of potential family class members, only two categories comprise the vast majority of applications received each year: a) FC1s (mainly spouses, partners and dependent children); and, b) PGPs (parents and grandparents) and also referred to sometimes as FC4s.

[22] Dr. Attaran's complaint set out the two-step process for sponsoring a member of the Family Class. First, the prospective sponsor in Canada must complete the Part 1 sponsorship application about themselves which assists the Respondent in determining the applicant's eligibility to be a sponsor. A number of factors are considered, including the applicant's income level and ability to support the sponsored immigrant family member(s). The second part of the process is the sponsored relatives' application (Part 2) which sets out information about them. The application process also includes background checks and results of a medical examination to ensure compliance with the statutory requirements applicable to all immigrants to Canada. In these reasons, both Part 1 and Part 2 together form the Attaran family's "application", while Part 1 may also be referred to as the application to sponsor and Part 2 may be referred to as the application for permanent resident status.

[23] Section 94 of *IRPA*, requires the responsible Minister to table in Parliament an annual report on the operation of *IRPA* in the preceding calendar year. Under s. 94(2)(b) of *IRPA*, this annual report must also include a description of the number of foreign nationals

who became permanent residents, and the number projected to become permanent residents in Canada in the following year. The parties described the annual plan for projected new immigrants as the "Levels Plan". While s. 94(1) states it is the responsibility of the Minister to present the annual report to Parliament, the way the Levels Plan is developed is not prescribed by the statutory regime. The character and significance of the Levels Plans is explored further below.

[24] In a general sense, *IRPA* is a statute that provides the framework for the immigration regime. It gives only an outline of the main structure of the program. It addresses matters like the broader objectives of the immigration program, general requirements for immigration (such as clear background and medical checks), details about the Immigration and Refugee Board and enforcement.

[25] The actual details about who gets into Canada, and who does not, is subordinated to the *IRPA Regulations*. The regulations set out the detailed requirements for each sub-category of immigration. The points assessment regime for the economic classes is outlined in detail. The requirements for the family classes and refugee classes are also set out in the *IRPA Regulations.*

[26] In addition to *IRPA*, the *IRPA Regulations* and the Levels Plans, the processing of immigration applications is also affected by Ministerial Instructions. In 2008, *IRPA* was amended by the addition of s. 87.3 which authorizes the Minister to create Ministerial Instructions in furtherance of the Government's immigration goals. Ministerial Instructions and Section 87 are discussed in detail later in these reasons.

[27] Another type of action taken by the Minister that is in issue in this case is the issuing of exemptions from any applicable criteria or obligations under *IRPA* for a foreign national who is inadmissible or does not meet the normal requirements for immigration. The Minister has authority to issue exemptions for public policy considerations under section 25.2(1) of *IRPA.*

[28] In addition to the foregoing, the processing of immigration applications is also impacted by IRCC policy decisions. These are generally administrative decisions by IRCC directing its officers to implement processing in a particular manner.

VI. HISTORICAL CONTEXT OF THE COMPLAINT

[29] When looking at the longer processing times for PGPs at the time of Dr. Attaran's application, it is helpful to examine that time period in broader context. From an historical point of view, up until the late 1980s, Canadian immigration policy alternated between periods of large inflows targeted at specific economic goals and periods of virtual shut down of immigration in the face of poor domestic labour market conditions. Whereas the level of inflow was only 83,402 in 1985, by 1993 it was increased to nearly 250,000 and inflow levels have remained high ever since, currently at levels of approximately 400,000 – 500,000 new immigrants per year. The notion of curtailing immigration in periods of high domestic unemployment was abandoned in the 1990s in favour of perceived long-term goals of a sustained high-level of new immigrants. (See "*The Economic Goals of Canada's Immigration Policy: Past and Present"* by Alan G. Green (Queen's University) and David A. Green (University of British Columbia) submitted with the Complainant's final written argument, which I will refer to as the Complainant's "Factum.")

[30] This historical change, the decision to keep immigration at high levels constantly, which began in the early 1990s, had a significant impact on this complaint and the processing of all PGP sponsorship applications. In order to be a sponsor for immigration of one's parents or grandparents, one must first be a Canadian citizen or permanent resident. Secondly, one's parents or grandparents must not already be in Canada as permanent residents or citizens. As such, the pool of potential sponsors is mostly comprised of new immigrants to Canada. As that pool grew considerably in size in the late 1990's and early 2000s, so did the demand for sponsorship of PGPs.

[31] During the hearing, Dr. Attaran put a document to Mr. Glen Tetford, the Respondent's witness responsible for Part 1 sponsorship application processing at the IRCC Case Processing Centre in Mississauga, Ontario ("CPC-Mississauga" or "CPC-M"). Mr. Tetford confirmed this document's apparent veracity, and it was admitted as Exhibit 84. It was identified as an IRCC document called a "PGP Diagnostique" from 2017, which outlined the following history of IRCC's intake of PGP sponsorship applications:

> Until the early 2000's the department was able to keep pace with application intake, processing PGP applications with minimal delay. There were no numeric limits on application intake and processing largely kept pace with intake although in some cases PGP applications for permanent residence were processed over slightly longer time frames than those for Spouses and Partners.
>
> However, by 2001 it was becoming apparent that PGP application intake was beginning to outpace the department's ability to process those applications, resulting in inventory backlogs and lengthening wait times…
>
> The increased demand on the overall program and the department's response in the form of deliberate and strategic management of levels resulted in limits on the number of PGP cases to be processed annually. For the first time, in 2002, there was a backlog of PGP cases, and over a matter of months a marked increase in PGP processing times became the reality. By 2003 intake of sponsorship applications for PGPs reached 50,000 while the levels plan and attendant landings hovered around 20,000. As a result of ongoing application intake well in excess of levels targets, inventories continued to grow until 2011 when they reached over 168,000 PGP applicants with projected wait times of 6 -11 years for those in the queue.

[32] In 2002, the Government implemented a major overhaul of its immigration framework with the introduction of a new immigration act, *IRPA,* and then the *IRPA Regulations*.

[33] In a 2006 affidavit presented by Dr. Attaran (Exhibit 16), a senior executive of the Respondent, David Manicom, states at paragraphs 28 and 29:

> 28. “To my knowledge, during the years prior to 2001, there was little or no difference between the “target ranges” set out in the Annual Reports to Parliament, and the actual number of sponsored applications seeking immigrant visas from members of the Family Class.”
>
> 29. “There was no significant accumulation of cases in inventory because the number of Parents and Grandparents applying as sponsored immigrants, roughly matched the numbers of Parents and Grandparents that Canada wished to admit to Canada each year.”

[34] In 2009 when Dr. Attaran applied to sponsor his parents, the upper limit of the target range in the Levels Plan for the number of PGPs to be admitted as permanent residents that year was 19,000. However, as of 2009, there were 95,597 pending applications in the inventory for the PGP category. In order not to exceed the targets in the

Levels Plan each year, the Respondent explained it only processed a limited number of those applications in the inventory queue.

VII. THE EXPERIENCE OF DR. ATTARAN AND HIS PARENTS

[35] Mr. Tetford examined Exhibits 2, 3 and 82 relating to the Complainant's application. Mr. Tetford confirmed the Part 1 sponsorship application was stamped as received by CPC-Mississauga on July 14, 2009. He also explained a letter from the Respondent at page 52 of Exhibit 3. This letter from IRCC to Dr. Attaran is dated March 30, 2012. The letter states: "We are now ready to begin processing of your sponsorship application and require additional information." The letter contains a checklist of required documents and asks the sponsor to return them within 90 days.

[36] Mr. Tetford explained that this letter indicates that Dr. Attaran's application, submitted in July 2009, was now being actively processed in March 2012, some 32 months later. When asked what happened to Dr. Attaran's sponsorship application between July 2009 and May 2012, Mr. Tetford replied that it was essentially just "sitting on a shelf" waiting for its turn to be processed when it came up through the queue (Mr. Tetford's examination in chief on February 8, 2021.)

[37] According to the evidence in Exhibit 3, the additional documents requested in the March 30, 2012, letter were received by CPC-M on May 9, 2012. Mr. Tetford examined other parts of the file and confirmed that after the updated documents were provided by Dr. Attaran, the Part 1 sponsorship application was approved on May 28, 2012, only 19 days after the receipt of the requested documents. The entire application was finalized on December 13, 2012, when permanent resident visas were issued to Dr. Attaran's parents.

[38] It is apparent that, of the total time between when IRCC received Dr. Attaran's sponsorship application and when his parents' permanent residence visas were issued, the application spent the great majority of it's time in the backlog queue. The active processing time was relatively short. After the application had been "taken down off the shelf" in March 2012, IRCC's total processing time for the Attaran family reunification was less than nine months.

[39] The Complainant and his father, Dr. Kazem Attaran, both testified before the Tribunal about their experience and the hardship caused by the long wait to have the application processed.

[40] The Complainant emphasized how important it was for his children to have a close relationship with their grandparents. He testified that he had been born and raised in California. However, as his parents were immigrants to the U.S. from Iran, he did not have much of a relationship with his own grandparents who remained in Iran. The Complainant also testified that when he applied to sponsor his parents, he and his wife were planning to have children. It was his hope that his parents could be in Canada as permanent residents to support him and his wife when the children arrived. He testified that when his first child was born in 2012, his parents provided childcare, cooked for the family and helped him and his wife maintain their careers.

[41] The Complainant also testified that until his parents became permanent residents in early 2013, it was not possible for them to obtain provincial health care coverage or to access Canadian banking and other services. After they became permanent residents, his parents bought a house about a block away from his in Ottawa. Once they became permanent residents, Dr. Attaran said his parents no longer had a fear of being refused entry into Canada and they could begin to live the life they wanted to in Canada.

[42] Dr. Kazem Attaran testified that his son, the Complainant, was their only child. Before he became a permanent resident, Dr. Kazem Attaran usually visited his son and his family for 2-3 weeks maximum. After becoming a permanent resident, they bought a house in Ottawa and (prior to the pandemic in 2020) usually stayed 1.5 - 2 months each time they came to Canada. On cross examination, the Complainant's father stated that he and his wife spent roughly 50% of their time in Canada from 2013-2020. He explained that he owns three properties in California, including his principal residence which sits on a two-acre lot. If it remains vacant for more than 30 days, he has an issue with the insurance. He also testified that he and his wife maintain health care coverage in California where he receives a pension as a retired civil servant. Dr. Kazem Attaran also testified that he never had any problems entering Canada as a visitor prior to obtaining his permanent resident status.

VIII. TERMINOLOGY

[43] Throughout the hearing and in the written submissions, certain terminology was used by the parties to describe the process and factors which gave rise to this complaint. Unfortunately, at times the terminology was not consistent and it has led to some confusion. Distinguishing the different parts of the application process, from receipt at IRCC to final determination, and using consistent terminology for this, is important for bringing the alleged discriminatory practices into focus. For clarity in these reasons, I set forth below the meaning of the terminology used herein.

[44] **Inventory** means the number of undecided applications in the possession of IRCC at any given time. Mr. Tetford explained that in order to reach the processing targets for each sub-category of immigrant types in the Levels Plan, there needs to be a level of “inventory” of pending applications in each sub-category from which IRCC can draw in its attempt to reach the processing targets. Not having enough pending applications in Inventory would be a problem for reaching the targets.

[45] **Backlog** means the number of applications in the possession of IRCC in excess of what would be reasonably required in order for IRCC to meet its processing targets in that category in any given year. Mr. Tetford testified that having too many pending applications in Inventory would lead to backlogs, as IRCC generally aimed to not exceed the upper range of the targets set in the Levels Plan.

[46] **Processing Time** refers to the global amount of time an applicant waits, from the moment the application is received by IRCC, until the time a final determination is made. Respondent witness Mr. Simon Cardinal testified that IRCC refers to “processing time” as the combination of both backlog wait times and application review wait times. (Direct Examination of Simon Cardinal on September 20, 2021 at 2:19:50, Respondent Factum, para. 119.)

[47] **Backlog Wait Time** refers to the time when an application is received at a Case Processing Centre but sits in a queue waiting for review by an IRCC officer.

[48] **Application Review Wait Time** refers to the amount of time an IRCC officer spends actively working on the application towards its final determination.

IX. WITNESSES

[49] Both the Complainant and the Respondent called witnesses to testify at the hearing. The Commission and CSALC did not call any witnesses of their own.

[50] The Complainant was a witness at the hearing, appearing on his own behalf. His examination in chief was led by counsel for the CHRC. Dr. Attaran is very articulate and answered most questions candidly. He was reluctant to give any indication about how much time his parents had spent in Canada since becoming permanent residents in 2013. He did offer to follow up with that information if he could locate his parents' permanent resident card renewal applications, but the information was not presented to the Tribunal if it was provided to the Respondent. The Respondent's cross-examination of the Complainant lasted less than 10 minutes.

[51] The Complainant's second witness was his father, Dr. Kazem Attaran. Dr. Kazem was also very articulate and answered questions candidly and in detail.

[52] The final witness for the Complainant was Prof. Susan Chuang, who appeared before the Tribunal as an expert witness. Prof. Chuang is an Associate Professor in the Department of Family Relations and Applied Nutrition at the University of Guelph. Dr. Chuang was qualified as an expert in human development and family studies, having conducted research in immigration and settlement in Canada's diverse socio-cultural context. She prepared a 21-page report dated September 11, 2019 for the Tribunal. Dr. Chuang has previous experience as an expert witness. Prof. Chuang's qualification as an expert and delivery of her expert report, including cross-examinations, was completed over the course of one day of hearing.

[53] The Respondent called three lay witnesses and one expert witness.

[54] The first witness for the Respondent was Mr. Glen Tetford, Assistant Director in the IRCC's Humanitarian and Migration Office in Mississauga (CPC-Mississauga). He was

called to give evidence from an operations perspective. From 2009-2017, Mr. Tetford held various positions at CPC-Mississauga that were related to the processing of Family Class sponsorship applications. His evidence was very helpful to the Tribunal in setting the context in which the Complainant's application was handled by the Respondent.

[55] The second witness of the Respondent was called to give evidence concerning IRCC policy. Mr. Glen Bornais worked at the Respondent since 2006. At the time of his evidence, he was a Senior Advisor to the Director General in the Strategic Policy and Planning Branch of the Respondent. Up until 2018, he was a Senior Analyst and then an Assistant Director in the same branch. His primary duties involved assisting senior management in the annual levels exercise to prepare recommendations for Cabinet consideration and also dealing with backlog elimination strategies.

[56] Dr. Attaran submits that Mr. Bornais was not a credible witness and strongly recommends that the Tribunal not rely on his testimony. Mr. Bornais was a witness at this hearing for three-and-a-half days, and was cross-examined by Dr. Attaran for one-and-a-half days. Dr. Attaran completed his cross-examination of Mr. Bornais, who was then scheduled to be cross-examined by the Commission when the hearing was to resume one week later. (Dr. Attaran did reserve the right to recall Mr. Bornais for cross-examination as his testimony made reference to certain documents that had not been previously disclosed. Dr. Attaran later brought a written motion for the disclosure of those documents.)

[57] However, before the hearing resumed the Tribunal was advised by Respondent counsel that Mr. Bornais had a health issue that would prevent him from returning to the witness stand at any time in this proceeding.

[58] The Complainant and the Commission both raised concerns about excusing an important witness when his testimony is incomplete. I asked counsel for the Respondent to submit a medical letter to confirm the condition impacting the witness and his stated inability to return to the witness stand at any point. I assured Respondent counsel the letter would be subject to a confidentiality order. When the first medical letter was submitted, both Dr. Attaran and the Commission raised concerns that it was inadequate, written by a doctor who did not acknowledge having a good knowledge of the patient's condition, and not

providing any clinical diagnosis of any illness. I concurred with their concerns and asked the Respondent counsel in writing to provide a more comprehensive medical letter to alleviate the concerns of the other parties.

[59] The second letter was moderately better than the first, although also authored by the same doctor at a clinic in Ottawa. At paragraph 205 of his Factum, Dr. Attaran alleges the second letter bears several hallmarks of possible forgery. He alleges that the Respondent's refusal to put this doctor forward as a witness is suspicious. Dr. Attaran observes in his Reply Factum (at paras. 31-35) that the Respondent chose to file no evidence which might authenticate the doctor's letter. Furthermore, Dr. Attaran notes s. 31.1 of the *Canada Evidence Act* stipulates that for documents in electronic form (the doctor's letter is a PDF file) the burden is on the Respondent to prove authenticity. Where there is no appearance of inauthenticity, then authenticity is just assumed and not challenged. Where authenticity is challenged, Dr. Attaran asserts that some evidence must be introduced to establish that the document is what it purports to be.

[60] Dr. Attaran concludes that the Tribunal must draw an adverse inference from the Respondent's failure to file evidence of any illness (at para. 214 of his Factum.) In the alternative, if testimony of this witness is admitted, it should not be given weight.

[61] Dr. Attaran also attacks the credibility of Mr. Bornais based on the manner in which he answered questions during cross-examination. There were numerous long pauses after questions had been posed and Dr. Attaran described the witness as evasive (at para. 207 of Complainant's Factum.)

[62] The Respondent explains the long pauses of their witness due to "objectionable questions relating to cabinet confidences" (at para. 50 of the Respondent's Factum.) They also call the allegation of forgery baseless (para. 54 of Respondent's Factum.) The Respondent states that the attack on Mr. Bornais' credibility is both unnecessary and unwarranted. They also observe that all of the parties have relied on Mr. Bornais' testimony and the exhibits to which he spoke in their final arguments.

[63] It was unfortunate that Mr. Bornais was unable to complete his testimony. The allegation of forgery occurred late in the proceeding and the Respondent only responded to

the allegation as being baseless. If the forgery allegation had been made earlier during the hearing, perhaps corroborating evidence might have been forthcoming. As such, I will not speculate that Mr. Bornais' failure to return to the witness stand was anything other than what was presented. However, I would agree with Dr. Attaran that Mr. Bornais was not a spontaneous and frank witness under cross-examination. There were numerous, long silent pauses, even after I tried to be helpful by re-phrasing certain contentious questions that were put to him.

[64] While the circumstances of Mr. Bornais' testimony were less than ideal, he did give valuable evidence upon which all the parties relied. His reluctance during parts of his cross-examination related to the Levels Plan creation by Cabinet and what went into that process. However, I did not find reason to doubt the veracity of the evidence that Mr. Bornais gave. I believe he was being truthful when he did answer questions. He stated his reluctance was related to what he perceived were his duties of confidentiality concerning Cabinet privilege.

[65] The final lay witness for the Respondent was Mr. Simon Cardinal. Mr. Cardinal worked with IRCC for 13 years. His evidence came mostly from his experience as a Director with the Operations Planning and Performance Branch which he testified played a role in meeting the targets set out in the Levels Plan. Mr. Cardinal was on the witness stand for five of the hearing days, which included four days of cross-examination. Mr. Cardinal was generally a helpful witness, but at times was hesitant when answering questions which he felt might conflict with his professional obligations.

[66] In response to the Complainant's expert witness, the Respondent commissioned its own expert report authored by Prof. Michael Haan, an Associate Professor in the Department of Sociology at the University of Western Ontario. Prof. Haan was the Canada Research Chair in Migration and Ethnic Relations and also the Canada Research Chair in Population and Social Policy. At the hearing, Prof. Haan was qualified as an expert in the areas of immigration, demography, Canadian labour markets, data development, data infrastructure and the residential choices of newcomers to Canada.

[67] Dr. Attaran and the Commission vigorously opposed Prof. Haan's qualifications as an expert and opposed the introduction of his report. As a result, he was cross-examined on his expertise for the better part of two hearing days. There was an entire afternoon of argument about whether or not the Tribunal should accept Professor Haan as an expert at all. Dr. Attaran and the Commission both argued that I should follow the tests outlined in *White Burgess Langille Inman v. Abbott and Haliburton Co.* (2015 SCC 23) (*White Burgess*). They argued that Professor Haan should not be accepted as an expert witness on several grounds. They also argued that the four principles in *R. v. Mohan*, (1994 2 SCR 9 ("*Mohan"),* namely relevance, necessity, absence of any exclusionary rule, and the expert being properly qualified, should be applied.

[68] The *Mohan* and *White Burgess* tests had been rigorously applied in a previous ruling by a different member of this Tribunal in *Christoforou v John Grant Haulage Ltd.* (2016 CHRT 14) (*Christoforou.*) In that case, Member Bryan made a strict application of those tests in her ruling which excluded the respondent's expert report and testimony. Dr. Attaran and the Commission made long argument that I should follow the decision in *Christoforou* by making a strict application of the *Mohan* and *White Burgess* tests. In their view, Prof. Haan was not properly qualified to address the broad range of subjects in his expert report, which had been in their possession for more than one year by the time he testified. Dr. Attaran called Prof. Haan "the Swiss army knife of experts" because, in his view, Prof. Haan's expert report spoke to topics on which he was not truly expert.

[69] In his submissions, Respondent counsel Stynes noted that in the *Christoforou* ruling, long-time senior Commission counsel, Daniel Poulin, had argued the exact opposite. As a party representing the public interest, Maitre Poulin took the position that the Tribunal should be more liberal in its approach, using its discretion under s. 50(3)(c) to accept the evidence. Some of his arguments were noted in the following paragraphs of *Christoforou*:

> [34] The Commission further submitted that:
>
> > To dismiss the report[s] as requested by the Complainant would impose onerous obligations on parties before the Tribunal in future cases and would over judicialize the process before the Tribunal. Ultimately, it would be inconsistent with the

> necessary flexibility of the Tribunal's process and would create obstacles for unrepresented complainants in the future.

> [41] The Commission submits the Complainant's motion cannot succeed without allowing for the trier of fact to weigh the evidence the witnesses will provide, and cites *FNCFCS.* The Commission submits: "the Rules do not contain a section to exclude an expert report and the Tribunal must be cautious not to resort to extraordinary measures such as striking out a large segment of a party's evidence."

