Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2024 CHRT 23
Date: April 19, 2024
File Nos.: T2511/6820; T2512/6920; T2661/3721 and T2667/4321

Between:

Milad Irannejad et al.

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Immigration, Refugees and Citizenship Canada, Public Safety Canada, Canada Border Services Agency and Canadian Security Intelligence Service

Respondents

Ruling

Member: Jennifer Khurana

I. OVERVIEW

[1] Milad Irannejad filed four complaints on behalf of over 40 individuals against Immigration, Refugees and Citizenship Canada (IRCC), Public Safety Canada (PSC), Canada Border Services Agency (CBSA) and the Canadian Security Intelligence Service (CSIS), which are the Respondents. In broad terms, the complainants, who are all Iranian nationals, allege that the Respondents discriminated against them on the basis of national or ethnic origin in the delayed processing of their applications for permanent resident status, visas or citizenship applications. The complainants are represented by five individuals.

[2] In 2020 and 2021, the Canadian Human Rights Commission (the "Commission") referred the four groups of complaints to the Tribunal (the "Irannejad complaints"). The complaints against the IRCC and PSC list 41 individuals in an annex as complainants. The complaints against CBSA and CSIS list 47 individuals as complainants. Separately, the Commission referred 57 similar complaints that are not part of the Irannejad complaints and that are all proceeding as individual files. These four complaints are not joined or consolidated, but this ruling is identical for all four.

[3] Following the referrals to the Tribunal, the Respondents requested that the Commission refer the complaints to the National Security Intelligence and Review Agency (NSIRA) under para 45(2)(b) of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the Act). On November 2, 2020, the Tribunal held the initial complaints in abeyance and suspended all deadlines pending the completion of the NSIRA process. The Tribunal issued similar abeyances for all the complaints subsequently referred.

[4] NSIRA communicated its report to the Commission on March 13, 2023. The Respondents asked the Commission not to process the complaints pending its application for judicial review challenging the procedural fairness of the NSIRA process. From March until October, the Commission said it was processing the complaints and would decide whether the complaints should be referred to the Tribunal.

[5] On October 17, 2023, the Commission advised the Tribunal that it had made a determination under s.46(2)(a) of the Act and that it decided to refer the complaints to the Tribunal a second time (the "re-referrals"). But this time the Commission reduced the number of individuals included in each group complaint. It decided "not to deal with" the circumstances of six individuals and dismissed the allegations by three of the individuals that it had previously referred as part of the Irannejad complaints. According to the Commission, the Irannejad complaints now consist of 38 complainants only. In addition, the Commission amended the complaints to add the grounds of age and sex, grounds that the complainants appear to not have included when they filed their complaint forms with the Commission. The Commission also removed the ground of race, which it had added when it first referred the complaints, acknowledging that it does not know why it was added in the first referrals.

[6] By way of letter dated October 20, 2023, the Tribunal advised the parties that, as the NSIRA process had concluded, the abeyance was over and the complaints would proceed in the Tribunal's process.

[7] The Respondents want the Tribunal to reinstate the abeyance pending the resolution of all matters that are currently before the Federal Court, which they say will only take a matter of months. They argue that the NSIRA process was procedurally unfair and say that if that process is reopened, this may affect the Commission's decisions to refer the complaints. As set out below, the parties are all involved in applications for judicial review before the courts. NSIRA has also applied to intervene in the Respondents' application for judicial review of the NSIRA process.

[8] The complainants oppose the abeyance request and say it is based on a speculative assumption that the Respondents will be successful before the Federal Court. The complainants also say they have been unfairly excluded from the NSIRA process. They argue that the Respondents are using delay as a tactic, and they want their complaints to be addressed promptly.

[9] The Commission opposes the Respondents' request and argues that there are no exceptional circumstances justifying granting a stay and that it is not in the "interests of justice" to do so.

[10] The terms "stay" or "hold in abeyance" are used in the parties' submissions. I am not going to address what the difference is between these terms, or whether they should be used interchangeably, because doing so is not necessary to decide the Respondents' request. Regardless of the terms used, it is clear what the Respondents seek. They want the Tribunal to put the complaints on hold until all the issues currently before the courts are resolved.