[70] In light of those submissions in the *Christoforou* case and the public interest duty to assist the Tribunal, Mr. Stynes said he found it "unbelievable" that the Commission was taking the exact opposite position in this case. (Hearing recording at 1:57 on April 28, 2021.)

[71] After allowing lengthy oral arguments on the admissibility of Prof. Haan and his expert report, I took my decision under reserve at the end of the hearing day. On the morning of April 29, 2021, I delivered my ruling and advised that I would provide more fulsome reasons in this final decision.

[72] I advised the parties orally that I would accept Prof. Haan and his report under the broad discretion afforded me under s. 50(3)(c) of the *CHRA,* which reads as follows:

> 50 (3) In relation to a hearing of the inquiry, the member or panel may
>
> (c) subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law;

[73] I am more persuaded by the Commission's argument in *Christoforou* that the Tribunal should remain flexible and not over judicialize the process, in particular given the number of self-represented complainants who appear before it.

[74] Previous rulings by a Tribunal member are not binding in subsequent matters before the CHRT. In my opinion, the *Christoforou* ruling was an outlier decision. By contrast, the Tribunal generally has a propensity to admit evidence under its broad discretion afforded under s. 50(3)(c).

[75] I advised the Complainant and Commission orally that their arguments were well-noted and that they would have the opportunity to argue against the report's weight and relevance later.

[76] Prof. Haan was cross-examined over the course of eight hearing days. Dr. Attaran's questioning shed light on a number of deficiencies in the expert report and they were well-noted. In the end, however, there is little evidence in Prof. Haan's report, or in his testimony, that I rely upon in this decision.

X. PRELIMINARY ISSUES

[77] The parties raised two important issues which need to be addressed first. The Respondent argues that the complaint is moot. The Complainant argues that the Federal Court of Appeal made findings in *Attaran v. Canada (Attorney General)*, 2015 FCA 37 ("*Attaran-FCA*") on elements of the *prima facie* test that bind the Tribunal in this inquiry.

A. IS THE COMPLAINT MOOT?

[78] The Respondent argues that this complaint is moot and it is not in the interest of justice to hear the complaint. In their view, there is no live controversy between the parties as the complaint concerns events that occurred between 2009 and 2012. Dr. Attaran's parents have been permanent residents of Canada since 2013 and therefore, Dr. Attaran no longer has a personal stake in PGP sponsorship. Furthermore, since the time Dr. Attaran made his application, there have been sweeping changes to the PGP program and the lengthy backlogs which affected him and his family no longer exist.

[79] The Complainant argues that the complaint is not moot. He cites the decision of the Federal Court in his judicial review application (2013 FC 1132) which found the complaint was not moot (at paragraph 47) due to allegations of systemic discrimination and the fact that processing times remained high at that time. Dr. Attaran argues further that the Federal Court of Appeal would not have ruled in his favour if the complaint was indeed moot. In his view, this issue has already been decided by the Federal Court, it is *res judicata* and cannot be relitigated.

[80] The Commission argues the complaint is not moot. They argue that the Tribunal should proceed to determine liability and award appropriate remedies if it is determined there has been a violation of the *CHRA*. They say there is evidence of systemic discrimination and that the complaint seeks redress for past transgressions for Dr. Attaran and others like him.

[81] The Respondent cites the Supreme Court of Canada decision in *Borowski v. Canada* (1989 1 SCR 342) and suggests the mootness analysis should proceed in two stages. The first question is whether a live controversy remains that affects or may affect the rights of the parties. A decision of the Court that will have no practical effect on the parties is moot. If the proceeding is moot, a second question arises: whether the court should nonetheless exercise its discretion to hear and decide it. The Supreme Court cautions hearing decisions that may be moot, and that exercise of discretion should consider whether a dispute between the parties continues to exist, the principles of judicial economy, and whether consideration of a moot argument will lead to unnecessary precedent implying a departure from the adjudicative role into the legislative domain.

[82] There is no live controversy concerning the finalization of Dr. Attaran's sponsorship (Part 1) or his parents' immigration application (Part 2). The complaint was never about whether his parents would be granted permanent residence, but rather the length of time it took for the applications to be processed. His parents landed as permanent residents long before his complaint was referred to this Tribunal. The question is whether Dr. Attaran and his parents were the victims of prohibited discrimination under the *CHRA,* including whether his complaint establishes systemic discrimination, and if so, what remedies may be appropriate.

[83] The *CHRA* is an act of Parliament which seeks to restore victims of discrimination to the place they would be if there had been no discrimination. The remedy powers granted to the Tribunal under the *CHRA* are broad, including the potential for orders to make available rights, opportunities or privileges that have been denied, and compensation for certain expenses. In addition, quite symbolically, victims may be awarded damages for pain and suffering caused by the discriminatory conduct. Further, s. 53(3) permits an award for

special damages under circumstances where a respondent's wrongful conduct was determined to be reckless or wilful.

[84] This complaint before the Tribunal is about the manner in which Dr. Attaran and his parents were treated, and how similar applicants in the PGP category were treated, not the final outcome of those applications. It has always been open that the alleged adverse differential treatment could lead to a finding of liability that could properly imply individual and/or public interest remedies. The complaint is not moot.

B. DID THE FEDERAL COURT OF APPEAL MAKE FINDINGS IN *ATTARAN-FCA* ON ELEMENTS OF THE *PRIMA FACIE* TEST THAT BIND THE TRIBUNAL IN THIS INQUIRY?

[85] Dr. Attaran asserts that several issues have already been determined by the Federal Court and the Federal Court of Appeal (FCA) in his judicial review application. In addition to the point on mootness above, Dr. Attaran asserts the fact the Respondent engaged in adverse differential treatment on the grounds of family status is *res judicata* in *Attaran-FCA*. In his view, the Tribunal's hands are bound by these findings and it would be an error of law for the Tribunal to determine otherwise (paras. 10-12 of Complainant's Factum.)

[86] As mentioned above, the Commission initially dismissed Dr. Attaran's complaint in July of 2011, finding that an inquiry by the Tribunal was not warranted. When Dr. Attaran's application for judicial review was dismissed by the Federal Court, he appealed to the FCA. In *Attaran-FCA,* the FCA was split 2-1 in his favour, with Justices Webb and Stratas concurring in the result to say that Commission's decision not to refer the complaint to the Tribunal was unreasonable. In coming to that conclusion, Justices Webb and Stratas made comments about the Commission's interpretation of the complaint.

[87] Justice Webb wrote the majority reasons for judgment, after observing at the hearing of the Appeal that both parties focused on whether there was a *bona fide* justification for the differential treatment:

> [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. (ibid. paragraph 8.)

[88] At paragraph 31 of his reasons, Justice Webb speaks further about the CHRC decision:

> [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.

[89] At paragraph 19 of the decision, Justice Webb states that the Commission implicitly accepted that whether a person is a parent establishes the ground of family status:

> [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.

[90] Justice Webb noted that the Commission appeared to accept the presence of a discriminatory practice and appeared to have concluded that Ministerial discretion was a justification. However, under the *CHRA*, if a discriminatory practice is found, then possible justifications are limited to the statutory defences. Justice Webb emphasized that Ministerial discretion is not a statutory justification under the *CHRA* at paragraph 35:

> [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 meanings 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.

[91] In his concurring reasons at paragraph 52(1), Justice Stratas gave different reasons for finding the Commission's decision unreasonable. Justice Stratas examines the claim by CIC that its resources were scarce and therefore had to be allocated based on differing levels of dependance the two groups of family members had on their Canadian sponsors. Not only did he find this to be a blanket statement based on stereotypes, Justice Stratas found the explanation to underscore that in this case, "CIC made distinctions based on family status."

[92] The Respondent counsel disagrees with the argument that these statements in *Attaran-FCA* bind this panel in this decision on the question of whether some or all elements of the *prima facie* test had been established. While decisions of the FCA are generally binding on the Tribunal, in *Attaran-FCA*, the FCA was exercising a judicial review of the Commission's decision to dismiss the complaint and not refer it to the Tribunal. In that context, they argue, statements relating to elements of the *prima facie* test by the FCA do not bind the Tribunal.

[93] I agree with the Respondent on this point. In the judicial review, the FCA evaluated the reasonableness of the Commission's decision not to refer the complaint to the Tribunal. Under the scheme of the *CHRA*, the Commission does not decide the merits of a complaint. That is the role of the Tribunal.

[94] The Supreme Court of Canada described the nature of a Nova Scotia Human Rights Commission's decision to refer a complaint to the Tribunal in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)* (2012 SCC 10) ("*Halifax*") at para. 19:

> The Commission's decision to refer a complaint to a board of inquiry is not a determination of whether the complaint falls within the Act. Rather, within the scheme of the Act, the Commission plays an initial screening and administrative role; it may, for example, decide to refer a complaint to a board of inquiry so that the board can resolve a jurisdictional matter.

[95] This is consistent with the structure of the complaint process under the *CHRA* and the fact that the Tribunal hears the evidence of witnesses and enters documentary exhibits. The Tribunal makes findings of fact, determines credibility and ultimately decides on the merit of the complaint based on the record before it. The Commission does none of those things.

[96] It would be contrary to the scheme of the *CHRA* and prejudicial to the parties to hold that the referral decision (and any review of that decision) could bind or otherwise fetter the discretion of the Tribunal to determine the merits of the Complaint. The record before the Tribunal is not the same as it was before the Commission or the Federal Court and FCA.

[97] Furthermore, there are significant issues argued before this panel that were not addressed by the Federal Court or the FCA. Most notable is the issue of whether the complaint implicates a service.

[98] For the foregoing reasons, I consider the findings on the judicial review in the Federal Court and the FCA's comments on elements of the *prima facie* test, which Dr. Attaran asserts are binding on the Tribunal, are not binding on the Tribunal now when considering the merits of the complaint.

XI. DISCRIMINATION LAW AND BURDEN OF THE COMPLAINANT

[99] The purpose of the *CHRA* is to ensure that all individuals have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered or prevented from doing so by discriminatory practices based on prohibited grounds of discrimination (s. 2 of the *CHRA*.)

[100] It is well established that a complainant has to meet his or her burden of proof on a balance of probabilities to establish a *prima facie* case. A *prima facie* case is "one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer." (*Ontario Human Rights Commission and O'Malley v. Simpsons-Sears,* [1985] 2 S.C.R. 536, at p. 558).

[101] To prove a *prima facie* case of discrimination here, the Complainant is required to show:

A. that he had a characteristic protected from discrimination under the CHRA;

B. that he experienced an adverse impact in the provision of a service by the Respondent; and

C. that the protected characteristic was a factor in the adverse impact (*Moore v. B.C. (Education)*, 2012 SCC 61 (*Moore*), para. 33).

[102] A respondent can either present evidence to refute the allegation of *prima facie* discrimination, meaning that no discriminatory practice is established, or put forward a defence justifying the discriminatory practice, or do both (see *Québec (C.D.P.D.J.) v. Bombardier Inc., (Bombardier Aerospace Training Center),* 2015 SCC 39, at para. 64). Where the respondent refutes the allegation, its explanation must be reasonable. It cannot be a pretext to conceal discrimination (*Khiamal v. Canada,* 2009 FC 495, at para. 58).

XII. *MOORE* TEST PART 1: THE COMPLAINANT HAS ESTABLISHED THAT HE HAS ONE OR MORE PROTECTED CHARACTERISTICS UNDER THE *CHRA*

[103] Dr. Attaran's complaint alleges discrimination on the grounds of family status, age (of his parents), race and national or ethnic origin (para. 2 of Complainant's Factum). Dr. Attaran's written arguments focused on age and family status, while the CSALC focused their arguments on race, national and ethnic origin. The Commission has endorsed the arguments made by both these parties (Commission Factum, para. 58).

[104] There is no dispute between the parties that Dr. Attaran has established that he has characteristics which are protected under the *CHRA*.

[105] Family status and age were the prohibited grounds referenced in the original complaint. Upon a written motion I permitted Dr. Attaran to add the prohibited grounds of race, and national or ethnic origin (see 2017 CHRT 21). After the ruling, I asked the parties to submit revised SOPs in early 2019 to reflect this and another ruling in favour of the Respondent. Although certain parts were changed, Dr. Attaran did not amend his SOP to include the two additional prohibited grounds allowed in my ruling. Ordinarily, failure to set

out proposed argument in an SOP could preclude a party from making that argument at hearing or in final submissions. However, the Respondent did not take that position in this case, and indeed, the error was so obvious that I view this as a procedural oversight. Accordingly, I will address each of the four alleged prohibited grounds below.

A. Race and National or Ethnic Origin

[106] The evidence established that Dr. Attaran was born in San Diego, California and he testified that he identifies as a visible minority of Iranian descent and ethnically Persian. The evidence was uncontroversial that his parents, Dr. Kazem Attaran and Ms. Nasrin Attaran, were born in Iran and became citizens of the United States of America following their move there in 1962 to pursue studies. I am satisfied that Dr. Attaran has the protected characteristics of race and national and ethnic origin.

B. Family Status

[107] The Complainant testified that he has two children. His familial relationship with his parents and the fact that he is a parent and his parents are elderly are at the heart of this complaint. The *CHRA* does not define the ground of “family status”, but it is well-established that it has been afforded an inclusive interpretation in the jurisprudence. (See Commission Factum, para. 60; *B v Ontario (Human Rights Commission),* 2002 SCC 66.) The Commission devotes lengthy written arguments explaining why family status includes the parent-child (and parent and grandparent) relationship. This point was not in dispute by the Respondent.

[108] Family status has been afforded a broad interpretation in the leading jurisprudence. In a leading Tribunal decision concerning family status, *Johnstone v. Canada Border Services* (2010 CHRT 20), Member Findlay sets out the reasons for including childcare responsibilities, of the type and duration experienced by Ms. Johnstone, under the heading of family status.

[109] Fewer cases before the CHRT have sought the inclusion of the adult child to parent relationship as part of the family status prohibited ground. The issue was considered

by Member Johnson in *Waddle v. Canadian Pacific Railway and Teamsters Canada Rail Conference* (2017 CHRT 24) ("*Waddle*"). Ultimately, Member Johnson did not find the complainant in that case brought forth sufficient evidence to substantiate the complaint on the basis of his obligations for eldercare to his parents. However, the decision did consider the earlier CHRT decision in *Hicks v. Human Resources and Skills Development Canada* (2013 CHRT 20) ("*Hicks*"). In *Hicks*, the Tribunal member made clear that the obligations of a child to an elderly parent could also be recognized in the context of a family status claim (*Hicks*, para 44). The Tribunal's finding on this point was upheld on judicial review to the Federal Court (see *Canada (Attorney General) v. Hicks*, 2015 FC 599 at para. 66).

[110] The Commission cites *B v Ontario (supra*) to support a broad interpretation of "family status." In further support, the Commission also asks the Tribunal to take into consideration several international human rights instruments on the family. Article 16 of the United Nations' *Universal Declaration of Human Rights*, among other things, states that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

[111] Article 10(1) of the *International Covenant on Economic, Social and Cultural Rights* states that "[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."

[112] The Commission also cites the *International Covenant on Social and Political Rights* which echoes these fundamental principles providing that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the state."

[113] In addition to addressing gender equality, much of the *International Convention for the Elimination of Discrimination Against Women* is geared towards ensuring work and family balance. To this effect, Articles 5, 11 and 16 are meant to enable parents to combine family obligations with work responsibilities and participation in public life.

[114] Finally, the Commission submits, Article 3 of the *Convention on the Rights of the Child* requires that "in all actions concerning children (…) the best interests of the child shall

be the primary consideration." The Convention also requires Canada to provide the appropriate assistance to parents and guardians to perform child-rearing responsibilities, including all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible. Accordingly, reliance on parents and grandparents for childcare is a relevant consideration according to the Commission.

[115] As noted, the Respondent's final argument does not dispute that the ground of family status is engaged. I am persuaded that the Complainant has established the protected characteristic of "family status" under s. 3 of the *CHRA.*

C. Age

[116] Dr. Attaran also refers to the "age (of his parents)" in his submissions. Dr. Attaran's parents are not parties to this complaint. However, for this first step of the prima facie test, the Complainant need only show he has the characteristic. He is a mid-life adult, with parents who are necessarily senior to him. (Sadly, Dr. Attaran's mother passed away while these reasons were under reserve.)

[117] I have concluded that Dr. Attaran has established these characteristics, which are prohibited grounds for discrimination, on the balance of probabilities (s. 3 of the *CHRA*): race, national or ethnic origin, family status and age. Whether one or more of these prohibited grounds was a factor in any alleged discriminatory practice is a matter for the next steps of the prima facie test.

XIII. *MOORE* TEST PART 2: HAS THE COMPLAINANT ESTABLISHED ADVERSE DIFFERENTIAL TREATMENT IN THE PROVISION OF A SERVICE BY THE RESPONDENT?

[118] To apply section 5 of the *CHRA*, it must be determined whether the actions complained of occurred "in the provision of goods, services, facilities or accommodation" (see *Watkin v. Canada (Attorney General)*, 2008 FCA 170 (*Watkin*) at para. 31).

[119] Section 5 of the *CHRA* reads:

> 5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
>
> (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
>
> (b) to differentiate adversely in relation to any individual,
>
> on a prohibited ground of discrimination.

[120] A key issue is therefore whether the adverse differential treatment, if any, occurred in the provision of a service by the Respondent. Addressing this issue requires identifying the government actions alleged to be the service. If an adverse differential treatment is established and determined to have occurred in the provision of a service, then it must be determined if a prohibited ground was a factor in the adverse treatment.

[121] The Tribunal must determine the proper characterization of the service or services in issue. In some previous cases, the Tribunal was able to deal with this question as a preliminary matter. This would be helpful where addressing the question in a preliminary way might completely dispose of the complaint. In this complaint the Complainant and the Commission attacked numerous actions by IRCC, including by the Minister, and plead broad, composite adverse effects, including overly lengthy delay and disproportionately low numbers of PGPs approved in relation to the total number of persons applying for permanent resident status in Canada. The Complainant and Commission also specifically asked the Tribunal not to evaluate certain kinds of government action that influence the procession of applications. As such, this decision must carefully consider the impugned government actions and properly identify the service or services that the Complainant and Commission have put into issue.

A. THE ALLEGED SERVICE(S) IN ISSUE AND NOT IN ISSUE

[122] Addressed in more detail below, it was conceded by the Respondent that, in a general sense, the processing of immigration applications by IRCC is a service to the public. However, the Respondent disagreed with what the Complainant and Commission included under the umbrella of “processing applications”. The Complainant and Commission alleged

that actions with a variety of characteristics were discriminatory practices. The parties did not agree that all the alleged adverse differential treatment occurred during or flowed from the IRCC's processing of sponsorship applications.

[123] When comparing the processing of one category of immigration applications to another, it is necessary to look more closely at the various stages of the processing, and what guides and constrains those stages as applications work their way through the system towards finalization. As a result, it is necessary to identify the key kinds of government action that were involved, determine whether they are alleged to be services by the Complainant and Commission, and if so, whether they meet the definition of "service" in s. 5 of the *CHRA.*

[124] In the case of PGP applications, there are four basic evaluations that need to be made: eligibility of the sponsor (Part 1 application); eligibility of the sponsored relatives (Part 2 application); medical examinations to determine admissibility; and background checks to determine admissibility. These four evaluations are governed by statute and regulation which, as discussed below, were not challenged by the Complainant and the Commission.

[125] The processing of applications is also guided and constrained by other factors, including the Levels Plans and Ministerial Instructions. The Complainant and Commission asked the Tribunal to consider the discretion afforded to the Respondent under the regime for immigration when processing applications, taking account of the provisions of *IRPA* and the *IRPA Regulations*, and the target ranges specified in Levels Plans each year by Cabinet. The significance of Levels Plans was highly disputed in this inquiry, as is discussed further below.

[126] The parties also make allegations concerning Ministerial Instructions, which are also discussed further below.

[127] In addition, the Complainant alleges that the Minister should have used statutory powers of exemption to eliminate disparities connected to a prohibited ground of discrimination.

[128] It is important to identify what was within the scope of the IRCC's authority, and what was imposed by other government actions that were not argued to have been

“services” by the Complainant and Commission, who bear the burden of proof at this stage. In this case, it would be overly broad and superficial to state that because IRCC processes applications, any adverse effect on a group of applicants that connects to a prohibited ground must derive from a discriminatory practice carried out by IRCC.

[129] The following sections evaluate these various components and their impact on the overall processing of applications. The careful examination of all of these factors is required to resolve this complaint.

B. THE RESPONDENT DID NOT CONCEDE THAT ITS ACTIONS IN THE PROCESSING OF DR. ATTARAN’S APPLICATION CONSTITUTE A “SERVICE” UNDER THE *CHRA*.

[130] The “services” issue cannot be dismissed in entirety as having been “admitted” by the Respondent, as Dr. Attaran urged the Tribunal to do. Dr. Attaran argued that it is common ground of the parties that IRCC’s processing of applications is a “service” under s. 5 of the *CHRA*. (Complainant Factum, paras. 13-14; Applicant’s Reply Factum, para. 73.) In both submissions, Dr. Attaran asserts that the Respondent’s counsel has conceded so on record in the following exchange:

> “So Chair Thomas, the issue here is the, of course there’s a legal question before the Tribunal about what’s a service and what’s not. And so that's the scope of the question. And I want to state also, I mean, we don’t dispute that the processing of an application is a service, right, that you know, that’s not what we’re, what the issue is.” (Mr. Stynes on Hearing Recording, February 9, 2021 at 2:36:25.)

[131] The Complainant submits that since all parties agree that application processing is a service, the Tribunal need not inquire further and should decide the case on that basis. (See Complainant’s Reply Factum, para. 73.)

[132] Closely related to this argument is the Commission’s submission that the terminology used by IRCC itself concedes that processing is a service. They emphasize evidence where phrasing like “client service unit”, “clients” and “immigration services” appears, as indicia that IRCC processing of applications must be a service under s. 5 of the *CHRA*.

[133] On this subject, the Complainant adds that in Justice Noel's *obiter* in *Watkin* at para. 31, it was written "Immigration Canada provides a service" in relation to acquiring permanent residency (Complainant's Reply Factum at para. 76.) He adds that taking this at face value, "Immigration Services" are a service.

[134] I find the Complainant's initial argument regarding Respondent counsel's concession that processing is a service to be unpersuasive. When taken in context, the Respondent has made no such concession. The Respondent conceded that review of sponsorship applications by an IRCC officer can be a "service", but they argue that the Complainant and Commission have not established that IRCC engaged in a discriminatory practice in providing the service of processing applications. Furthermore, the Respondent specifically argued that Ministerial Instructions are not a service, and Levels Plans are not a service. The Respondent's acknowledgement that the IRCC provides a service when processing applications did not include the Minister's issuance of Ministerial Instructions or Cabinet's approval of Levels Plans as subcomponents of "processing".

[135] Within the array of discriminatory measures IRCC is alleged to have taken, the Respondent argued that the true source of delays in processing applications in this complaint was the Levels Plans, which caused the Backlog Wait Time. The Respondent further argued that Ministerial Instructions are not a service, and that the Complainant and the Commission have made indirect attacks on the *IRPA Regulations*, which the Respondent says are not a "service". It would be misguided to disregard the Respondent's substantive submissions on a question of central importance to this case based on a mischaracterization of their concession.

[136] Likewise, I do not accept that generic terms in internal or public records like "processing", "client services" and "immigration services" are conclusive of a "service" within the meaning of s. 5 of the *CHRA*. A semantic argument cannot replace a required sober analysis based on the particular facts and context of the case.

[137] I would add in regard to the Complainant's reference to Justice Noel's *obiter* in *Watkin*, the full quotation is: "Immigration Canada provides a service <u>when it advises immigrants about how to become a Canadian resident</u>." (*Watkin* at para. 28, emphasis

added). Justice Noel's example was conditional on the specificity of his "when" statement which referred to advice offered to the public. This brief statement in obiter should not be inflated so as to bind the Tribunal in any further inquiry about anything to do with the IRCC's provision of services.

[138] The Respondent brought a pre-hearing motion in November of 2018 seeking to amend their Statement of Particulars to add a legal argument, not previously raised, that this complaint does not implicate a "service" under s. 5 of the *CHRA.* Notwithstanding the eight arguments against put forward by Dr. Attaran (the Commission took no position), I granted the motion (see 2019 CHRT 12). Clearly this is a fundamental argument the Respondent wishes to raise and it would not be appropriate to dismiss it on a superficial basis.

[139] Therefore, in evaluating whether the Complainant has discharged the burden to establish *prima facie* discrimination, these reasons must determine whether any of the discriminatory practices alleged occurred in the provision of a service by the Respondent, within the meaning of s. 5 of the *CHRA.*

C. THE LAW OF "SERVICES"

[140] The Supreme Court of Canada considered the term "services" in *Gould v. Yukon Order of Pioneers* (1996 1 S.C.R. 571) (*Gould*). This case involved the refusal to admit Ms. Gould into the fraternal order of the Yukon Order of Pioneers. The main issue in *Gould* was whether membership in the fraternal order was offered to the "public". The Court held that there is a "requisite public relationship between the service provider and the service receiver, to the extent that the public must be granted access to or admitted to or extended the service by the service provider." (See para. 55 of *Gould*.)

[141] The Supreme Court of Canada further noted in *Gould* that there is a "transitive connotation" to the finding of a service, in which a benefit must be held out to the public. "[I]t is not until the service, accommodation, facility, etc., passes from the service provider and has been held out to the public that it attracts the anti-discrimination prohibition." (*Ibid.* para. 55.)

[142] Prior to *Watkin*, there was a line of authority holding that virtually anything done by government was a "service". (*Watkin* at paras. 24-31.) The FCA in *Watkin* clearly "disavowed" this notion and brought more precision to the interpretation of the word "services" in s. 5 of the *CHRA*. (*Ibid*. para 32.) The FCA clarified that the fact that government actions are taken in the public interest and for the public good does not make them "services". (paras. 22 and 33.)

[143] Further clarity was provided by the 2018 decision of the Supreme Court of Canada in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31, ("*Matson/Andrews")* when the Supreme Court affirmed two CHRT decisions and upheld case law on s. 5 applicable to this context. As a result of *Matson/Andrews*, a clear line of case law binding on the Tribunal exists (in addition to *Watkin*): *Forward v. Canada (Citizenship and Immigration)*, 2008 CHRT 5 ("*Forward"), Public Service Alliance of Canada et al. v. Canada Revenue Agency et al*., 2012 FCA 7, application for leave to appeal refused, (SCC) 2012 CanLII 68761 ("*Murphy")* and *Matson/Andrews* itself. I will address each in turn as well as *Andrews et al v Canada (Indian and Northern Affairs)* (2013 CHRT 21) ("*Andrews*") and *Matson et al v Canada (Indian and Northern Affairs)* (2013 CHRT 13) ("*Matson")*.

[144] In *Forward,* two brothers were denied citizenship and the complainants/Commission argued that the service at issue was the reviewing of applications for citizenship. The Tribunal's former Chairperson, Grant Sinclair, did not accept this characterization of the complaint. He found that the evidence and argument were not directed at the conduct of ministerial officials, the exercise of their discretion, or at the implementation of departmental policies and practices. The Tribunal ruled that the sole source of the alleged discrimination was the legislative language of the 1977 *Citizenship Act*. (*Forward* at paras. 36-38.) Legislation by itself fell beyond the scope of the *CHRA*. This conclusion was upheld by the Federal Court of Appeal in *Murphy*.

[145] In the Tribunal's decision in *Murphy* (2010 CHRT 9), the complainant/Commission argued that when the Canada Revenue Agency (CRA) assesses payable taxes, it performs a service. They brought evidence that taxpayers are referred to as "clients" and also looked at the actions that the CRA staff complete to provide advice that can benefit a taxpayer. The

complainant submitted that actions, like putting data into an information system and screening out applicants, came within the meaning of a “service customarily available to the public” (at paras. 45-46.) The Commission held the assessment of income tax was a service because assisting taxpayers is a benefit held out for the general public (at para. 49).

[146] Again, this characterization was rejected by the Tribunal. Vice-Chairperson Hadjis ruled that: “(e)ven if the tasks undertaken by the CRA in processing QRLSP claims constitute a service, they are not the basis for the adverse differentiation alleged in the complaint. The source of the alleged discriminatory practice is found solely within the legislative”. The impugned legislation was the *Income Tax Act* (*Ibid.* at para 54.)

[147] The Federal Court of Appeal affirmed this decision and held that complaints aimed at legislation, and nothing else, fall outside the scope of the *CHRA*. The proper recourse is through a constitutional challenge.

[148] Then came *Matson/Andrews*. Since the Supreme Court of Canada focused its analysis on the principle of deference and the standard of review, it is necessary to review the reasoning on the s. 5 provisions in the first instance decisions.

[149] In *Matson*, the Tribunal started its s. 5 analysis by characterizing the government actions that were being challenged. The Tribunal determined whether the challenge was truly against processing of the Complainant’s application for registration under the *Indian Act* or against something else. Member Lustig held that processing was not truly being challenged. Rather, the “sole source of the alleged discrimination in this case is the legislative language of section 6 of the *Indian Act*.” (*Matson* at para.59.) To arrive at this result, the Tribunal relied on *Watkin*: “(…) the first step to be performed in applying section 5 is to determine whether the actions complained of are “services” (see *Gould, supra*, per La Forest J., para. 60)”.

[150] In *Matson*, the Respondent argued that the challenge was truly against legislation and nothing else. Within the context of parties disagreeing on the nature of the case, the Tribunal chose to particularize the actions as its starting point.

[151] Member Lustig acknowledged the general proposition in *Watkin* that "… 'services' contemplates "something of benefit being 'held out' as a services and 'offered' to the public" (*Watkin*, at para. 31). However, Member Lustig found that it was not the respondent department that offered to the public the benefit of entitlement to registration under the *Indian Act*. The *Indian Act* itself offered that benefit: "(w)hat the Respondent may offer as a benefit/service to the public is the processing of applications for registration to determine whether a person should be added to the Indian Register, *in accordance with the Indian Act*." (*Matson* at para. 58.) In that case, the processing of an application by a registrar officer, described as reviewing applications, could have been a service, but the resulting status or lack thereof was not the service offered by the department doing the processing pursuant to the *Indian Act*'s requirements, nor was the act of legislating those requirements a service.

[152] In *Andrews*, the Commission/complainant again argued that the processing of registration under the *Indian Act* was a service. First, they argued that Service Canada listed registration as a service on their website. (*Andrews* at para 43.) Then the Commission analyzed the benefits that registration under the *Indian Act* provides to argue that they are a service.

[153] In that case, the Commission submitted that registration under the *Indian Act* met all the hallmarks used to determine if government conduct qualifies as a service. These indicia included tangible and intangible benefits, benefits being held out to an eligible public and people submitting applications to the Indian Registrar for those benefits to confer. (*Andrews* at para. 45.)

[154] However, the respondent did not view entitlement to registration under the *Indian Act* as a "service". The respondent conceded that processing of an application for registration may constitute a "service" but argued that Parliament's criteria for identifying who is eligible is not a service. In other words, had the application been processed in a way that differentiated on a prohibited ground in a manner that diverged from the legislative criteria, that could have been a discriminatory practice, but simply applying legislative criteria was not.

[155] The Tribunal held that Indian status does confer tangible and intangible benefits to the public. However, although Aboriginal Affairs and Northern Development Canada (as it was then called), may be a service provider, providing a service to the public, ultimately the services the department provided were not the object of the complaint. The Tribunal characterized the true challenge as a challenge to the *Indian Act* itself.

[156] In this case, it would be overly broad and superficial to state that processing times or immigration services writ large are a “service” under s. 5 of the *CHRA*. Given *Matson/Andrews* and the case law leading up to those decisions, the proper approach is to analyze whether specific government actions that contributed to the longer processing times for the PGP category are captured by s.5(b) of the *CHRA*.

D. *IRPA* AND THE *IRPA REGULATIONS* NOT ALLEGED TO BE SERVICES

[157] In this complaint, Parliamentary law-making is not alleged to be a discriminatory practice, nor is regulation-making by Cabinet alleged to be a discriminatory practice. The Tribunal was specifically asked by the Complainant and Commission, whose burden it is to establish the prima facie case, not to determine whether the passage of regulations and levels plan final approvals are “services” under the *CHRA* and to focus instead on processing by the IRCC as the impugned service. No party made a direct attack on *IRPA* (consistent with *Matson/Andrews*) and no party made a direct attack on the *IRPA Regulations*. The Complainant submitted:

> It is an open question whether the ratio in *Matson* and *Andrews* immunizes subordinate legislation such as the *IRPA Regulations*, as opposed to Acts of Parliament like *IRPA* itself, from Tribunal review. That legal issue need not, and should not, be decided in this case— so the Applicant takes no position on it presently. [Complainant’s Factum at para. 171, underline in original.]

[158] The Commission submitted:

> Dr. Attaran’s complaint does not target legislation. He does not complain that a piece of legislation is discriminatory, but the way the respondent processes spouses and children at a much faster rate than those of parents and grandparents is discriminatory. [Commission’s Factum at para. 55.]

[159] To the extent that adverse differentiation on prohibited grounds between types of applicants is imposed on IRCC by *IRPA* and the *IRPA Regulations*, that type of adverse differentiation was not pursued as a discriminatory practice under the *CHRA* by the Complainant and the Commission. Instead, the Complainant and CHRC have asked the Tribunal to look very closely at IRCC's procedures, processes, and results, including the discretionary authority of the Minister to make Ministerial Instructions that direct IRCC officials' handling of applications, the implementation of Levels Plans and to grant exemptions to applicants "from any applicable criteria or obligations of this Act" (s. 25.2(1) of *IRPA*.)

[160] As a result, if the Tribunal determines that binding, mandatory components of *IRPA* and the *IRPA Regulations* were the inescapable causes of the adverse differential treatment attributed by the Complainant or Commission to IRCC, then the Complainant and Commission will not have discharged their burden of establishing a discriminatory practice by the IRCC when processing applications. For these same reasons, the question of whether regulation-making is a service will not be determined in these reasons. These questions are not properly before the Tribunal as argued by the Complainant and Commission. Instead, the key question before the Tribunal is whether, in light of the scope of government actions left to IRCC, within a regime that includes *IRPA* and the *IRPA Regulations*, IRCC has engaged in a discriminatory practice.

[161] Consequently, in this decision *IRPA,* the *IRPA Regulations* are taken as part of the statutory and regulatory framework within which the Respondent processes applications.

E. THE SIGNIFICANCE OF THE LEVELS PLANS IN THIS INQUIRY

[162] The parties took differing views of the significance of Levels Plans and made extensive submissions about them. There was also much evidence before the Tribunal at the hearing about how the Levels Plans are determined and whether the Respondent or Cabinet decides the numbers in the Levels Plans each year.

[163] Throughout the inquiry, the Respondent explained that the long processing time for the PGP subgroup, experienced by the Attaran family, was a direct result of the Levels Plans having admission target ranges for PGPs that were consistently too low to prevent backlogs from arising. According to the Respondent, the source of the alleged discrimination is not found in the assessment of the sponsorship application, but rather in the number of the available permanent resident spots under the Levels Plan relative to the demand, year after year. (Paras. 2-3 Respondent's Factum.) They explained that the Levels Plan set the number of admissions for PGPs each year and once those numbers had been reached, the remaining sponsorship applications sat on the shelf until admission space became available in a subsequent year. IRCC could not approve significantly more PGP applications because the Levels Plan did not give them authority to do so. (See Respondent's SOP at paras 38-39.)

[164] Before the hearing began, Dr. Attaran took aim at the Levels Plan and how they impacted the processing time for his application. Paragraph 4 of his SOP reads:

> "The cause of the problem is rather simple: successive governments have, about once a year, issued immigration "Levels Plans" which shuffle Family Class applications for parents and grandparents to the back of the processing queue. The Respondent department, speaking for the Immigration Minister, says they have the statutory discretion to prioritize applications, which is true, but overlooks the fact that when Parliament granted that statutory discretion, it stipulated in both *the Immigration and Refugee Protection Act (IRPA)* and the *Canadian Human Rights Act (CHRA)* that it must never be employed so as to discriminate – which he is."

[165] While Dr. Attaran here pointed to the influence of Levels Plans in creating fewer admissions spaces for PGPs, and consequently longer processing times, his focus was and remains the Minister's discretionary powers. At the conclusion of the hearing, Dr. Attaran argues his case has never been about discrimination in how the Cabinet makes its Levels Plan and that he has never demanded Cabinet raise or lower its numbers: "But <u>nowhere</u> in the oral or written evidence did the Applicant demand the Cabinet increase the level of PGP intake, and <u>nowhere</u> in pleadings did the Applicant allege that Cabinet discriminated by not doing so." He also states, "…by litigating as if setting the Levels Plan is the alleged

discriminatory "service", the Respondent's counsel is in a galaxy far, far away." (Paras. 114-117 of Complainant's Factum. Underline in original.)

[166] The Respondent argues that Dr. Attaran has shifted his argument:

> After pleading in his Statement of Particulars that the "cause of the problem is …'Levels Plans'", the Complainant has now shifted his position and instead, he now argues in his closing submissions that the source of the alleged discrimination was the alleged failure to bring in the legislative and policy reforms to control *demand* for PGP sponsorship sooner." (Respondent's Factum at para.7.)

[167] As is apparent from these exchanges, the parties fundamentally disagreed on whether Levels Plans determine the wait times and impose adverse differentiation among applicants on prohibited grounds, or whether the Minister could have improved the *Respondent's* treatment of applicants in the PGP category with the discretionary powers available under *IRPA* such that that PGP applicants would have been on par with other categories of applicants, such as FC1s.

[168] The Respondent emphasized that finding the cause of the delays for PGP applicants is critical:

> "The issue in this case was the wait time before his application could be assessed by an immigration officer. The critical task for the Tribunal in this case is to determine the cause of that wait time." (Respondent's Factum at para. 6.)

[169] In further support of the view that the service or services the Complainant asks the Tribunal to rule on do not include Cabinet's approval of Levels Plans, the sought remedies outlined in Dr. Attaran's Factum do not address the Levels Plans. The five main, non-monetary remedies sought by Dr. Attaran are: prospective service standard reform; statistical transparency; operational equality; public accountability; and inclusion of a safety mechanism for emergencies when operational equality cannot be met. All of these remedies speak to the Application Review Wait Time when the file is being actively worked on by an IRCC officer. The sought remedies do not speak to Levels Plan target ranges, the making of Levels Plans or to the problem of applications "sitting on the shelf" for long periods of time. (The evidence before the Tribunal showed that in recent years, after the finalization of the

Attaran family's application, the issue of applications "sitting on the shelf" for long periods has disappeared due to strict application intake controls.) This supports the view that the Complainant impugns the Respondent's processing of applications and the Minister's discretionary powers that the Complainant considers to be part of that processing, and not Levels Plans themselves.

[170] The Commission also did not allege that Cabinet's approval of Levels Plans is a service. The Commission's position on Levels Plans was difficult to follow. The Commission argued, "the levels plan and the processing of the application are inextricably tied to one another. The levels plan is the supply for the service and therefore an integral part of the supply chain in the delivery of the service." However, the Commission also says that Levels Plans are "irrelevant", and the source of the shortage in supply does not matter, again emphasizing that this complaint attacks the downstream processing of applications, not the Levels Plans themselves (Para. 47 of the Commission's Factum.)

[171] Notwithstanding the concluding arguments of the Complainant and the Commission that do not attack the Levels Plans themselves, much of the evidence at the hearing and much of the final argument was devoted to the process of establishing the Levels Plans, their significance and what discretion, if any, exists around their implementation. As such, to conclude whether IRCC engaged in discriminatory practices requires a detailed examination of the Levels Plans in the immigration regime.

[172] As outlined above, s.94(1) of *IRPA* requires the Minister to table in Parliament an annual report on the operation of *IRPA*. The required details of the annual report are set out in s.94(2), including s.94(2)(b) which calls for a description of the number of foreign nationals who became permanent residents, and the number projected to become permanent residents in the following year. This description under s.94(2)(b), part of the annual report to Parliament, is a report to Parliament of the Levels Plan, upon which much hinges. Although, as Dr. Attaran points out, the words "Levels Plan" do not appear the legislation.

[173] It is correct that neither *IRPA* nor the *IRPA Regulations* use the term "Levels Plan" which is interesting, given how much the Respondent apparently relies on the Levels Plan to explain how resources are allocated by IRCC to meet the Government's immigration

goals. The documentary evidence at the hearing also showed the Government was inconsistent in the way the Levels Plan was presented in various annual reports. All of the annual reports to Parliament for the years 2008 to 2020 were submitted as exhibits at the hearing. Only the reports for 2009 and 2010 set out the target ranges for the various sub-categories of immigrants, including PGPs. From 2011 onwards, the annual reports did not break down the prospective target ranges for the sub-categories like PGPs and FC1s. In most years, a target range was given for all federally approved selections combined, including economic classes, all family classes and refugees. The immigrants to be selected under Quebec's unique immigration program were usually set out separately, with just a global target range being given for all immigrants in the coming year.

[174] During the cross-examination by Dr. Attaran, Mr. Bornais stated that even though target ranges were not broken down into sub-categories of immigrants in the annual reports from 2011 onwards, the target ranges for each group, such as FC1s and PGPs, were posted on the IRCC website each year. Mr. Bornais was unable to explain why the reporting to Parliament changed, not to include the target ranges for the various sub-categories.

[175] During this cross-examination, the Complainant referred to the breakdown of target ranges for the various sub-categories as the mix. He asked Mr. Bornais about those latter reports to Parliament that did not detail the mix, but instead only set out global target ranges for all immigrants in the economic, family and refuges classes all lumped in together. Dr. Attaran asked, as result of only the global targets being reported to Parliament, if that meant IRCC had flexibility to decide the mix of the various sub-categories within the global targets. Mr. Bornais answered no.

[176] When Dr. Attaran asked the follow-up question, why, there was an objection from Respondent counsel that the question was delving into matters subject to Cabinet confidence. The witness was excluded and there were lengthy discussions amongst counsel about the question, and whether it was about Cabinet or just IRCC. When the witness returned, I rephrased the question to him. I asked Mr. Bornais why the department did not take the Levels Plan, as reported to Parliament where there was no indication of the mix, to mean there was no mix? There was a very lengthy pause after my question and Mr. Bornais simply answered that the department set out to deliver on the Levels Plan approved by

Cabinet. A second re-phrasing of the question yielded another lengthy pause and the same answer. (Cross-examination of Mr. Bornais on February 12, 2021 @ 3:41:50.) It was unclear why Mr. Bornais was avoiding answering the question, as it did not appear to implicate a matter of Cabinet confidence.

[177] After the exclusion of the witness again, I made the observation that all of the annual reports examined did include a retroactive break-down of target ranges for each of the immigration sub-categories. When reporting on the prior year's actual admissions, each annual report gave a break-down for each sub-category, including PGPs and FC1s, and compared the prior year's Levels Plan target range for each sub-category against the actual number of admissions in each.

[178] Dr. Attaran raised the question of how we are supposed to know if those are Cabinet's original ranges, or target ranges set by IRCC to fall within the global numbers set out in the reports to Parliament.

[179] There was other evidence before the Tribunal to suggest that in all years, Cabinet set out specific target ranges for each sub-category, notwithstanding their absence from the annual report to Parliament. For example, Exhibit 32 was a multi-year comparison chart that examined past targets and future target ranges. (This document also noted that some classes of immigrants were shifted into different categories in some years which would explain the appearance of under-reporting. However, this did not impact the reporting of PGP targets and admissions.)

[180] During another exclusion of the witness, it was suggested by counsel for the Commission that the Tribunal could rely on Mr. Bornais' oral evidence that the mix of the Levels Plan was posted on the IRCC website each year, setting out the target ranges for each sub-category. Ms. Carrasco also suggested that those website materials could be introduced as exhibits. However, the Complainant objected to their introduction on the grounds of procedural fairness, so they were not admitted into evidence.

[181] Dr. Attaran also makes the case that IRCC – not Cabinet – is the original author of the intake levels in the Levels Plan, and that "Cabinet merely chooses from IRCC's menu of options." (para. 126 of Complainant's Factum.)

[182] Relying on the evidence above, I find that the Levels Plans in those latter years were approved by Cabinet and did include a breakdown of target ranges for the sub-categories each year which guided the department in the same way as in earlier years, when the mix was set out in the annual reports.

[183] Regarding IRCC's role in generating proposed levels, it is neither shocking nor determinative that departmental proposals and advice on the Levels Plan would reach Cabinet first (Complainant's Factum at para. 135.) Top public servants provide advice to Cabinet on issues of discussion. IRCC may have prepared options, memoranda and even recommendations for the Minister and Cabinet. However, regardless of the degree of assistance given by IRCC, I do not accept the Complainant's position that the Levels Plans are anything other than a document of the Cabinet. The Cabinet is accountable to Parliament and the Canadian public for its content.

[184] The Respondent calls the Levels Plan the "source of the discrimination", a phrase used in *Forward* and *Matson*. In the context of this case, they argue that a complaint against Backlog Wait Time is truly a complaint against the Levels Plan allotments set by Cabinet (i.e., the supply side). Put another way, the setting of target ranges in the Levels Plan is the action that gave rise to the allegedly discriminatory delay.

[185] The Respondent submitted that "when Cabinet approves the Levels Plan and the Minister reports it to Parliament under s. 94 of IRPA, it does not provide a service." Cabinet decisions are analogous to Parliament decisions; they happen at the highest levels of government. Furthermore, the Respondent adds that the Levels Plan does not meet the basic principles to be characterized as a service: members of the public are not transacting "in the provision of a service" when the Levels Plan is set by Cabinet. (Respondent Factum, paras. 196-200.)

[186] The Commission's main argument, addressed further below, is that various discriminatory practices occurred in IRCC's implementation of the Levels Plan. They argue that based on IRCC's wide discretionary power, the Levels Plan referenced in s. 94 of *IRPA* is different from clear statutory criteria that the complainants had in *Forward, Murphy,* and *Matson and Andrews*. Accordingly, they argue that the ratio in *Matson/Andrews* is the wrong

framework to follow. The proper starting point is *Watkin* as described previously. If the source of the discrimination were to matter, they noted that the Levels Plan is not parliamentary law-making and therefore is not immunized from *CHRA* scrutiny. However, the Commission says the source does not matter: “It would be onerous to suggest that parties and the Tribunal go behind the service complained each time a government service is implicated”. (Commission’s Factum at para. 47.) In other words, the Commission did not argue that Cabinet’s decisions on Levels Plans were discriminatory practices; rather the Commission argued that those decisions are irrelevant.

[187] Although the Complainant did not allege the Levels Plans were a discriminatory practice, he said that even if Cabinet sets the Levels Plan, it is not immunized from *CHRA* scrutiny:

> **“The Respondent is wrong throughout its factum—fervently and tiresomely wrong—that there is something special in this case about Cabinet laying the Levels Plan.** Not only is that contrary to binding precedent (*Vaziri*) but it posits a nonexistent, unreviewable Royal Prerogative, and ignores that Parliament’s law is supreme—including the *CHRA*. From Mr. Stynes’ broken-record objections of “Cabinet confidence!” during Mr. Bornais’ cross-examination to its factum now, the Respondent hurls the word “Cabinet” about as if it were a magical hex to throw sand in the Tribunal’s eyes and elevate government above human rights review. It is total—and arguably totalitarian—nonsense**. Even Cabinet decisions are reviewable for legality—period, no exceptions.** (…) if a Cabinet decision is subject to judicial review under the common law, then how could it possibly be immune from Tribunal review under the quasi-constitutional *CHRA*?” (Complainant’s Reply Factum, paras. 8-9. Emphasis in original.)

[188] Although the above submission sounds like a challenge to Cabinet setting the Levels Plan, I accept the Complainant’s earlier submission that setting the Levels Plan is not challenged as a service under the *CHRA*.

a) Are the Levels Plans Binding?

[189] Consistent with his approach of focusing on the discretion of the Minister and IRCC, Dr. Attaran makes lengthy argument that the Levels Plans were not legally binding and that public servants were not bound to follow them (para. 43 of Reply Factum.) His final

submissions also cite extensive evidence that the Levels Plans were not strictly followed, and that there were numerous occasions when the target ranges set out in the Levels Plans had been missed. (Complainant Factum paras. 51-57.) He concludes that this is proof that the discretion to admit more than the Levels Plan was always there. He concludes:

> "To sum up: the Respondent's framing of this case – as if it were a legal challenge to Cabinet's Levels Plan, and as if the Levels Plan binds and straightjackets IRCC utterly, inexorably leading to PGP backlogs and long wait times – is richly embroidered nonsense." (Para 135 Complainant's Factum.)

[190] The Commission agrees that the Levels Plan is one of the controls used to manage intake and concedes that the Levels Plan has many moving parts to it. (Commission Reply Factum at para. 27.) They argue that the *implementation* of the Levels Plan is where discretion is used and, therefore, where the CHRT has jurisdiction. (Para. 6 of Commission's Factum.) They argue that IRCC is provided with wide discretion to manipulate the target ranges throughout the year and can effectively rewrite programs or create new ones. (Commission's Factum at para. 6.) In their words, "IRCC can, among other things, borrow, swap, recalibrate, exceed and fall short". (Commission's Factum at para. 37.)

[191] The evidence provided through testimony showed that the IRCC Operations Planning and Performance Branch, which manages the implementation of the Levels Plan, uses the ranges set therein as targets to be met on an annual basis. As Mr. Tetford testified, his office reported weekly on their progress towards reaching those annual target ranges. Overseas offices were also allotted targets to meet. (Cross-examination of Mr. Tetford on Feb. 9, 2021 @ 3:28:45.) It is not disputed by the Commission, based on the documentary evidence, that IRCC usually stays within the set target ranges. (Commission's Factum at para. 37.) However, their argument highlights years where IRCC fell short or exceeded target ranges particularly within the PGP category (Commission's Factum at para. 39.)

[192] The evidence at the hearing was clear that in all years, admission targets for PGPs were set in the Levels Plans at levels far below the actual demand (where demand is the number of people seeking to sponsor a parent or grandparent). By contrast, the admission targets for spouses and minor children in the Levels Plan were set high enough with the intention to absorb all of the applications submitted so that no backlog would accumulate.

With respect to those FC1 applications, Mr. Bornais testified that, “levels were set to correspond as much as possible with forecast demand, and that’s in contrast to most programs where the Department tries to set up demand application intake in accordance with supply in the levels space.” (Direct Examination on February 10, 2021 at 48:45.)

[193] Mr. Tetford explained that from July 2009 until the spring of 2012, Dr. Attaran’s sponsorship application was essentially “sitting on a shelf” waiting for its turn to be processed when it came up through the queue. Mr. Tetford testified that each year he would be provided with the target set out in the Levels Plan and he would allocate resources accordingly to try to meet that target. Applications like Dr. Attaran’s would sit on a shelf as Inventory until it was time to process it in order to meet the target in the Levels Plan. Applications were processed in chronological order based on when they were received, on a “first in - first out” basis. Mr. Tetford testified that applicant requests to “expedite” processing, like the request Dr. Kazem Attaran made in his letter dated May 8, 2012 (Exhibit 3, page 51) would likely have little impact. He said that most everyone had a reason why they wanted their application to be processed sooner. If they responded to every request, it wouldn’t be fair. As such, they adhered to the first in – first out principle. (Commission’s cross-examination of Mr. Tetford on February 9, 2021 starting at @ 3:31.)

[194] Looking at the whole of the evidence, there were reasonable explanations provided as to why deviations from the Levels Plan target ranges occurred. Mr. Cardinal clarified that reaching target ranges is not a hard science. He explained the numerous challenges encountered when carrying through and implementing the Levels Plan. Permanent residence applications are processed and visas issued at numerous offices in Canada and throughout the world. Operational challenges include variables outside of IRCC control, namely, visa wastage (when a person does not choose to use a visa they are issued), landing lag (landing in the calendar year after visa issuance), seasonality and travelling with dependent children who might have to wait until the end of school before travelling. (Respondent’s Factum at para. 94.)

[195] The degree of these deviations was highlighted in the Minister’s 2008 annual report to Parliament (Exhibit 21) on page 5. In 2007, the overall target range for new immigrants was 240,000 to 265,000. Over 250,000 visas were issued but there were only

236,758 admissions in that year. In other words, over 13,000 permanent resident visas issued, representing more than 5% of the total, were not used in that calendar year.

[196] Devoting appropriate resources is also a challenge. The same IRCC employees who process PGP applications overseas also have to cope with peak seasonal demands for visitor and student visa processing. (Cross-examination of Mr. Cardinal on September 23, 2021 @ 1:03:50.) Mr. Bornais testified that deviations occur as a result of these multiple moving parts, but that IRCC nevertheless makes every effort to reach the target range in the Levels Plan. In other words, there are practical realities that make reaching target ranges difficult. (Respondent's Factum, par. 99; Cross Examination of Glen Bornais on February 12 at 1:57:20.) I accept Mr. Cardinal's and Mr. Bornais' testimony on these points as credible and compelling.

[197] Regarding the Commission's argument that the Levels Plans were not really binding, and that discretion existed to depart from them, I am guided by the evidence of Mr. Tetford who spoke to Exhibit 18, the policy document drafted by Tracey Bender. At page 18, the author gives perspective on the number of applications arriving at CPC-M at a time when the Respondent could not refuse acceptance of applications that were coming in, indicating that the change in levels would have to have been extreme to keep up with demand, to a degree not consistent with competing immigration goals that the IRCC is tasked to implement:

> Levels management could never have prevented the inventories from accumulating both in Canada and abroad. In 2002, over 22,000 parents and grandparents became permanent residents. The inventory that same year was 48,460 people, which meant that the processing time was just over two years. In 2003 however, the number of PGPs accepted as permanent residents stayed relatively constant at 19,394, but the inventory grew by over 25,000 people for a new total of over roughly 73,649 person applications waiting to be processed. Since 2004, the inventory has been over 100,000 people.
>
> To maintain the inventory at the 2002 level of 48,460 people- over 44,000 people (or an additional 25,000 people) would needed to have become permanent residents in 2003; over 69,000 people (or an additional 56,000 people) in 2004; over 71,000 (an additional 59,000) in 2005; and over 79,000 people (or over 59,000 extra) in 2006- simply to maintain the 2002 inventory!

> What is clear from this chart (not pictured) is that the inventory could not have been prevented operationally by adjusting the 60/40 split and simply increasing the number of parents and grandparents that became permanent residents. Since the level of intake of applications (in persons) each year since 2002 was nearly as high as the 2002 inventory level- 48,460, preventing the inventory from accumulating could never have been possible through levels management alone.

[198] The 60/40 split referred to the overarching goal of the government to admit approximately 60% of total immigrants in the economic classes and the remaining 40% to be admitted as refugees and Family Class members. (See paragraph 86 of the David Manicom Affidavit, Exhibit 16.)

[199] Mr. Cardinal gave evidence that confirmed the magnitude of the problem. He said that in 2011, even if the target ranges for PGP admissions were increased by 4,000-5,000 spaces per year, it would not have any effect on the then-40 month estimated processing time. (Redirect Examination of Mr. Cardinal on September 24, 2021 @ 3:08:40.)

[200] As the Respondent noted, the extent of the PGP backlog in 2011 was so high that processing times could only have been resolved by Levels Plan changes so drastic that they would have upset the balancing of the other immigration streams (such as economic and refugee classes) as decided by Cabinet. It would have required a tripling or quadrupling of PGP admission levels to bring the inventory down in a matter of two to three years. (See Respondent's Factum at para. 276.)

[201] There was no evidence that IRCC had the authority to unilaterally rewrite, swap or create new programs. While the evidence showed that the Levels Plan targets were often missed for the reasons above, there was also evidence they were departed from because of periodic Ministerial commitments (cross-examination of Simon Cardinal on September 23, 2021 @ 1:01:54). For example, in 2015, Protected Persons and Refugees exceeded the target range by over 6,000 due to the commitment of the new government to resettle a high number of Syrian refugees (see Exhibit 28 and the Respondent's Factum at para. 105.)

[202] There was no evidence to suggest that IRCC had the discretion to increase the PGP numbers on its own volition, and certainly not on such a massive scale. The actual demand for PGP admission spaces has always been very high, and permitting IRCC to

exceed the targets sufficiently to meet all demand, would have resulted in a massive number of PGP admissions, making the Levels Plans meaningless.

[203] I have found that Cabinet sets the Levels Plan. No party directed the Tribunal to explicit authority in *IRPA* or the *IRPA Regulations* for IRCC to deviate from the Levels Plans in a manner that defeats their intention and purpose. The regime contains elements of discretion that are designed to help the Minister accomplish the Levels Plan and implement *IRPA*, given the range of circumstances and exigencies that can arise. Those elements of discretion do not indicate that the Minister or IRCC should ignore the instructions of Cabinet.

[204] Regarding the Complainant's argument that Cabinet decisions are not immune from *CHRA* scrutiny, or whether Parliament is supreme and Cabinet decisions may be judicially reviewed, these are not the issues here. The issue is whether IRCC had the discretion under *IRPA* to process applications in a manner that would undo the resulting differential treatment of PGPs expressed in Levels Plans.

[205] The fact that Cabinet chose to limit admission spaces for PGPs, and chose to not set targets which match actual demand (as they do for spouses and children), those are decisions of Cabinet.

[206] IRCC must implement Cabinet decisions. The limited flexibility that existed, or the fact that target ranges were sometimes missed, must not be conflated to be wide discretion allowing IRCC to ignore the targets in the Levels Plan and instead admit a massive number of PGPs to achieve parity with spouses and children.

F. MINISTERIAL INSTRUCTIONS

a) Did the IRCC's Use of Ministerial Instructions involve the provision of a service?

[207] In addition to *IRPA*, the *IRPA Regulations* and the Levels Plans, Ministerial Instructions guide IRCC officials for the intake and processing of PGP sponsorship applications. The Complainant and Commission allege that the Minister's non-use and use,

respectively, of Ministerial Instructions were discriminatory practices. In response, the Respondent asserts that Ministerial Instructions are not a service.

[208] The Complainant and Commission say that the power to use Ministerial Instructions is a discretionary policy-making tool and should be considered an element of IRCC's provision of service in processing applications. The Respondent argues that Ministerial Instructions do not meet the definition of service in *Watkin*. Is the creation of a Ministerial Instruction by the Minister a service, or does it lack the hallmarks of a service?

[209] It is worthwhile to examine the language in s. 87.3 of *IRPA* which authorizes the Minister to create Ministerial Instructions:

> **Application**
>
> **87.3 (1)** This section applies to applications for visas or other documents made under subsections 11(1) and (1.01), other than those made by persons referred to in subsection 99(2), to sponsorship applications made under subsection 13(1), to applications for permanent resident status under subsection 21(1) or temporary resident status under subsection 22(1) made by foreign nationals in Canada, to applications for work or study permits and to requests under subsection 25(1) made by foreign nationals outside Canada.
>
> **Attainment of immigration goals**
>
> **(2)** The processing of applications and requests 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.
>
> **Instructions**
>
> **(3)** For the purposes of subsection (2), the Minister may give instructions with respect to the processing of applications and requests, including instructions
>
> > **(a)** establishing categories of applications or requests to which the instructions apply;
> >
> > **(a.1)** establishing conditions, by category or otherwise, that must be met before or during the processing of an application or request;

(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.

Application

(3.1) An instruction may, if it so provides, apply in respect of pending applications or requests that are made before the day on which the instruction takes effect.

Clarification

(3.2) For greater certainty, an instruction given under paragraph (3)(c) may provide that the number of applications or requests, by category or otherwise, to be processed in any year be set at zero.

Compliance with instructions

(4) Officers and persons authorized to exercise the powers of the Minister under section 25 shall comply with any instructions before processing an application or request or when processing one. If an application or request is not processed, it may be retained, returned or otherwise disposed of in accordance with the instructions of the Minister.

Clarification

(5) The fact that an application or request is retained, returned or otherwise disposed of does not constitute a decision not to issue the visa or other document, or grant the status or exemption, in relation to which the application or request is made.

Publication

(6) Instructions shall be published in the *Canada Gazette*.

Clarification

(7) Nothing in this section in any way limits the power of the Minister to otherwise determine the most efficient manner in which to administer this Act.

[210] The introduction of Ministerial Instructions was explained by legal expert, Mario Bellissimo in a document referenced by the Commission in its Factum at para. 40:

> By 2008, the Canadian Federal Skilled Worker ("FSW") program was facing a tremendous backlog. The number of applicants consistently exceeded program capacity by large measure, and in 2008, over 600,000 applicants were awaiting processing while this number continued to swell. This backlog led to an extreme delay between the time of applying and time of processing. Applicants put their lives on hold for years while awaiting a decision, and it became increasingly difficult to match applicants' skills with current Canadian labour market needs. Despite enormous delays, the backlog continued to expand.
>
> In response, the Immigration and Refugee Protection Act ("IPRA") was amended and section 87.3 was created. This provision granted the Minister of Citizenship and Immigration (currently Minister Jason Kenney) broad authority to set processing quotas and priorities for different classes of applications in a given year by way of "Ministerial Instructions," and summarily dispose of those that did not meet these criteria. *(Immigration and Refugee Protection Act, S.C. 2001, c. 27, section 87.3(3) [in force from 18 June 2008 until 28 June 2012], section 3.*) It also deemed that any action performed pursuant to these Ministerial Instructions did "not constitute a decision not to issue the visa or other document, or grant the status or exemption," (Immigration and Refugee Protection Act, S.C. 2001, c.27, section 87.3(5)) thereby attempting to insulate these decisions from judicial review in the Federal Court of Canada. (Emphasis added.)

[211] According to Mr. Bellissimo, Ministerial Instructions were the new tool used to perform actions that would not be attacked on judicial review as a decision denying a visa or document or granting a status or exemption.

[212] Moreover, s. 5(2) of *IRPA* requires the Minister to table in each House of Parliament, for referral to the appropriate committee of each House, any proposed regulation affecting the most important sections for admission to Canada. The use of Ministerial Instructions by the Minister, to impose important conditions and limits on immigration criteria, avoids the scrutiny of Houses of Parliament committees previously required when amendments were made by regulation.

[213] The very first Ministerial Instruction, introduced as Exhibit 93, focussed on the Federal Skilled Worker (FSW) backlog. It introduced new criteria for FSW applications

received after February 29, 2008 that would be “placed into processing immediately upon receipt.” The FSW applications received prior to that date were therefore deprioritized. This marked the departure of the “first in-first out” rule for deciding an application in the order in which it was received. This was a significant change affecting hundreds of thousands of people in the FSW queue who lost their priority in that queue. That group, who applied prior to February 27, 2008, mostly had their applications languish until they were “terminated” by amendments to *IRPA* in 2012. The new amendment, s. 87(4) of *IRPA*, included subsection (3) deeming the termination to not constitute a decision to issue a permanent resident visa (insulation from judicial review according to Mr. Bellissimo) and sub-section (5) precluding any right of recourse or indemnity against the Government for the termination of their applications, which at this point had been languishing for at least four years, but in the majority of cases, much longer.

[214] Subsequent Ministerial Instructions submitted into evidence revealed that they were used for a variety of purposes to fine tune selection criteria and to impose limits on numbers of applications that would be received in various categories, including PGPs. They also made provisions for applications in certain categories that would simply “not be processed.” (See Exhibit 93 for example.)

[215] There were eight Ministerial Instructions impacting PGP sponsorship applications submitted into evidence. Only Ministerial Instruction #4 was issued during the time-frame of Dr. Attaran’s application. Issued in late 2011, it imposed a temporary moratorium on the intake of new sponsorship applications, but this did not affect the Complainant. The subsequent Ministerial Instructions, issued from 2014 to 2020, imposed intake caps for sponsorships and different methods for selection for such applications. In some years, there would be a short time-frame for application submission. In other years, there was a randomized selection. These later Ministerial Instructions did not impact the Complainant or others like him seeking to sponsor parents or grandparents at that time.

[216] The Complainant frames the issue as when using his discretion, did the Minister differentiate adversely (Reply Factum at para 65.) The Commission describes Ministerial Instructions as an innovative form of law-making which allow wide discretion to revamp policy and criteria (CHRC Factum at paras 40 & 45.)

[217] The Respondent's position is that policy measures needed to permit intake control cannot be characterized as a "service" because they lack the transitive connotation required of a service as described by the Supreme Court of Canada in *Gould*. Moreover, Ministerial Instructions do not resemble 'goods… facilities or accommodations'. There isn't a public interface with the alleged service provider. There is no ability nor requirement to 'accommodate' individual circumstances. (Respondent's Factum at paras. 208 and 194.)

[218] It is clear that Ministerial Instructions are not decisions of Cabinet. Ministerial Instructions are distinct from Cabinet decisions as they are a result of the opinion of the Minister. Subsection 87.3(2) of *IRPA* makes it clear that in granting authority to the Minister to make Ministerial Instructions, the authority must be exercised in a particular manner: "The processing of applications and requests 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." The section does not grant the Minister authority to set immigration goals contrary to those set by Parliament and Cabinet.

[219] The preponderance of evidence in this case is that the Minister in making Ministerial Instructions was attempting to implement "the immigration goals established by the Government of Canada", as required by s.87.3(2) of *IRPA*. The combination of high demand for sponsorship of PGPs and relatively low target ranges in the Levels Plans meant IRCC had great difficulty with Backlogs on the one hand, and the dissatisfaction of potential applicants who were excluded by intake controls on the other.

[220] When Ministerial Instructions were finally implemented in 2011 to deal with PGPs, the Minister treated the PGP applicants differently than other categories, but this was inevitable to implement the goals in the Levels Plans, *IRPA* and the *IRPA Regulations*. With the exception of Ministerial Instruction #4, the later Ministerial Instructions are far removed from the time-frame of Dr. Attaran's complaint and did not impact him or others like him making applications at that time.

[221] In my view, Ministerial Instructions are not a service under the *CHRA*. They lack the transitive connotation required. There is not an interface between the public and the

Minister (*Gould, supra* at para. 55.) Not every action of the Government is a service (*Watkin, supra,* at para. 33.)

[222] Having come to this conclusion, I now address the specific arguments of the Complainant and the Commission.

b) Non-Deployment of Ministerial Instructions from 2008-2011 to Control Intake of Applications to Prevent Backlog Growth

[223] Dr. Attaran alleges that the non-deployment of Ministerial Instructions from 2008-2011 to control intake of PGP applications was adverse differential treatment because, in his view, this would have reduced the growth of the Backlog of applications during that period.

[224] At the time Dr. Attaran submitted his sponsorship application, CPC-Mississauga would only draw from Inventory, on a first in – first out basis, a limited number of applications sufficient enough to fill the spaces allocated in the Levels Plan for the PGP subgroup in that year. However, at the same time, there was no intake control. The number of new applications that arrived each year far exceeded the number of spaces allocated in the Levels Plan. This resulted in a growing Backlog of cases.

[225] IRCC did not implement intake controls for applications until the amendment to *IRPA* in 2008 afforded the Minister the power to issue Ministerial Instructions. As Mr. Cardinal testified, the Minister's initial use of Ministerial Instructions was to control intake and to dispense with the Backlog in the Federal Skilled Worker category in 2008.

[226] The Minister did not invoke this power with respect to PGP applications until 2011 when Ministerial Instruction #4 was implemented to bring in a pause in the acceptance of new PGP sponsorship applications from November 2011 to the end of 2013. As noted above, in the ensuing years, there were a number of subsequent Ministerial Instructions used to control the intake of new PGP sponsorship applications, including a lottery.

[227] Dr. Attaran argues that the Respondent could have earlier: (i) paused the intake of new applications; (ii) placed a limit or "cap" on the number of applications that it accepts for

intake; (iii) issued a limited number of invitations to apply; and / or (iv) run a randomized selection or lottery to select a pool of applications. Dr. Attaran cited Exhibit 65 to show these options had been under consideration by the Respondent.

[228] Dr. Attaran acknowledges that eventually, the Respondent did implement a pause and the other suggested methods to control the intake of applications. However, these measures were only undertaken after he had submitted his application to sponsor his parents and it joined the existing queue at CPC-Mississauga.

[229] Dr. Attaran alleges that the Respondent should have used these intake control measures earlier to reduce the total processing time for his application, and that by not doing so, he and his family were subjected to adverse differential treatment as compared to spouses and partners (for whom demand and supply were reasonably matched) and other categories of immigrants who had intake controls sooner (eg. Foreign Skilled Workers in 2008). (Paras 122 and 143 of Complainant's Factum.)

[230] Dr. Attaran did not suggest what specific Ministerial Instruction could have been implemented in 2008 which would have benefitted him specifically and would not itself have been discriminatory. It is true that Ministerial Instructions related to PGPs could have been implemented sooner, as early as 2008. However, if there had been some earlier intake control to his benefit, it would seem to come at the expense of excluding other potential applicants.

[231] The Respondent points out that if the Ministerial Instructions were implemented in 2008 for intake controls for PGP applicants, Dr. Attaran may have faced measures such as a moratorium and then not been able to submit an application for sponsorship at all. (Respondent's Factum at para. 206.) Dr. Attaran calls this argument a factual fabrication and suggests the Respondent "wildly speculates" in making it without citing any evidence. (See Para. 80 of Complainant's Reply Factum.)

[232] The evidence showed the first Ministerial Instruction to address PGP Intake, Ministerial Instruction #4 dated November 5, 2011, implemented a moratorium on the intake of new PGP sponsorship applications that lasted for 26 months. If intake controls had been in place earlier, those intake controls would have prevented some of the people seeking to

apply between 2008-2011 from doing so. That is the meaning and purpose of "intake control", and it is what happened after 2011. Dr. Attaran's argument assumes that his application would, nevertheless, have been one of the ones accepted into the inventory.

[233] The argument for earlier intake controls through Ministerial Instructions also ignores the "elephant in the room." Any form of intake control, when compared to the on-demand intake of the FC1 Family Class members, represents differential treatment of PGPs.

c) Aggressive Ministerial Instructions (e.g. Caps, Moratoriums and Lotteries) are used for PGPs but not for Spouses and Children

[234] The Commission alleged a second form of inappropriate use of Ministerial Instructions. Whereas Dr. Attaran made the argument that the Respondent could have implemented Ministerial Instructions sooner to limit the intake of PGP sponsorship applications, the Commission submitted that the Minister's aggressive use of Ministerial Instructions to control intake for PGP applicants was adverse differential treatment.

[235] Starting in November 2011, various Ministerial Instructions called for caps, moratoriums and even lotteries for PGP applicants, but not for spouses and children. For example, Ministerial Instruction #4 brought in the 26-month intake moratorium in 2011. Ministerial Instruction #9 set an intake cap for PGP sponsorship applications in 2014 at 5,000. Ministerial Instruction #21 set an intake cap for 2017 at 10,000. Ministerial Instruction #25 introduced a system of randomized selection and set the cap for 2018 at 10,000. Ministerial Instruction #43 introduced a short window of time in 2020 when potential sponsors could submit an interest to sponsor, which if selected, would lead to an invitation to submit an application. It also set the intake cap for 2021 at 10,000.

[236] The Commission makes the observation that several memoranda to the IRCC Minister made exhibits at the hearing suggested the use of certain tools to recalibrate the number of applications in the Backlog relative to the supply of admissions spaces in Levels Plans for PGP applications. The memoranda refer to tools such as temporary pauses, first-in intake with a narrow time-limited opening, randomized selections, moratoriums and caps. However, the Commission notes that nowhere in the record does it show that the

Respondent used such "aggressive tools" for the calibration of application numbers for spouses and minor children (Commission's Factum at para. 91.) They refer to the testimony of Mr. Cardinal who confirmed that FC1s were not subjected to these tools for application intake control because the levels of intake demand were consistently aligned with the Levels Plan. (Para. 91 of the Commission's Factum.) As noted above, Cabinet set the Levels Plan target ranges for permanent resident admissions in the FC1 subgroup in a manner that consistently aligned with the number of people actually seeking to be sponsored. As such, Backlogs were not an issue for FC1s.

[237] The Commission suggests that the use of the Ministerial Instructions to manage application intake are "capricious solutions" for the parent and grandparent backlogs that suggest differential treatment. The Commission argues there is no evidence that supports a reasonable explanation for the adverse differential treatment for PGPs caused by the use of Ministerial Instructions but not for FC1s. They argue that the Ministerial Instructions further marginalize the PGP category.

[238] Echoing these arguments of the Commission, Dr. Attaran observes that no other members of the Family Class besides the PGPs "suffered the indignity of a lottery." (Complainant's Factum at para. 160.)

[239] For the Commission, the discretionary power afforded to the Minister under s.87.3 of *IRPA* is again distinguishable from *Matson/Andrews*, where the processing department had no discretion to interpret the eligibility criteria differently. Using Ministerial instructions, the Minister has discretion in the implementation of policies and practices in delivering the immigration program (para. 20 of Commission's Reply Factum.)

[240] The Complainant and Commission have both argued issuing Ministerial Instructions is akin to the facts in the Tribunal's case of *Beattie v Aboriginal Affairs and Northern Development Canada*, 2014 CHRT 1 (*Beattie*). In *Beattie*, the Respondent, while processing an application for Indian status, had an interpretation available to it that did not differentiate on a prohibited ground.

[241] In *Beattie*, the non-discriminatory option that lay within the scope of the official's discretion had been identified. The official's interpretation of the *Indian* Act contributed to the

adverse differentiation experienced by the complainant, whereas in *Matson/Andrews,* the official had no choice because the source of the adverse differentiation was entirely attributable to the eligibility criteria in the *Indian Act*.

[242] In *Beattie*, the Tribunal found that a representative of the government did not exercise their discretion in a manner consistent with the *CHRA*. In this complaint, the allegation is that the Minister himself did not exercise discretion, in the exercise of articulating his opinion on best how to carry out the objectives of Cabinet through Ministerial Instructions, in a manner consistent with the *CHRA*.

d) The Minister's non-use and use of Ministerial Instructions after 2008: analysis of alleged adverse differential treatment

[243] Starting with the Respondent's position on the alleged inappropriate use of Ministerial Instructions and failure to implement intake controls before 2008, the Respondent argues that prior to the 2008 amendment to *IRPA* granting authority for Ministerial Instructions, the Minister did not have the discretion to stop or limit the intake of new applications without the intervention of Parliament or the Cabinet.

[244] The Complainant retorts that the Respondent's argument "is a brazen lie" and that the original version of *IRPA* passed in 2001 at s. 14(2) allowed regulations to govern the number of applications in a year (Complainant's Reply Factum at paras. 51-52.) He argues that amendments to regulations could have implemented intake control measures such as lotteries, moratoriums and caps. The Respondent clarifies in its Sur-Reply (at para. 12) that the *IRPA* amendments in 2008 gave the *Minister* the power, for the first time, to control intake.

[245] The parties are not arguing the same point here. The evidence showed the Government did use regulation to reduce PGP intake in 2014 by implementing Regulation 133(1)(j)(i)(B) to increase the minimum required sponsor income by 30%. Dr. Attaran is correct that s.14(2) of *IRPA* does provide that the *IRPA Regulations* may include provisions respecting the number of applications that may be processed or approved in a year. However, the Respondent is arguing that in the absence of provisions in *IRPA* or a

regulation, IRCC had no authority to refuse to accept applications for sponsorship at the point of intake until Ministerial Instructions came into play in 2008. As already discussed, regulation-making is not the service before the Tribunal in this complaint. The focus needs to remain on the powers the Minister had under s. 87.3 of *IRPA*, and whether those were exercised appropriately.

[246] Ministerial Instructions involve implementation of processes to best achieve the immigration goals of Canada, which are expressed in *IRPA*, the *IRPA Regulations* and the Levels Plans as set by Cabinet. The language in the statute (s.87.3) is clear that the Minister is given wide discretion to determine the most efficient manner in which to administer *IRPA* (sub-section (7).) Subsection (2) clarifies that Ministerial Instructions reflect the opinion of the Minister on how to support the immigration goals of the Government, which include those goals reflected in *IRPA,* the *IRPA Regulation*, and decisions of Cabinet on target ranges for categories of applicants as expressed in Levels Plans.

[247] However, the existence of discretion does not necessarily imply the existence of a service. For the reasons above, I have concluded that Ministerial Instructions are not a service. Dr. Attaran has not presented a convincing argument to demonstrate how an earlier use of intake controls through Ministerial Instructions would have benefited him or others like him seeking to sponsor parents and grandparents.

[248] The post-2011 Ministerial Instructions which the Commission seeks to impugn cannot be properly included in this complaint. The later intake controls had no impact on Dr. Attaran's application or the others applying at the same time. While their submission into evidence gave context and insight to the use of the Ministerial Instructions, the post-2011 Ministerial Instructions impacted persons who were subjected to a new regime for PGP processing. That new regime included strict application intake controls which resulted in the elimination of the PGP Backlog and much faster processing for the cases accepted.

[249] In conclusion, Ministerial Instructions are not services. Furthermore, the Complainant and the Commission have not convinced the Tribunal, on a balance of probabilities, that their earlier use would have ameliorated the wait time experienced by Dr. Attaran and his family. Therefore, these allegations are dismissed.

XIV. Was the Minister's Failure to Use the Authority under section 25.2(1) of *IRPA*, to Exempt PGP Applicants from Certain Financial Requirements Set out in the Regulations, Adverse Differential Treatment in the Provision of a Service?

[250] The Complainant and the Commission submitted that PGP sponsors are subjected to more onerous financial requirements than sponsors of other members of the Family Class. Dr. Attaran argues that the higher financial thresholds for PGP sponsorship are adverse differential treatment of those who wish to sponsor parents and grandparents because they make eligibility to become a sponsor more difficult. He then alleges that the Minister ought to have used his discretionary authority provided by s. 25.2(1) of *IRPA*, discussed below, to eliminate this differential treatment. The Minister's failure to use his discretionary power in this manner was, in Dr. Attaran's submission, a discriminatory practice.

[251] Firstly, the Tribunal heard evidence that every Family Class sponsor must submit an Undertaking of Assistance as part of their sponsorship application. According to *IRPA Regulation* 132(1), "…the sponsor's undertaking obliges the sponsor to reimburse Her Majesty in Right of Canada or a province for every benefit provided as social assistance to or on behalf of the sponsored foreign national and their family members…"

[252] The duration of the sponsor's Undertaking of Assistance is set out in R.132(1)(a) and (b) of the *IRPA Regulations* and varies based on the type of applicant. The start date of the undertaking is defined in R.132(1)(a) as the date upon which the sponsored relative arrives in Canada on a temporary resident permit, obtains a temporary resident permit while in Canada, or becomes a permanent resident. End dates vary significantly based on the subcategory of immigrant. While FC1 sponsors are generally obliged under their undertaking for three years (*IRPA Regulation* 132(1)(b)(i)), PGP sponsors are obliged under their undertakings for much longer. At the time Dr. Attaran sponsored his parents, the Undertaking of Assistance that he signed obliged him for 10 years after his parents' arrival. However, the *IRPA Regulations* have since been amended to require PGP sponsors to sign undertakings that are valid for 20 years after their relatives' arrival in Canada: *IRPA Regulation* 132(1)(b)(iv). The length of undertaking for FC1 sponsors has not changed.

[253] Sponsors of parents and grandparents also experience another, related financial requirement that is more rigorous than the requirements for sponsors of other Family Class members. All Family Class applications require the sponsor to provide financial information to demonstrate they are financially capable of fulfilling their obligations under the Undertaking of Assistance. Depending on the intended province of residence, the sponsor must demonstrate they (and their spouse, if applicable) have an income that meets or exceeds the low-income cut-off (LICO) amount for the size of family in that region.

[254] In the 2011 CIC Executive Committee presentation dated June 30, 2011 (Exhibit 160) various options were explored to deal with the increasing intake of PGP applications. One policy option considered was to increase the LICO amount for sponsors. Preliminary data suggested that increasing the income requirement to 25% over the existing LICO would result in a 43% reduction in application intake. Increasing the requirement to 40% over LICO would result in a 57% reduction of PGP applications.

[255] In 2014, the *IRPA Regulations* were amended such that R.133(1)(j)(i)(B) required PGP sponsors to have the minimum necessary income of the existing LICO plus 30% in order to be eligible. By contrast, under R.133(1)(j)(i)(A), FC1 sponsors are only required to show they have the minimum necessary income at the existing LICO level.

[256] The source of the increased income requirement is clearly by way of the amended *IRPA Regulations* which came into force on January 1, 2014. The source of the more burdensome financial undertaking is also by way of the *IPRA Regulations.* The amendment increasing the PGP sponsors' undertaking from 10 years to 20 years also came into force on January 1, 2014.

[257] The Respondent argues that the regulatory changes did not affect Dr. Attaran and the evidence showed he had no difficulty demonstrating the minimum necessary income required. The changes to the *IRPA Regulations* came into force after Dr. Attaran's parents had landed as permanent residents in Canada.

[258] The Respondent also argues that Dr. Attaran's challenge to the duration of undertakings was not mentioned anywhere in his Statement of Particulars, nor was the challenge to the minimum income requirements. Furthermore, they argue the changes had

no impact on wait times and are not engaged by the facts of this case. (Para. 214 of the Respondent's Factum.)

[259] It may be true that these regulatory measures have adverse, differential effects on PGP sponsors. The additional 7-17 years of undertaking constitutes a larger financial risk to the sponsor and as such, it is adverse. It might also have the effect of discouraging some people from becoming sponsors.

[260] Similarly, the minimum income requirement for PGP sponsors is more burdensome. The additional 30% requirement will undoubtedly eliminate the chances of some Canadians who wish to be sponsors of PGP relatives.

[261] These regulatory requirements are unambiguous. The new financial requirements make sponsorship more difficult for some prospective sponsors. However, the Complainant and Commission have not established how the passage of these regulations involved the "in the provision of a… service", as required by s.5 of the *CHRA*. The Complainant and Commission have stated that regulation-making is not the impugned service in this complaint. As such, these reasons do not make a determination on whether creating or amending the *IRPA Regulations* is itself a service.

[262] Instead, the discriminatory practice alleged by Dr. Attaran is the Minister's failure to use the authority under section 25.2(1) to exempt PGP applicants from the financial requirements set out in these regulations.

[263] Putting aside for a moment the Respondent's objection about relevance to the Complainant's own application, the Complainant and Commission have put two specific regulations about financial requirements in issue and say the Minister's failure to exempt all PGP applicants from these is systemic discrimination. Although not engaged by the Complainant's own application, these allegations relate to the experience of other PGP applicants at the IRCC.

[264] Section 14 of *IRPA* states that the *IRPA Regulations*, may prescribe, and govern any matter relating to, classes of permanent residents or foreign nationals. Sub-section 14(2)(c) states that the *IRPA Regulations* may include provisions respecting:

> "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;"

[265] The Complainant argues that where the *IRPA Regulations* make a distinction on a prohibited ground, the responsible Minister has an obligation to use his or her discretion pursuant to section 25.2(1) to exempt applicants. The Complainant asserts that the *CHRA* requires this.

[266] The Tribunal's case law in *Beattie* states that where government actors have discretion to interpret legislation in a way that avoids adverse differential treatment on a prohibited ground, the *CHRA* requires that they must exercise their discretion in a manner that does just that. In *Beattie*, a public servant chose to draw distinctions between biological children and custom-adopted children when interpreting provisions of the *Indian Act* (*Beattie* at para. 50). At para. 102 of his decision, Member Lustig found that "(w)here a statute has ambiguous language that can be interpreted in more than one way, the *CHRA* requires that the administering department choose the interpretation that is most consistent with human rights law principles."

[267] The Complainant relies on this principle to argue that the Minister is not strictly bound by R.132 and R.133 of the *IRPA Regulations* because s.25.2(1) of *IRPA* gives the Minister discretion to waive requirements in the *IRPA Regulations* (Complainant's Factum at para. 176.)

[268] Subsection ss. 25.2(1) of *IRPA* reads as follows:

> **Public policy considerations**
>
> **25.2(1)** The Minister may, in examining the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act, grant that person permanent resident status or an exemption from any applicable criteria or obligations of this Act if the foreign national complies with any conditions imposed by the Minister and the Minister is of the opinion that it is justified by public policy considerations.

[269] The Complainant refines this into two arguments. First, the IRCC's application of the financial undertaking and LICO requirements in the *IRPA Regulations* to PGP applicants

does not attract the ratio in *Matson/Andrews* because the Minister can use s.25.2(1) to make exemptions which, being discretionary acts, are necessarily a "service" under the *CHRA.* Second, the Minister must use his/her discretion to waive requirements in the *IRPA Regulations* that cause differential treatment to the PGP category because the *CHRA* takes precedence over the *IRPA Regulations*. The Complainant supports this argument by stating that the *CHRA* is Parliament's will, therefore the *CHRA* takes precedence over the *IRPA Regulations* to guide the Minister's exercise of discretion.

[270] The Complainant submits that the Minister must exercise his discretion under *IRPA* to issue exemptions, and in this way, effectively bring the *IRPA Regulations* into what he perceives as conformity with the *CHRA*. Effectively, the submission is that the Minister should use sub-section 25.2(1) of *IRPA* to exempt all PGP applicants from any adverse differentiations within the Family Class that are rooted in the *IRPA Regulations* that result in systemic discrimination and admit PGP applicants in a manner reflecting equal prioritization with other Family Class applicants. (Complainant's Factum at para. 177.) In other words, the *IRPA Regulations* are not truly binding like most other laws because Parliament granted the Minister the ultimate discretion in *IRPA* s.25.2(1) to waive requirements under the regulations on public policy grounds (Complainant's Factum at para. 172.)

[271] To support his position, the Complainant offered evidence from 2021 whereby the Minister exercised discretion under s.25.2(1) to temporarily exempt PGP sponsors from the elevated income requirements of the *IRPA Regulations*. (Complainant's Factum at para. 175.) (This policy change was in response to difficulties in meeting levels targets because of the COVID-19 pandemic. The policy change was not undertaken to exceed the levels targets set by Cabinet.)

[272] The Minister's use of s.25.2(1) to exempt the entire pool of PGP sponsors from the usual income requirements appears to be a departure from the ordinary use of this regulation to grant exemptions for individuals. On its plain reading, it is not obvious that s.25.2(1) was intended to dispense with binding *IRPA Regulations*, particularly in a manner that would imply exercising Ministerial discretion to overturn regulations for entire categories of people or the Levels Plans and their prioritization of categories of immigrants. Here is the relevant part:

> ss. 25.2(1) "The Minister may, in examining the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act, grant that person permanent resident status or an exemption…" (Underlining added.)

[273] Nevertheless, the evidence was that the Minister relied on this discretionary provision in 2021 to exempt an entire category of persons from the income requirement of the *IRPA Regulations* and the Complainant now suggests that it could have been used similarly in the past to bring any offending regulations in line with the *CHRA*.

[274] While arguing the Tribunal should make a finding on adverse differential impacts based on the Minister's failure to exercise discretion under s.25.2(1) to overturn regulations, it is important to recall that the Complainant also submitted that the Tribunal "need not, and should not" decide whether the *IRPA Regulations* are immunized under the ratio in *Matson*/*Andrews* (Complainant's Factum at para. 171, underlining in original.)

[275] In addressing the *IRPA Regulations,* the Respondent argues that challenges to *IRPA Regulations* do not engage a service. Beyond arguments previously canvassed, the Respondent relies on conclusions in *Murphy FCA* where challenges to both the *Unemployment Insurance Act* and the *Unemployment Insurance Regulations* were found to be outside the scope of the *CHRA*. In short, they argue that regulations are subordinate law that attract the ratio in *Matson/Andrews*. In *Matson/Andrews*, the Supreme Court did not decide whether regulations are subject to scrutiny under the *CHRA*. As already set out in these reasons above, regulations are not the service the Complainant and Commission asked the Tribunal to inquiry into, and they did not present a case that regulations are a service.

[276] Read in context, the discretion afforded to the Minister in s.25.2(1) is intended to enable the Minister to make exceptions, from time to time, to permit the admission of individuals who may be inadmissible or otherwise fall short of the normal immigration requirements. As the Complainant demonstrated, in 2021, this discretion was also used to exempt all potential PGP sponsors from the income regulation to enable the IRCC to meet Levels Plan target ranges. It would be inappropriate to interpret this use of the exemption as a reason to find s.25.2(1) gives the Minister discretion to render any regulation inoperable

that creates an adverse differential effect in which a prohibited ground is a factor. This is a disguised attack on the government's power to make regulations that have that type of effect. Because the Complainant and Commission did not ask the Tribunal to rule on whether regulation-making is a service, and did not present argument and evidence going to that service, I decline to determine that question.

[277] The scope of the Minister's discretion is narrower. The Minister can, exceptionally, make exemptions – and did, on the evidence. But the discretion to make exemptions is constrained by the statutory and regulatory regime, including Levels Plans. To the extent the Complainant's and Commission's arguments would, implicitly, overturn regulations or Levels Plan ranges, they are a disguised attack on those government activities, which the Complainant and Commission have not alleged to be nor demonstrated to be services under the *CHRA*.

[278] The fact that *IRPA* and the *IPRA Regulations* make distinctions on prohibited grounds has been repeatedly noted and upheld in Canadian law. Immigration law is by its very nature exclusionary (*Kanthasamy v. Canada (Citizenship and Immigration)* 2015 SCC 61 at para. 14.) It dictates who is permitted, or not permitted, to enter our country, whether permanently or for a temporary purpose.

[279] As described above, the framework of *IRPA* is such that the statute is only an outline of the main structure of the program. The actual details about who gets admitted into Canada as a permanent resident is subordinated to the *IRPA Regulations*.

[280] It has been a very long-standing factor in the *IRPA Regulations,* since their beginning, that certain potential immigrants are assessed on their age. *IRPA Regulation* 81 sets out the different points awarded to skilled worker applicants based on their age. The different age points for self-employed immigrant applicants are set out in *IRPA Regulation* 102.1. Age is a prohibited ground of discrimination under s.3(1) of the *CHRA*.

[281] *IRPA Regulation* 7(1) states that a foreign national may not enter Canada to remain on a temporary basis without first obtaining a temporary resident visa. However, there is an exemption for certain individuals, based on their citizenship (which in most cases implies national origin) set out in *IRPA Regulation* 190(1). Those foreign nationals who are

citizens of countries listed in that regulation or listed in Schedule 1.1 of the *IRPA Regulations* are exempt from the requirement to obtain a temporary resident visa to visit Canada. National origin is a prohibited ground of discrimination under s.3(1) of the *CHRA*.

[282] The Minister has not chosen to use discretion under s.25.2(1) of *IRPA* to remove distinctions on prohibited grounds generally in the *IRPA Regulations*. If the Tribunal were to find that by not using a Ministerial exemption, to make *IRPA Regulation* 132(1) (regarding length of Undertakings) and the *IRPA Regulation* 133(1)(j)(i)(B) (increased LICO) irrelevant, it offended the *CHRA*, then this result would appear to suggest the Minister would be similarly obligated to make categorical exemptions relating to *IRPA Regulations* 81, 102.1, 190(1) and perhaps others as well. Surely this could not have been the intention of Parliament all along in the way *IRPA* and the *IRPA Regulations* were drafted, separating the framework from the detailed requirements. Immigration law is by its nature exclusionary and *IRPA* and the *IRPA Regulations* make distinctions sometimes based on prohibited grounds.

[283] Consequently, the Complainant's argument that the Minister should have used discretion under s.25.2(1) of *IRPA* to bring regulations into "compliance" with the *CHRA* must fail as an attack on the regulations themselves. The Complainant and Commission did not establish that regulation-making is a service, and did not ask the Tribunal to determine that question.

[284] Moreover, I agree with the Respondent that Dr. Attaran's challenge to this *IRPA Regulation* was not mentioned anywhere in his Statement of Particulars. It did not preclude him from applying and the difference was not related to the wait times he experienced. The issue is not engaged by the facts of his case.

[285] This allegation of a discriminatory practice is dismissed.

XV. Whether IRCC engaged in any other of the alleged discriminatory practices when processing applications in the PGP category

[286] As described earlier, in his original complaint to the Commission (Exhibit 1), Dr. Attaran described the "basic problem" as the time taken by CIC to process the in-Canada portion of the sponsorship application for PGP's. He contrasted the estimates for processing

times on the Respondent's website at the time: Adopted children / orphans - daily; PGPs – 37 months; and spouses, partners and dependent children (FC1s) – 42 days.

[287] The Factum of the CHRC asserts that the adverse differential treatment is "IRCC's practice of processing parents and grandparents' applications for permanent residence at a much slower rate…" (at para. 7). "This complaint is about the adverse treatment of Dr. Attaran and his parents experienced by the lengthy processing times when Dr. Attaran applied to sponsor his parents…" (Ibid at para. 33.) The Commission says that the service offered by IRCC was "application processing" which started when it was "accessed" by the Attaran family by the submission of the application in 2009. They then waited "for more than three years for IRCC to confer the benefit." (Para. 26 of the CHRC Sur-Sur Reply.)

[288] As outlined above, after the updated application documents were provided to CPC-M, the Part 1 of Dr. Attaran's sponsorship application was approved on May 28, 2012, only 19 days later. The entire application was finalized on December 13, 2012, when permanent residence visas were issued to Dr. Attaran's parents. The Complainant himself underscores at paragraph 38 of his Factum that the Application Review Wait Time of 9 months was less than IRCC's current service standard (12 months) for spouses, partners, and dependent children.

[289] These facts support the interpretation that Dr. Attaran's complaint must be about the entire time it took to process his complaint, from the IRCC's receipt of it on July 8, 2009 until December 13, 2012 (when the visas were issued.) If the complaint were only about the time in which it took to actively evaluate Part 1, it would have been about a processing time of only 19 days. That is less than half the stated processing time (42 days) for FC1 applications, to which Dr. Attaran compared his own application. If the complaint is only about the time it took to actively evaluate Part 1 and Part 2, from March 30, 2012, until December 13, 2012, (which included the time it took for Dr. Attaran and his parents to submit further documents, medical examination results and police certificates) it was less than nine months. In either case, there would have been no demonstrable adverse differential treatment upon which the Commission would have found the complaint to warrant referral to the Tribunal.

[290] It is important to note this distinction because some of the final arguments of the Complainant and the Commission do not make the proper distinction between “Processing Time” and “Application Review Wait Time” as those terms are defined above. Being clear about the distinction makes it possible to make findings about what elements of the delays experienced by PGP applicants may be attributable to the combined effects of *IRPA*, the *IRPA Regulations*, the Levels Plans, Ministerial Instructions, and in turn, the IRCC’s processing of applications in accordance with *IRPA*, the *IRPA Regulations*, Levels Plans and Ministerial Instructions.

[291] Processing Time includes the “sitting on the shelf” period for applications in the Backlog. The adverse differential treatment allegation about processing PGP applications more slowly must include this period because, in its absence, the Application Review Wait Time experienced by the Complainant did not result in longer wait times.

[292] The Complainant and the Commission have argued that various different actions and inactions contributed to the longer processing times, including: streaming and prioritizing other applicant categories through simultaneous submission of applications for sponsorship and permanent residence; more favourable timing for requests for medical examinations; giving priority to so-called “wild card” relatives; the use of service standards for some categories but not PGPs; the suspension of PGP sponsorship applications at CPC-M in 2004-2005; and the deliberate shifting of resources away from PGPs in favour of FC1s. Each will be explored below.

A. Simultaneous submissions of applications for sponsorship and permanent residence

[293] Under the Family Class Re-Design Initiative of 2003-2004, FC1s were permitted to submit Part 2 of their applications along with the Part 1 sponsor’s application. Evidence at the hearing concluded that in testing by CIC, by submitting both parts of the application at the beginning, FC1 processing times were reduced by over 50% for routine cases. The joint application kit for FC1s was introduced on June 28, 2002. (See Exhibit 63, at page 4.)

[294] Dr. Attaran alleges that this differential treatment resulted in longer processing times for PGP (FC4) applicants like his parents. Their Part 2 application was not permitted to be submitted along with the Part 1 sponsorship. At the time he applied, his parents were required to wait for the approval of the Part 1 of the application before being invited to submit the Part 2. (However, this policy was changed shortly before the Attaran application was taken off the shelf.)

[295] The streamlined processing, which allowed FC1s to submit both the Part 1 and Part 2 of their application at the same time, was originally not allowed for the PGP subgroup. However, immediately following Ministerial Instruction #4 which brought in the PGP application moratorium, IRCC issued Operations Bulletin 353 on November 7, 2011 (Exhibit #81.) This document confirms that as of July 18, 2011, PGP applicants were asked to include both Part 1 and Part 2 of the applications, thus mirroring the more streamlined process available for FC1s. Operations Bulletin 353 also instructed that sponsors who applied prior July 18, 2011, such as Dr. Attaran, should be contacted and requested to send the Part 2 of the application, with supporting documents, within 90 days.

[296] Mr. Tetford confirmed that the letter from CIC dated March 30, 2012, requesting Dr. Attaran to submit Part 2 of the application (Exhibit 3) was created in accordance with and as a result of Operations Bulletin 353. Operations Bulletin 353 also stated that those applicants who had already submitted Part 2 of the application may be requested at a later date to provide updated forms. This suggests that, if the application took too long to finalize, the Part 2 forms might be considered stale and not current, and would have to be redone. (This was not the case for the Attaran family.)

[297] As noted above, Cabinet sets the target ranges in the Levels Plan for FC1s high enough to absorb all the anticipated demand in the coming year. The intention is to not subject FC1s to backlogs and protracted waiting times. For the FC1 Family Class members, it is reasonable to conclude that their Part 2 applications will not become stale by “sitting on the shelf” for a protracted period. As such, IRCC can request the simultaneous submission of the Part 1 and Part 2 applications to avoid delay through a two-stage application process.

[298] The Commission and the Respondent do not make submissions specifically addressing this allegation. However, the Respondent points out in para. 88 of its Factum that all immigrants to Canada must be evaluated for their admissibility on the grounds of security, criminality, health and finances. The Part 2 applications for permanent residence contain detailed biographical information, including addresses and countries of residence since the applicant's 18th birthday and a list of any countries where the applicant has resided for more than 6 months. The information contained in the Part 2 application is required by IRCC in order for them to determine from which countries the applicants should provide police certificates. That is why it is important for the Part 2 application forms to be current. The police certificates are required to make a determination about potential inadmissibility for criminality under s.36 of *IRPA*. The Complainant has not challenged s.36 of *IRPA*.

[299] When FC1 applications are processed in a very short period of time, the Part 2 application will not become stale. However, the efficiency of a simultaneous submission of Part 1 and Part 2 was not available at the time of Dr. Attaran's application. If the Part 2 application for permanent residence was submitted simultaneously with the Part 1 sponsorship for PGP application in 2009, it would certainly become stale as the application "sat on the shelf" for two or more years. The applicant would need to re-submit an updated Part 2 application at the time it was ready to be reviewed by an officer, causing extra burden for the applicants and additional administration for IRCC.

[300] In light of the foregoing, Dr. Attaran has failed to establish, on a balance of probabilities, that submitting the Part 2 application simultaneously for PGPs would have had any impact on speeding up the overall processing time of his application or PGP applications in general. Furthermore, this allegation was not plead in the Statements of Particulars of the Complainant or the Commission and had no demonstrable impact on the processing of his application. Even if I did find it to have adversely affected Dr. Attaran's application, which I do not, it would be prejudicial to the Respondent to allow this argument at this late stage. Therefore, this allegation is dismissed.

B. More favourable timing for requests for medical examinations for FC1s

[301] This allegation of adverse differential treatment is related to the one above concerning the permission for FC1s to simultaneously submit both parts of their applications up front. The Tribunal heard evidence that as part of every immigration application, in all categories, the applicants must undergo a medical examination. The evidence showed that the up-front medical examinations for FC1s enhanced the efficiency of submitting Part 1 and Part 2 of the application simultaneously. Important in the context of the up-front medical examinations permitted for FC1s, the Respondent's website stated: "When CIC tested the joint application and up-front medical examination process, processing times were reduced by over 50% for routine cases." (Exhibit 63, at page 4.)

[302] Mr. Tetford explained to the Tribunal that in the Family Class Re-Design Initiative of 2002-2004, it was decided that FC1 applicants could do their medical examination up front, prior to the actual submission of the application by their sponsor. The reasons were two-fold. Firstly, FC1 sponsors could submit Part 1 and Part 2 of the application at the same time. Secondly, given the Levels Plan targets to absorb all demand, there was a presumption that the applications would be reviewed quickly. The Part 2 application would be reviewed immediately after approval of Part 1, which at that time was taking an average of 42 days for most cases. As such, the medical examination and IRCC's review of the results could happen concurrently.

[303] The results of the medical examination are valid for only 12 months (see *IRPA Regulation* 30(3).) Given that the processing time of the Part 1 application for FC1s was completed in a matter of a few short weeks, it was unlikely that the medical examination results would expire before the processing of the Part 2 of the application was completed and permanent resident visas could be issued. Allowing up front medical examinations for FC1s permitted the avoidance of possible time delays if the medical examinations were only requested later on in the process.

[304] Exhibit 3 (the Part 2 of the application of the Complainant) contained a letter from the Respondent to Dr. Attaran's father dated July 23, 2012. This letter includes what appears to be standard content, some of which read as follows:

> All applicants who are seeking permanent residence in Canada must satisfy Canada's medical inadmissibility criteria. In order to determine your medical admissibility to Canada, you and your spouse are required to undergo a medical examination. This examination is required whether or not your spouse will accompany you to Canada.
>
> Please take this letter and the enclosed **Medical Report** Form IMM1017 for yourself and your spouse to the medical doctor performing the examination. You and your spouse should be examined by the same doctor.
>
> **NOTE: Medical examinations completed prior to this request is (*sic*) not acceptable for the purpose of immigration to Canada.**
>
> (Emphasis contained in original.)

[305] The fact that FC1s were permitted to do their medical examinations in advance, without waiting for a request from the Respondent, is alleged to be adverse differential treatment of the PGP group, including Dr. Attaran's parents. Dr. Attaran also argues that older immigration applicants are more likely to develop age-related health issues that could make them inadmissible. As such, delaying their medical examination makes them more vulnerable to this risk. At para. 155 of his Factum, Dr. Attaran makes the assertion that an up-front medical examination "locks-in a clean bill of health" and that PGP's would not fear the consequences of falling ill while waiting for their turn in IRCC's backlog.

[306] The Commission did not make submissions on this allegation of adverse differential treatment. As part of outlining general requirements for all immigrants, the Respondent made the observation that *IRPA Regulation* 30(3) requires the medical examination to have happened not more than twelve months prior to the date when an individual comes to Canada to land as a permanent resident (para. 89 of Respondent's Factum.)

[307] The up-front medicals not being available to PGP applicants is a logical consequence of R.72(1)(e)(iii) of the *IRPA Regulations* and Levels Plan ranges for PGPs not meeting the demand. This subsection of the *IRPA Regulations* requires all foreign nationals, at the time they arrive in Canada with their permanent resident visa, in order to land and become a permanent resident at that moment, to be in possession of a medical certificate based on a medical examination which took place within the previous 12 months.

Mr. Tetford testified that up-front medical examinations were not permitted in 2009 because they knew the finalization of Part 2 of the PGP applications within 12 months was foreseeably impossible. (Direct examination on February 8, 2021 @2:11:30.)

[308] If Dr. Attaran's parents had been permitted to undergo their medical examinations up-front, in July of 2009, those medical results would have long expired before their permanent resident visas were ready to be issued in December of 2012. They would have been required to undergo medical examinations again within a timeframe that would allow the Respondent time to finalize their application, to issue their visas, and to give the Attarans some time to physically arrive in Canada to "land" with the visas before the twelve-month deadline (para. 89 of the Respondent's Factum).

[309] In essence, this allegation is a disguised attack on the *IRPA Regulations* and/or Levels Plans. The fact that up-front medical examinations were not permitted for PGPs was the result of other factors, like the Backlog Wait Time, that made the Processing Time take more than 12 months. In face of *IRPA Regulations* 30(3) and 72(1)(e)(iii), it is clear that permitting up-front medical examinations for PGP applicants would not have sped up their application processing times, nor would it have "locked in" an applicant's health status as of the time of their initial application. They would always have to do those medical examinations towards the end of their application processing to ensure they were within 12 months of landing with the visas.

[310] As such, the Complainant has failed to demonstrate the Respondent's actions relating to the timing of the medical examinations contributed to longer processing times for PGPs or was otherwise adverse. The 12-month expiry under the *IRPA Regulations* prevented the "locking in" an early medical result. Given Levels Plan constraints that prevented on-demand processing similar to FC1s, this allegation is, effectively, a disguised attack on regulations and the Levels Plans. Furthermore, this allegation was not plead in the Statements of Particulars of the Complainant or the Commission. Even if I did find it to have adversely affected Dr. Attaran's application, which I do not, it would be prejudicial to the Respondent to allow this argument at this late stage. Therefore, this allegation is dismissed.

C. Giving priority to so-called "wild card" relatives

[311] Under R.117(1)(h) of the *IRPA Regulations*, there is a category of relatives who may be sponsored for immigration if certain conditions are met. These relatives include cousins, nephews, aunts and others who ordinarily would not be eligible for immigration in the Family Class. The conditions for eligibility are that the Canadian sponsor must not have any close relatives in Canada and no one in the FC1 or PGP subgroups who they could sponsor. IRCC refers to this group as the “wild card” relatives.

[312] Given the eligibility requirements, the pool of potential Canadian sponsors is quite small. Dr. Attaran cited Exhibit 64 to quote then-Deputy Minister Yeates who said, “Few applications of this type are received and by nature of the unique circumstances of these relationships they are afforded higher processing priority.” In cross-examination, Mr. Tetford testified that wild card relatives under R.117(1)(h) were processed along with FC1 applicants in the faster processing stream. He admitted that these relatives could be more distant than a parent or grandparent, such as a cousin. However, they were processed much faster than the PGP sponsorship applications. There was no evidence to explain why the wild card relatives were processed in the faster stream, other than there were very few of them.

[313] Exhibit 65, a letter from Deputy Minister Marta Morgan to the Commission dated July 7, 2016, concerning Dr. Attaran’s complaint, confirmed that the number of wild card relative sponsorship applications received in 2010 was 1,002. By comparison, the number of PGP sponsorship applications received that year was for 39,886 persons.

[314] Dr. Attaran’s submissions make the observation that wild card relatives are not part of the nuclear family and include more distant relatives than parents or grandparents. However, they are processed by the Respondent as if they are part of the nuclear family. Dr. Attaran argues that strictly within the extended family, the wild card relatives are afforded the faster processing which is denied to the PGP subgroup and this constitutes adverse differential treatment.

[315] The Commission did not make submissions on this allegation concerning wild card relative processing. The Respondent limited its submissions to observing the evidence (at para. 103 of the Respondent’s Factum) that the number of so-called wild card immigrants did not exceed 500 in each of the last five years.

[316] The source of this differential treatment between the wild card relatives and PGPs appears to be internal policy of the Respondent. The *IRPA Regulations* do not specify in what manner the wild card relatives should be processed. Their separation into the faster processing stream was in place before the creation of Ministerial Instructions. They are not identified as a separate sub-group in the Levels Plan.

[317] The *IRPA Regulations* describe PGPs in R.117(1)(c) and (d). They are excluded from the definition of wild card relatives in R.117(1)(h). The wild card relatives are not subject to the limits in the Levels Plans that apply to PGPs. As such, there is no barrier to them being processed on an on-demand basis. Dr. Attaran has alleged more favourable treatment of the relatively few wild card relatives in the processing. However, given that PGPs could not be processed in the same manner, given separate regulatory definition and the application of Levels Plans that applied to PGPs, the Respondent did not engage in a discriminatory practice by treating wild card relatives differently.

[318] Furthermore, this allegation was not plead in the Statements of Particulars of the Complainant or the Commission. Even if I did find it to have adversely affected Dr. Attaran's application, which I do not, it would be prejudicial to the Respondent to allow this argument at this late stage. Therefore, this allegation is dismissed.

D. Service Standards

[319] Dr. Attaran's alleges that the PGP applicants, including his parents, were subjected to adverse differential treatment because there were no "service standards" established for that subgroup of the Family Class. By contrast, the 2002-2003 Family Class Re-Design Initiative did establish a service standard for the processing of FC1 applications.

[320] Mr. Cardinal testified that service standards are requested by Treasury Board to give people a reasonable expectation about how long it will take various government agencies to deliver their services. IRCC articulated its service standards by stating the percentage of applications it expected to process within a certain target timeframe. At the time of the Re-Design, an official service standard was created for FC1 applications and

other types of immigration applications, but not for PGPs. Mr. Cardinal said that he believed service standards were in place for more than 50% of the immigration sub-categories.

[321] Mr. Tetford confirmed under cross-examination that at the time Dr. Attaran submitted his sponsorship application, there was still no service standard in place for PGPs. According to Mr. Tetford's recollection, the service standard at the time for FC1 applications was to have the Part 1 sponsorship application processed in 30-40 days.

[322] In its final submissions, the Commission references Exhibit 174, which is an IRCC report for 2019-2020 outlining the service standards for various sub-categories of immigrants. In this document, also available on the IRCC website, the Respondent advertises service standards for Family Class overseas spouses, common-law partners and dependent children, but is silent about any service standard for parents and grandparents. The document goes on to give the Respondent's service standard for other immigration categories, such as the Canadian Experience class, the Federal Skilled Worker class, Provincial Nominee Program applicants, Quebec-selected Skilled Workers and the Trades Program.

[323] During his chief and cross-examination by the Commission, Mr. Cardinal was asked why no service standards had ever been established for the PGP subgroup. Mr. Cardinal testified that the PGP program was not "stable" because of the many changes that were implemented, year over year, changing the way the program was administered. Changes to the way the inventory is drawn down and changes to the way intake of applications is managed are factors that culminated in IRCC not implementing service standards for the PGP subgroup. By contrast, Exhibit 174 showed a service standard for FC1s of 12 months for processing 80% of applications that had been in place since 2010.

[324] Dr. Attaran and the Commission argue that the lack of a service standard for PGPs, while they exist for other members of the Family Class, is an adverse differential treatment resulting in slower processing times.

[325] The Respondent argues that service standards are used by IRCC to provide people with "a reliable expectation of how long they will wait in order to receive a service."

They contrast this to a processing time, which is based on data that measures how long it actually takes IRCC to process an application (see para 143 of Respondent's Factum).

[326] The evidence of Mr. Cardinal was that the requirement to create service standards was a request from Treasury Board. However, there was discretion at IRCC to create a service standard or not for various categories of immigration applications. I accept Mr. Cardinal's explanation that service standards for PGPs were not established because the program was subject to frequent changes, particularly through different Ministerial Instructions.

[327] The evidence showed that different categories of immigration applications had different service standards associated with length of processing. The variance is a reflection of different prioritization, the Levels Plan and other external factors. The service standards in place are aspirational in nature, but subject to the above factors.

[328] The Commission asks for a remedy of service standards for PGPs that "are in parity with other family class categories" (para. 127 of the Commission's Factum) but the request ignores the external factors which will dictate what is even possible. As Mr. Cardinal testified, PGP applications by their nature generally take more time to process. Medical examinations more frequently need to be furthered or re-done, there is often more time taken to obtain older birth certificates, marriage and divorce certificates. PGPs take longer to return requested documents. (Direct examination of Mr. Cardinal on September 20, 2021 at 3:48:42. Also see Exhibit 127 – memo to Minister at Annex B. Page 4.)

[329] Dr. Attaran and the Commission have not proven that the absence of service standards was a factor that, more likely than not, slowed the processing of applicants in the PGP sub-category. In the case of the Complainant, the evidence showed that the Application Review Wait Time for his Part 1 sponsorship application was 19 days. This was less than half of the 42-day estimate on IRCC's website for the processing of FC1 Part 1 applications at that time. Although the absence of service standards for PGPs is a differential treatment, the Complainant has failed to establish that it is *adverse* differential treatment. This allegation is dismissed.

E. The Processing of PGP Sponsorship Applications at CPC-Mississauga was suspended from May 2004 to September 2005

[330] In Dr. Attaran's Factum, he created a chart in paragraph 69 to illustrate how the processing times for PGPs rapidly diverged from the processing times for FC1s over time. Up until 2003, the processing times had been closely matched. At para. 145 of his Factum, he alleges the Respondent used its discretion to suspend the processing of PGP applications at CPC-M for 16 months which contributed greatly to the increase.

[331] During his cross-examination by Dr. Attaran, Mr. Tetford spoke about the suspension of the processing of FC4 (PGP) applications from May 2004 to September 2005 and acknowledged this was one of the reasons that the processing times for PGP sponsorship applications increased so dramatically, as illustrated in Dr. Attaran's chart.

[332] The Tribunal was again taken to Exhibit 18, the CIC policy document from June 2007, which reads as follows in the second paragraph of page 15:

> Third, the processing of parent and grandparent sponsorship applications at CPC-M was suspended between May 2004 and September 2005. This was done in order to devote operational resources to the processing of spouses and dependants. While the CPC-M inventory for FC4s in 2002-2003 was at 3,347 with a processing time of only 38 days, by the time processing had resumed in September 2005, the FC4 inventory had grown to 81,593, with a processing time of 2.3 years.

[333] Dr. Attaran asked Mr. Tetford if during this period of time, or if during the moratorium from 2011-2014, other sub-categories in the Family Class were also suspended. Mr. Tetford answered no, and clarified that in 2004-2005, CPC-M suspended the processing of applications already in the Inventory and those continuing to arrive. During the moratorium of 2011-2014, IRCC did not accept any new applications for PGP sponsorship.

[334] The Commission did not make submissions on this allegation. In their final argument, the Respondent states that IRCC stopped processing the sponsorship applications at CPC-M in 2004-2005 because if not, it would have needlessly shifted the Backlog to the overseas offices handling the Part 2 permanent residency applications. There was already an accumulated Inventory in those overseas offices, so continuing to process cases at CPC-M

during that period would not have alleviated the Backlog. The Respondent also argues that it was not possible for CPC-Mississauga to simply stop accepting new sponsorship applications without the intervention of Parliament or Cabinet (para. 116 of the Respondent's Factum.)

[335] I agree with the Respondent. While there may have been some measures that could have been taken to curb the demand, I saw no evidence that IRCC had the authority to outright refuse the acceptance of new applications until the introduction of Ministerial Instructions in 2008.

[336] In my view, the suspension of processing of PGP applications from May 2004 to September 2005 was differential treatment. However, there is insufficient evidence to conclude, on the balance of probabilities, that the IRCC's suspension contributed to the total time to process a PGP application all the way to visa issuance. At that time, in 2004-2005, there were already enough files in Inventory in the overseas offices to meet processing targets. The suspension of processing at CPC-M merely kept the files in Backlog in Canada rather than in the overseas offices. The actions taken at CPC-M to suspend processing were in response to the Levels Plan admission targets for PGPs, which had been greatly reduced for 2004 and 2005. The source of this action was the Levels Plan. Moreover, I find the claim that this policy was adverse is too remote from the timing of Dr. Attaran's own complaint. The impact the suspension might have had on processing times of PGP application four years later is too speculative to be considered further.

F. Deliberate Shifting of Resources Away from PGPs with the Family Class Re-Design Initiative in 2002-2004 leading to "Priority Processing" for FC1s

[337] Dr. Attaran alleges that IRCC explicitly chose to demote PGP applicants to a lower tier status (see para. 50 of Complainant's Factum.) He quotes another passage from Exhibit 18, the 2007 CIC document entitled "Policy Approaches for the Future of the Parents and Grandparents Category" drafted by Tracey Bender of the Social Policy and Programs Division, Immigration Branch. The first paragraph on page 15 of this document reads:

> Second, in April 2003, priority processing within 6 months was implemented for spouses and dependant children. A decision was also taken to decrease the parent and grandparent target ranges in 2004 and 2005 in order to shift operational resources to the processing of spouses and children. The result was that the numbers of parents and grandparents landed in 2004 and 2005 were the lowest in 11 years (12,732 and 12,471 respectively).

[338] Dr. Attaran also referred to how the IRCC "undershot" the Levels Plans ranges for PGPs from 2007-2010. Dr. Attaran alleges this deliberate shift of operational resources, away from the processing of PGP applications, to the processing of spouses and children, amounts to adverse differential treatment.

[339] I agree that the shift of resources involved differential treatment of the PGP subgroup. However, as discussed above, the impugned service is IRCC's processing of applications, which involves the implementation of Levels Plans ranges set by Cabinet. Were the Levels Plans the source of the adverse differential treatment? Was IRCC simply implementing the priorities inherent in the target ranges set for FC1s compared to PGPs while facing high demand for PGP sponsorship?

[340] In 2002, the upper target for PGPs in the Levels Plan was 21,000. For 2004, it was lowered to 13,500. For 2005, the Levels Plan for PGP admissions set a range of 5,500 – 6,800. In 2005, there was a public outcry and the levels were increased to 17,500-18,800. (See Exhibit 160, CIC Executive Committee presentation dated June 30, 2011, Annex C and notes.)

[341] As Ms. Bender correctly points out, the Levels Plan for 2004 and 2005 reduced the target ranges for PGPs significantly. IRCC processed applications in those years in a

manner aimed to land within the Levels Plan target ranges. Accordingly, this shift in operational resources, leading to priority processing for FC1s, is derived from the targets set in the Levels Plan. As such, this allegation is really an attack on the Levels Plan for those years. Furthermore, the shift substantially predated the Attaran family's application. I do not find that the Complainant and Commission have established a discriminatory practice on a balance of probabilities. This alleged discriminatory practice will not be considered further.

[342] Regarding the alleged undershooting of targets in 2007-2010, the data referred to by the Complainant does not establish a discriminatory practice. In 2010, IRCC actually landed 334 more PGPs than the minimum target of 15,000. During the years 2007, 2008 and 2009, the minimum target for PGPs was missed, but by only an average of 8.2% below the target. The Complainant provided data for certain other categories in those years where the actual landings overshot the maximum target range. However, upon closer examination, the average overshot for these 3 or 4 different categories cited in those years is only 11.3%. I find this consistent with the evidence that meeting the target range was not always achieved despite best efforts. The degree of undershot or overshot appears to be within a reasonable margin of error. (The various other categories not cited by Dr. Attaran fell below or within the target ranges.) The variations cited are not grossly out of line with the Levels Plan. On the other hand, to admit PGPs to Canada on-demand, in parity with FC1s, would have required overshooting their target ranges by enormous margins, which I have found (further above) is not an option that is available to the Respondent under the regime imposed by *IRPA*, the *IRPA Regulations* and the Levels Plans.

G. Was the Manner in which IRCC Reported Processing Times Reported to the Public for PGP Applications an Adverse Differential Treatment in the Provision of a Service?

[343] Over the course of the hearing, the Tribunal heard evidence about the different ways the Respondent reports processing times to the public for the various subgroups of immigration applications. Some reporting is based on the actual length of time it has taken. For example, the report might say, "applications being approved today were submitted on X date." This is a retrospective reporting on actual timelines. This would not necessarily be a good indicator of how long it would take to process a new case submitted today because

the impact of factors such as intake controls would not necessarily be apparent. In other instances, the Respondent would give a forward-looking estimate of how much time it anticipated it would take to process a certain type of application.

[344] This allegation arose in Dr. Attaran's Reply Factum where he cites an admission in para. 133 of the Respondent's Factum that IRCC implemented a change in how it calculates processing times for PGPs. According to the Respondent's submission, after intake controls for PGPs were implemented, CPC-Mississauga commenced a more thorough check of applications for completeness once they were received. If IRCC identified any missing documents, IRCC would request the documents from the applicant. However, the processing time for the application would only be calculated starting from the date when all of the required documentation had been received by IRCC, as opposed to starting from the date the incomplete application had been received. As such, any time IRCC spent waiting for missing documentation to be provided by the applicant would not be included in reported processing times.

[345] Dr. Attaran alleges that postponing the start of the clock until completeness for PGP applications, rather than using the receipt date for incomplete applications (as is done for FC1 applications) means that IRCC's sponsorship processing times for PGP applications are understated. "In other words, IRCC fudges its wait times, to make the difference with spouses, partners, and children look less glaring." (Complainant's Reply Factum at para. 55.)

[346] I concur that the reporting methods were different for PGPs than they were for the FC1 subgroup. However, I am not persuaded the reporting methods had any adverse differential impact on the processing time for the PGP applications, which is the essence of this complaint. That said, transparency in the reporting of processing times for PGP applications is obviously important to potential applicants who may be considering whether to apply, and for whom wait time may be a very important factor in their decision-making. However, the Complainant and the Commission have not demonstrated this alleged differential treatment had any impact on wait times or the Complainant's application. Moreover, this allegation was not raised in Dr. Attaran's SOP, and raised only in his Reply

Factum, which was prejudicial to the Respondent's ability to address it. Accordingly, this allegation of adverse differential treatment is dismissed.

H. Disproportionately low numbers of PGPs were admitted to Canada as Permanent Residents from 2007-2019

[347] Dr. Attaran did not make specific allegations of adverse differential treatment on these grounds. This argument was raised by the Commission. It is not a separate allegation of a particular policy or procedure, but more a submission on the cumulative impacts of the alleged discriminatory practices and alleged intentionality on the part of the Respondent. The Respondent did not respond to these allegations of intentional marginalization either.

[348] The Commission compiled statistics in their Factum (at para. 86) to show what a low number PGPs made up of the total number of immigrants admitted from 2007-2019. According to their rough calculations, PGPs made up 26% of the Family Class and only 6.79% of the total number of immigrants admitted during this period.

[349] The Commission alleges that the pressure to allocate as much space as possible to the economic class may assist in explaining the marginalization of the PGP group. They referenced to the testimony of IRCC witness Glen Bornais who spoke of the tension that sometimes exists between two principles of *IRPA*'s objectives: a prosperous Canadian economy; and family reunification. Mr. Bornais spoke about the ongoing consultations with the provinces and territories during his tenure from about 2007 to 2018. He said there was a general consensus to keep immigration levels stable, or even to increase them, but there was "a definite preference for, for favouring or prioritizing economic programs." (Hearing recording on Feb 10, 2021 – Direct Examination of Mr. Bornais.)

[350] The Commission alleges that the Respondent has intentionally marginalized PGPs given its aggressive tools to manage the program and regulations in an effort to mitigate possible negative economic impacts on the country. They cite the imposition of a minimum necessary income for sponsors and the lengthy financial undertakings the sponsors are required to sign. Given that these requirements of PGP sponsors are more onerous than the requirements for sponsors of the FC1 group, the Commission suggests

this is based on a certain perception IRCC has of parents and grandparents and "demonstrates a concern to manage the impact of the group on Canada's treasury," (para. 95 of CHRC's Factum.)

[351] The Commission further alleges marginalization of the PGP group by restricting sponsorship to only those who can afford it:

> "Notably, this also suggests that family reunification insofar as parents and grandparents are concerned may be reserved for those new Canadians and established Canadians who can afford it. This aspect serves as additional indicia of the marginalization of this group. They are to be dependant on their sponsors for a long period of time, evidently correlated with their life expectancy, to minimize their burden on the Canadian economy." (Para 95 of CHRC's Factum.)

[352] The outcome that PGPs made up only 6.7% of total immigrants during the period of 2007-2019 is derived from many factors. The higher incomes required and longer undertakings may have contributed to this outcome. However, those factors are dealt with separately above and found to result from regulations, which are not impugned in this complaint. The lower numbers for PGPs overall are a direct result of the consistently low numbers allocated to PGP admissions in the Levels Plans, which are also not impugned in this complaint.

[353] The Respondent has suggested the lower admission numbers are a result of the government's concern about negative financial impact on Canada's resources. It may well have been the intention of the Cabinet to limit the numbers of PGP immigrants to mitigate negative impacts on healthcare delivery systems and other limited resources. Insofar as those decisions were governed by the regime of *IRPA*, the *IRPA Regulations*, Levels Plans and Ministerial Instructions, they would lie beyond the scope of this inquiry for the reasons above.

[354] To succeed in this allegation, the Commission would have to demonstrate that the actions of IRCC, within its authority, exacerbated the lower number of PGP admissions. The reasons above outline why the Commission has fallen short of this burden of proof. Even in the case of years when IRCC undershot the target ranges for PGPs, the Tribunal accepts

the evidence of Mr. Cardinal that the deviations were the result of factors beyond its control, such as delays in overseas offices, landing lag and visa wastage.

[355] Accordingly, I do not find that the overall disproportionately low numbers of admissions in the PGP category reflected adverse differential treatment in the provision of a service by the Respondent.

XVI. CONCLUSION ABOUT PRIMA FACIE CASE

[356] As indicated above, the Complainant has established the first part of the *Moore* test: that he has characteristics that are prohibited for discrimination under the *CHRA*.

[357] At this stage of the analysis, I must examine whether the second part of the test in *Moore* has been met: the Complainant must demonstrate that he experienced an adverse impact with respect to a service provided to him by the Respondent. In this regard, the Complainant and the Commission have failed and the *prima facie* case has not been established.

[358] In review of the reasons above, there was insufficient evidence to convince me, on a balance of probabilities, that the following impugned actions resulted in adverse differential treatment in the Respondent's provision of a service:

- Not allowing streamlined processing (simultaneous submission of Part 1 and Part 2 of the applications) for PGP applicants;
- The disallowance of up-front medical examinations for PGP applicants;
- Allowing the wild card relatives to be processed in the faster stream with spouses and children;
- Not having any service standards for processing in place for the PGP subgroup;
- The suspension of PGP sponsorship applications at CPC-Mississauga in 2004 and 2005;
- The shifting of resources towards FC1 applications;
- The manner in which the Respondent reports processing times for PGP applications; and

- The alleged intentional marginalization of PGP applicants.

[359] The Complainant and the Commission also challenged the way IRCC implemented the Levels Plans. I concluded above that the establishment and application of the Levels Plans are not a service under the *CHRA* and the discretion for IRCC to ignore or circumvent the Levels Plans did not exist.

[360] The next set of impugned actions are based on the Ministerial Instructions. I found that Ministerial Instructions could not be considered a service under the *CHRA*.

[361] The remaining allegation concerns the failure of the Minister to exercise his authority under s. 25.2(1) of IRPA to exempt PGP sponsors and applicants from any *IRPA Regulations* which could be considered discriminatory on a prohibited ground under the *CHRA.* This allegation was, in essence, an attack on offending regulations. The Complainant and Commission bear the burden of proof and did not establish that regulation-making is a service, and specifically suggested the Tribunal not determine that question.

[362] The complaint is dismissed because the Complainant and the Commission have failed to make a *prima facie* case. While they have demonstrated differentiations and ways in which PGP applications were processed more slowly than other categories, the Complainant and Commission have not discharged their burden of showing that the Respondent engaged in a discriminatory practice. For each allegation discussed above, either there was no adverse differential treatment established, or the adverse differential treatment alleged was explained by something that was not proven to be a "service" under s.5 of the *CHRA*.

XVII. Additional Rulings

A. Confidentiality Rulings

[363] An inquiry before the CHRT is always conducted in public, but with limited exceptions. Under s. 52 of the *CHRA*, a panel of the CHRT may make an order for confidentiality that it considers necessary for a reason articulated under that section. In the

matter before me, I granted orders of confidentiality for two sets of information when requested by the parties.

[364] On the first day of the hearing, Dr. Attaran requested confidentiality for the personal information contained in two sets of documents admitted as exhibits 2 and 3. Exhibits 2 and 3 are the sets of application forms and supporting documents that Dr. Attaran and his parents submitted to the Respondent to begin the immigration sponsorship application for his parents. There is considerable personal information contained in the exhibits, including Dr. Attaran's Notice of Assessment from Canada Revenue Agency, a letter from his employer and a copies of identity documents. While this application is central to the facts of this complaint, the information contained in those forms and the supporting documents that form part of Exhibits 2 and 3 are not germane to the issues before the Tribunal. There is substantial risk that the disclosure of such personal information will cause undue hardship to the Complainant and his family. The language in the forms themselves, and certain boilerplate language in form letters from the Respondent have some relevance. Accordingly, the information contained in the forms and the supporting documents that comprise parts of Exhibits 2 and 3 are subject to confidentiality under s.52(1)(c) of the Act. The answers in the forms, personal information in letters and the supporting documents are to be redacted to maintain the confidentiality of their personal information

[365] I have also made reference to the dates of correspondence back and forth in Exhibit 3, which are also referred to in Exhibit 82, the Global Case Management System printout of the Respondent for Dr. Attaran's file. As Exhibit 82 also contains sensitive personal information, I am hereby ordering personal information in Exhibit 82 to be redacted, but not the dates of correspondence therein.

[366] The second set of information for which I granted confidentiality relates to the medical information concerning Mr. Bornais, the Respondent's witness. As mentioned above, Mr. Bornais was unable to complete his testimony before the Tribunal due to medical reasons. I agreed to grant an order of confidentiality for the two medical letters the Tribunal received about his condition. A letter of direction, a recording of a CMCC and some portions of the official recording of the hearing were also made subject to this confidentiality order under s.52(1)(c) of the *Act*.

[367] The second confidentiality order became contentious when the parties submitted their final arguments in writing. The Complainant included in his Factum actual quotations from the confidential letters and made other references to the nature of the medical illness which was the subject of the confidentiality order. This prompted the Respondent counsel to write to me on February 14, 2022, to clarify what had been ordered confidential and to make note of certain sections of the Complainant's written submissions which they felt were caught by the confidentiality order. The Complainant also mentioned a portion of the hearing recording on the morning of April 30, 2021, that was to be subject to the confidentiality order.

[368] I wrote a letter of direction to the parties on March 3, 2022, to clarify the scope of my original confidentiality order. Although not as broadly as asserted by Respondent counsel, I did clarify that paragraphs 203, 204 and 211 of the Complainant's Factum dated December 3, 2021, should be redacted. Paragraphs 203 and 211 contained verbatim quotations (in quotation marks) of the letters that I had ordered to be kept confidential. Paragraph 204 contained five references to the nature of the witness' medical condition which was the subject of the confidentiality order and, in my view, contravened the spirit and intention of the order.

[369] With respect to a portion of the audio recording on April 30, 2021, Dr. Attaran did make a verbal reference to the medical condition of the witness during an exchange amongst counsel. A few minutes later, Mr. Stynes mentioned that the discussion ventured into the area that was subject to the existing confidential order. Dr. Attaran acknowledged his mistake and apologized on the record. He also said that he had no objection and consented to the removal of that part of the audio recording from the public record.

B. The Cabinet Privilege Disclosure Motion and Follow-Up Litigation

[370] A motion for further document disclosure was made by Dr. Attaran after the ninth day of the hearing. As the Respondent objected to the disclosure on the grounds of Cabinet Privilege, I requested that submissions be made in writing. In order to preserve the next set of hearing dates scheduled, I delivered a brief, interim ruling on the motion in a letter to the

parties dated March 26, 2021. The letter indicated that I would give more fulsome reasons in the final merit decision, which are now set out in this section.

[371] The second witness of the Respondent, Mr. Bornais, had worked as an advisor to senior officials at IRCC. His work was at a very high level and was sometimes related to the Levels Plans that were decided upon by Cabinet further to s.94 of *IRPA*. During his cross-examination by Dr. Attaran, the testimony of Mr. Bornais touched on the existence of certain documents that had not been previously disclosed by IRCC. During the cross-examination, Respondent counsel raised several objections to questions being put to the witness by Dr. Attaran. The issue of Cabinet Privilege, otherwise known as a confidence of the Queen's Privy Council for Canada, was claimed and Mr. Bornais cited this privilege to explain his reluctance to answer certain questions. (As mentioned above, Mr. Bornais was unable to complete his testimony for medical reasons.)

[372] As Mr. Bornais made reference to certain documents that were not previously disclosed, Dr. Attaran made a request for their disclosure. As the Respondent made a claim of privilege in response, it was not prudent for me to make a ruling from the dais. Accordingly, I requested the parties make written submissions on the motion for disclosure for the documents mentioned in Mr. Bornais' testimony. As the hearing was scheduled to resume in April 2021, I gave the parties only four weeks to make written submissions.

[373] Dr. Attaran and the Commission made a joint motion for the disclosure. The requests were initially exchanged by way of email directly amongst the parties. However, the written motion repeated the materials requested, from 2008 to present, as follows:

> All memoranda and briefing materials to the Minister (but excluding those sent to Cabinet for the purpose of briefing it) and all FPT consultation materials related to developing the annual Levels Plans, and which: (1) contain or comment upon the scenarios that were prepared by the department, or (2) form part of the signal checking that took place with the Minister's office. Further, and with respect to the assertion that the Levels Plan is a Cabinet decision not a discretionary departmental decision, and: (3) any Orders-in-Council containing Cabinet's decision on the Levels Plan, as these are public and not Cabinet confidences.

[374] The motion argued that the evidence of Mr. Bornais disclosed that before annual Levels Plans are set by Cabinet, there is extensive preparatory work performed by IRCC in a continuing exercise of weighing trade-offs in priorities and in exercising discretion of both IRCC staff and the Minister. That preparatory work includes the creation of memoranda and FPT (Federal-Provincial-Territorial) consultation materials.

[375] In support of the arguable relevance of these documents, the motion pointed out that there had already been disclosure of several similar documents.

[376] The Respondent's main arguments were that the documents were not arguably relevant and if they were, they were subject to Cabinet Privilege. On the relevance argument, Respondent counsel framed the issue before the Tribunal as being about the actual processing time for Dr. Attaran's sponsorship application. The case is not, they argued, about how the processing time might have been different if there were different Levels Plans set; the Levels Plans were what the Levels Plans were at the time of the application in 2009.

[377] Respondent counsel accused the Complainant and the Commission of shifting their argument mid-hearing to allege that the Levels Plan is the service being offered. In their view, there was a procedural fairness question at issue because they felt the Complainant and the Commission had not plead their case along the lines of the Levels Plans being the service.

[378] The Respondent also warned that if the Tribunal did conclude that the requested documents were relevant, then they would be forced to make an application to the Clerk of the Privy Council under s.39 of the *Canada Evidence Act* ("*CEA")* to request a certificate for those documents deemed to fall under Cabinet Privilege. That application could take up to six months, they warned.

[379] Dr. Attaran made the point that s.39 of the *CEA* also permits a Minister of the Crown to grant the certification for Cabinet Privilege, in which case, it might take a lot less than 6 months. In reply, Mr. Stynes argued there was a "constitutional convention" which would not permit a Minister to grant certification over Cabinet Privileged documents that originated from a different government. In this case, it would be asking a Liberal government

Minister to make a determination about documents during a period, prior to 2015, that were under the purview of the former Conservative government.

[380] Respondent counsel suggested the merits of the request need be balanced against potential for delay, and cited my decision in *Brickner v. Royal Canadian Mounted Police* (2017 CHRT 28) ("*Brickner*") at paragraphs 7 and 8:

> [7] ….in the search for truth and despite the arguable relevance of evidence, the Tribunal may exercise its discretion to deny a motion for disclosure, so long as the requirements of natural justice and the Rules are respected, in order to ensure the informal and expeditious conduct of the inquiry (see *Gil v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8407 (FC) at para. 13; see also s. 48.9(1) of the *Act*).
>
> [8] This Tribunal … may deny ordering the disclosure of evidence where the probative value of such evidence would not outweigh its prejudicial effect on the proceedings. Notably, the Tribunal should be cautious about ordering searches where a party or a stranger to the litigation would be subjected to an onerous and far-reaching search for documents, especially **where ordering disclosure would risk adding substantial delay to the efficiency of the inquiry or where the documents are merely related to a side issue rather than the main issues in dispute** (see *Yaffa v. Air Canada*, 2014 CHRT 22 at para. 4; *Seeley* at para. 7; see also *R. v. Seaboyer* [1991] 2 S.C.R. 577 at 609-611). [emphasis added by Respondent counsel].

[381] Given that the hearing was not set to resume for several more weeks, I felt the disclosure order would not unduly delay the hearing from finishing and, as events unfolded, that proved to be true.

[382] The Tribunal has also established that for the purpose of analyzing the arguable relevance of documents, the complaint, the theory of the case contained in each parties' Statement of Particulars, and the entire Statement of Particulars of each party all serve as guides. As stated in *Syndicat des communications de Radio-Canada v Canadian Broadcasting Corporation*:

> For the purposes of disclosure, **the complaint, the theory of the case included in the Statement of Particulars and the entire Statement of Particulars in itself, all serve as guides for identifying the potential relevance of the documents.** This potential relevance will be analyzed from both the point of view of the complaining party and the respondent or the party

> representing the public interest, in this case, the Commission. In other words, **the documents to be disclosed are not limited to those which support the position of a single party, but the positions of all the parties.** [Emphasis added by counsel] *Syndicat des communications de Radio-Canada v Canadian Broadcasting Corporation*, 2017 CHRT 5, at para. 36.

[383] In reviewing the Statements of Particulars of the parties, I concluded that there was a sufficient connection to the Levels Plans. The Commission and the Respondent in particular set out arguments related to the Levels Plans and their role in determining the number of PGP admissions and the priorities applied. As such, I concluded that the documents being requested under the motion were at least arguably relevant.

[384] Section 50(1) of the *CHRA* provides that all parties appearing before the Tribunal must be given "a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations." The Tribunal's previous *Rules of Procedure for Proceedings Prior to July 11, 2021,* which applied to this matter (the "*Rules*") stipulate documentary disclosure obligations aimed at ensuring parties are granted this opportunity.

[385] Rules 6(1)(d) and 6(4) require parties to file a list of non-privileged documents which relate to facts, issues, or forms of relief identified by parties to the case, and to disclose copies of all such documents to the other parties. Rule 6(1)(e) requires parties to provide a list of all documents over which privileged is claimed. (However, parties are not required to disclose copies of such privileged documents.) The *Rules* also stipulate that the disclosure obligation of parties is *ongoing*. Rule 6(5) states that a party must provide additional disclosure either where new facts, issues, or remedies are identified, or where the party discovers that its compliance with its disclosure obligations is inaccurate or incomplete.

[386] Prior to issuing my ruling of March 26, 2021, Respondent counsel estimated that the number of documents arising from the Complainant's motion might be in the number of 50-100. Some of them could be disclosed forthwith in accordance with the *Rules.* However, my order stipulated that if any of the documents were claimed to be subject to Cabinet Privilege, the Respondent was ordered to list those documents in accordance with Rule 6(1)(e) and to articulate on that list specifically why s. 39(4) of the *CEA* does not apply to them. I further ordered that for those documents claimed to be subject to Cabinet Privilege,

the Respondent must obtain a certificate from a Minister of the Crown or the Clerk of the Privy Council in accordance with s. 39 of the *CEA*. I gave the Respondent a deadline of April 30, 2021, but also indicated I would entertain a request for an extension, if necessary. (I subsequently granted an extension to July 30, 2021.)

[387] There were a number of documents that were disclosed as a result of my ruling for which privilege was not claimed. However, the Complainant was not satisfied and insisted on waiting for a ruling from the Clerk of the Privy Council regarding the determination for the balance of the documents. I had been hopeful that the Respondent might seek a determination from the responsible Minister, as that might have taken less time than seeking certification from the Clerk of the Privy Council. However, the Respondent insisted the "constitutional convention" prevented that approach, even though there was very little offered in terms of proof that such a convention exists. Furthermore, the Respondent did not comply with my request that it specify in its list of documents why s. 39(4) of the *CEA*, which enumerates exceptions to Cabinet Privilege, did not apply.

[388] Nevertheless, when the hearing resumed in late April, 2021, the Respondent counsel requested a further extension of time to receive the certification from the Clerk of the Privy Council. I granted the extension request and the certification from the Interim Clerk, which excluded 31 documents from disclosure, was granted on July 14, 2021.

[389] The certification from the Interim Clerk was forwarded to the other parties and Respondent counsel provided partially redacted copies of certain documents as well as a list of other documents subject to claims under s. 38 of the *CEA* as well as notice of another document protected under s. 37 of the *CEA*.

[390] The disclosure order gave rise to a concern on the part of the Respondent that notice provisions had been triggered pursuant to s. 38.01(1) of the *CEA*. This eventually led to the National Security Group of the Department of Justice making an *ex parte* application to the Federal Court on November 5, 2021, regarding certain documents that were previously disclosed. On November 9, 2021, Justice Kane ordered that Dr. Attaran be identified as a Respondent in the application and that the matter, filed under s. 38.04(2) of the *CEA* be made public.

[391] When Dr. Attaran received the Amended Notice of Application dated November 9, 2021, he forwarded a copy to the Tribunal and advised that he would no longer be able to meet his deadline for final argument submissions as a result.

[392] At a subsequent CMCC, Mr. Stynes, advised that the application concerned documents that were disclosed on September 16, 2021. Two of those disclosures were entered as Exhibits 191 and 192 during the hearing. The redacted portions of those documents related to matters not material to the issues before the Tribunal.

[393] Nevertheless, the Federal Court application was an untimely distraction for the parties and the deadlines for written final argument submissions had to be delayed again.

[394] Dr. Attaran subsequently made an application for costs in that matter which was dismissed by Justice Kane on March 16, 2022 (See *Canada (Attorney General) v. Attaran* 2022 FC 353).

Signed by

David L. Thomas
Tribunal Member

Ottawa, Ontario
July 4, 2023

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2163/3716

Style of Cause: Amir Attaran v. Citizenship and Immigration Canada

Decision of the Tribunal Dated: July 4, 2023

With appearances by:

Amir Attaran, for himself, the Complainant

Caroline Carrasco and Sasha Hart for the Canadian Human Rights Commission

Sean Stynes, Kelly Keenan, Susanne Wladysiuk for the Respondent

Jin Chien and Ada Chan, for the Interested Party

XVIII. ADDENDUM -The Bias Allegation

[395] Any allegation of bias against a decision-maker is a very serious matter. Unfortunately, this allegation was made during the hearing. This decision would be incomplete if I did not address the incident and give my reasons for continuing with the inquiry after the allegation was levelled. The allegation did not affect my analysis in this decision in any way.

[396] To briefly give context, when the hearing resumed on April 29, 2021, it began with my ruling to admit the Respondent's expert witness, Prof. Michael Haan and his expert report. As noted above, this followed almost two days of cross-examination of Prof. Haan on his expertise and an entire afternoon of argument about whether or not I should accept him as an expert at all.

[397] It appeared to me that Dr. Attaran was displeased with my ruling. During Mr. Stynes' direct examination of Prof. Haan's expert report, Dr. Attaran made two objections when reference was made to data sets involving health costs. Dr. Attaran's objected that Prof. Haan was not qualified as a health expert. When I overruled the second objection, Dr. Attaran made his first of several insinuations that I was giving preferential treatment to the witness because he shared my gender and racial characteristics. Dr. Attaran said, "There has to be a limit, Chair….There is a propensity to think that every professor who is a white man is an expert in everything." (Hearing Recording at 2:49 on April 29, 2021.)

[398] The next morning, Dr. Attaran made a similar insinuation. He accused me of being inconsistent in a ruling when compared to questioning of his expert witness. He said, "The one time it happened, the professor was Asian and female, and this time it happened, the professor is white and male. I will leave that on the record." (Hearing Recording at 2:10 on April 30, 2021.) Over the course of these two days, I counted several instances when Dr. Attaran made insinuations that I was treating Prof. Haan with some preference because, like the witness, I am also white and male.

[399] In an administrative hearing such as this one, the adjudicator has different roles to play. Firstly, the adjudicator must be impartial, and must not be in any conflict of interest with the parties, whether that conflict is real or perceived. The adjudicator sits in the hearing to receive information, testimony and legal argument. The parties are entitled to test each other's evidence to ensure the adjudicator gets the best information upon which to base their decision.

[400] This hearing was unlike any I have adjudicated before in terms of the sheer number of objections and rulings I was asked to make. I was also forced on several occasions to ask the parties to maintain proper decorum and to refrain from making petty comments and insults to each other. I also asked that parties refrain from suggesting others are not meeting their obligations under the *Rules of Professional Conduct* of the Law Society of Ontario. I had to make all sorts of rulings over the course of this inquiry. I suspect all parties were unhappy with some of my rulings from time to time.

[401] Dr. Attaran made his allegation of bias after we returned from a 20-minute break during his cross-examination of Prof. Haan. Before the break, Respondent counsel, Mr. Stynes, had raised objection to the questions being put to his witness. He said that Dr. Attaran was attempting to intimidate and bully his witness by going after his academic integrity. Dr. Attaran started to lead questions to the witness about his possible ethical violations and professional misconduct.

[402] The exchange concerning the questioning of ethical violations and professional misconduct was heated, which eventually led me to call for the 20-minute break. Prof. Haan had been excluded from the hearing room after Mr. Stynes' objection while counsel discussed the line of questioning. I told Dr. Attaran that I did not want witnesses bullied, threatened or intimidated. I reiterated that as the adjudicator, that, "I am trying to maintain some decorum here, and so I would ask for your cooperation in that, and just in the mannerisms, and there are little things, Dr. Attaran, that you say and you do, and the expressions you make, but they are intimidating to people. And I don't think it's necessary for us, to get through the evidence that will allow this Tribunal to make a decision on the issues that are before it."

[403] In hindsight, these were not the best words I could have chosen. I was trying to avoid inflammatory language, but I thought it was clear to all parties, and members of the gallery, about what I meant when I referred to “mannerisms” and things that Dr. Attaran did during the course of the hearing. I used the word “mannerisms”, but the more accurate word would have been “theatrics” that Dr. Attaran performed as others spoke, such as rolling his head back, mock-laughing and throwing his face into his hands.

[404] Nevertheless, Dr. Attaran stated he had never before been criticized for his “mannerisms” by an adjudicator and made the suggestion that what I had just said had something to do with him being a visible minority. Dr. Attaran then again implied that I was racially biased and sexist in my conduct. My comment had nothing to do with any ethnicity of Dr. Attaran. This is when I decided it was time to take the 20-minute break.

[405] I had resolved to bring order back to the hearing room, and grant the widest discretion permissible for Dr. Attaran to ask the questions he wanted for the remainder of his cross-examination. However, before I said anything upon our return, Dr. Attaran made a statement about his perception of my bias:

> “But I think the manner in which you criticized me, for the way which I speak or my mannerisms, and saying that I may not even be aware of it, but it’s disrespectful. I don’t think you should have done that. And I honestly feel it gives rise to an apprehension of unconscious bias. I have spent my entire working life, as a minority person, being told I should speak differently, I should behave differently, it is not something I welcome. And I am unhappy that it has happened here and from somebody I respect, as I very much do you. The caselaw requires me to put notice of an apprehension of bias on the record when it happens. So I am doing that without acrimony.” (Hearing Recording at 2:12 on April 30, 2021.)

[406] I immediately asked Dr. Attaran if he was asking me to recuse myself. He said in reply that he was asking me to give thought to whether I should or if I should have made the statement that was made.

[407] The Respondent counsel was surprised at the allegation and sought clarification if Dr. Attaran intended to bring a motion for my recusal. Dr. Attaran replied that he did not intend to bring such a motion and that he was “happy to proceed” with his cross-examination of Prof. Haan.

[408] Respondent counsel requested a lengthy recess to conduct research on the matter, which I granted. Dr. Attaran went into a caucus with counsel for the Commission. I thought over the break the parties might absorb the magnitude of what had just transpired.

[409] When we returned from the recess, the Respondent counsel presented caselaw about the seriousness of making an allegation of bias against a decision-maker, especially mid-hearing. They suggested that Dr. Attaran should either bring a motion for recusal or completely withdraw his allegation of bias before we proceeded further with the hearing.

[410] Dr. Attaran scolded Mr. Stynes for suggesting he be told what position he would have to take. Dr. Attaran went on to again criticize me for my comment about his mannerisms and his way of speaking. He again re-iterated that it seemed to him to be the result of my unconscious racial bias. Dr. Attaran said that I probably regretted saying it and implied that I probably wanted to apologize for saying it. This was the fifth time Dr. Attaran implied or stated that I was racially biased against him.

[411] Dr. Attaran and the Commission both said they were prepared to continue with the hearing that day. Dr. Attaran wanted to put his allegation of bias aside and continue with his cross-examination of Professor Haan. The hearing was also scheduled to continue on the following week with the testimony of another witness.

[412] An allegation of bias against a decision-maker, especially in the midst of a hearing, is a matter which must be addressed. I determined that I would need more time to reflect and review the jurisprudence before making a decision. As such, I terminated the hearing that day and we vacated the hearing days for the following week.

[413] Before describing how the matter was resolved, I feel the need to speak on the record from a personal perspective. Allegations of racial bias are very toxic in today's world. The mere allegation of such impropriety carries with it significant stigmatization and it is often very difficult for the accused to achieve redemption because the allegation, though difficult to prove, is also quite difficult to disprove. My personal reputation was impugned by Dr. Attaran's allegation, so I wish to reply to defend myself. Firstly, I do not observe Dr. Attaran to speak with an accent or differently from anyone else in North America. He was born and raised in California and educated and employed at some of

the most prestigious universities in the English-speaking world. I have never met Dr. Attaran in person. I have only seen him on a video screen. He does not even appear to me to be a visible minority. Perhaps it might be different in person. I also highly doubt that I have a subconscious bias against people with a Persian ethnic background. Some of my closest friends are from Iran, including my college roommate who has remained a lifelong friend and participated as a groomsman at my wedding. In the absence of a motion for my recusal, I did not view the allegation as being serious. I perceived it more as an attempt to intimidate me, which it did not.

[414] In the moment of contentious litigation, it is possible for tempers to flare and judgement to be impaired. In the forum of a human rights tribunal hearing, allegations of discrimination are always top of mind, and perhaps this might influence perceptions.

[415] The Tribunal is sensitive to the fact that Dr. Attaran was self-represented and he was concerned about the need to make timely objections to preserve his rights when he believed they had not been respected. However, there is a distinction to be drawn between, on the one hand, objecting to a course of action adopted—or even a ruling made—by the Tribunal, and on the other hand, impugning the Tribunal's impartiality and integrity. The latter should not be asserted outside of a recusal request.

[416] It is well established that in certain contexts, a party must bring a timely objection on an allegation of bias to prevent an assertion of waiver. However, waiver can have no application in cases where the bias allegation is tied to what is said or done during the decision-making process (*Rothesay Residents Association Inc. v. Rothesay Heritage Preservation & Review Board et al.*, 2006 NBCA 61 (CanLII), at para 14).

[417] Bias is a serious matter. In *Arthur v Canada (Attorney General)*, 2001 FCA 223 at para 8, the Federal Court of Appeal explained that an allegation of bias against a tribunal is a serious allegation that cannot be made lightly. When deployed during the hearing as a simple advocacy tool, allegations of bias undermine the respectful atmosphere that is required for the quasi-judicial process to operate. They inflame the proceedings and distract from the matters to be decided. Because they do not seek a recusal decision from the

member, such advocacy allegations erode confidence in the administration of justice since they offer no avenue for either substantiation or dismissal.

[418] Mr. Stynes described Dr. Attaran's allegation of bias without a motion for recusal as a "sword of Damocles" hanging over the proceeding. In Mr. Stynes' view, unless fully withdrawn, an allegation of bias would serve as a "trump card" for Dr. Attaran to play for a judicial review if the final decision herein did not substantiate his complaint. (Hearing Recording at 2:34 on April 30, 2021.)

[419] The inherent problem with any allegation of unconscious bias is that it is next-to-impossible to prove what is going on inside the mind of another person, especially when part of the argument is that the person is not even aware themself of it. Unconscious bias finds its roots in the implicit-bias test developed by a group of American social psychology researchers around 30 years ago. Despite the wide use of the test for training in the work place, it has been controversial within the scientific community because of its inability to meet the accepted standard of consistent test results, suggesting to many that the implications, insofar as test results may relate to a propensity for discrimination, are not supportable. A bald allegation of unconscious bias made before a Tribunal member should be received in a careful and measured way. While the complainant may argue that the respondent is discriminatory due to the unconscious bias that is unseen, the respondent is equally open to argue that the complainant is delusional and seeing discrimination where it doesn't exist. Neither of these arguments are helpful to the adjudicator.

[420] With the hearing suspended indefinitely, I took time to reflect on how the matter could proceed. All parties had invested years of preparation into this inquiry and we had already completed 14 days of hearing. It would be an enormous set-back if a new adjudicator had to be appointed to take over the inquiry.

[421] After some reflection, I issued a letter to the parties concerning decorum on May 20, 2021, which outlined my expectations for hearing decorum and the good order required to complete the inquiry. The parties referred to these directions as the "Decorum Directives" for the remainder of the hearing. There were several allegations made that parties were breaching the Decorum Directives as we concluded the hearing in September. However, I

did not view any breaches as being sufficiently prejudicial as to warrant a further suspension of the proceedings. The inquiry had come so far and was getting close to the end. It needed to reach its conclusion.