II. DECISION

[11] The Respondents' request is dismissed. I am not persuaded that there are exceptional circumstances that justify staying the proceedings or that it is in the interests of justice to wait until multiple issues currently before the Federal Court are resolved. The timing and result of those applications are uncertain, and the complainants have been waiting for years to have their complaints proceed at the Tribunal. There are a number of open questions related to these complaints due to how they were processed and referred, however, and I have outlined a preliminary list of issues to be addressed in case management with the parties. There are likely others.

III. BACKGROUND

[12] The procedural history of these complaints is unusual and the chronology of the Commission and the parties' applications and motions before the Federal Court is complex. While the only issue for me to determine at this point is whether the complaints should be put in abeyance, I have set out what is still pending before the Federal Court to the extent this background is relevant to my decision and to next steps in these proceedings, as set out below.

Status of the re-referrals

[13] I asked the parties—starting with the Commission—to make submissions on the legal status of the "re-referrals" of complaints. More specifically, I asked the Commission to explain why it referred the Irannejad complaints a second time, how it proposes the Tribunal should treat these second referrals, and what, if anything, the Tribunal should do with these second referral decisions in light of the fact that these complaints have been open since 2020 and 2021.

[14] The Commission explained that upon receipt of the NSIRA report, it had only two options further to para 46(2)(a) of the Act. It could either dismiss the complaints or "deal with them" using the powers available to it under Part III of the Act. The Commission decided to deal with the complaints per its regular procedures and decided to re-refer the Irannejad complaints as though they were new complaints—albeit after shortening the list of individuals compared to its first referrals. It also re-referred 52 of the 57 individual complaints that are proceeding separately from the Irannejad complaints.

[15] The Tribunal did not open new complaint files upon receipt of these re-referrals because the complaints referred to the Tribunal in 2020 and 2021 were never closed, withdrawn or otherwise disposed of. The Commission did not request that the initial complaints be declared a nullity or closed.

[16] The Commission acknowledges that it is unusual to refer the same complaints to the Tribunal twice. It says this is because the respondents required a referral to NSIRA after the Tribunal had already commenced its inquiry and because there is no case law to guide how the Tribunal and the parties should proceed in these circumstances.

[17] According to the Commission, the October 2023 referral decisions should define the scope of the Tribunal's inquiry and should supersede the initial referral decisions. The Commission argues no weight should be given to its initial referral decisions. The other parties did not make submissions on this point or respond to this particular argument.

[18] Determining what to make of the second referral decisions is not material to this decision on the abeyance request. In any event, this may be a live issue before the Federal

Court as the Respondents have applied for an extension of time to judicially review the Commission's second decision to refer the complaints to the Tribunal on the grounds that the NSIRA process was flawed and procedurally unfair. The respondents do not appear to have sought judicial review of the first Commission decision to refer these complaints prior to the NISRA process being triggered. Although the Commission argues that the nine individuals whose names were removed from the re-referrals did not seek judicial review of the second referrals, it remains unclear to what extent—if at all—these individuals were made aware of the distinction between the referrals or understand that the Commission's position is that its re-referrals supersede its first referral decision. The Tribunal will address this issue in case management with the parties.

The pending judicial reviews

(i) Respondents' application for judicial review of the NSIRA Investigation Report

[19] In March 2023, the Respondents brought an application for judicial review of the NSIRA Investigation Report alleging a lack of procedural fairness in the NSIRA investigation (Federal Court File Number T-427-23). The Respondents are seeking to have the NSIRA Investigation Report set aside and the matter referred back to NSIRA. According to the Respondents, if the judicial review is granted, this would reopen the Commission's investigation of the complaints and may affect the Commission's decisions about the referral of the complaints to the Tribunal. They argue that further steps in the Tribunal process will be based on a record that is "ultimately found to be flawed" and will result in wasted time and expense for all parties.

[20] The Respondents argue that a hearing of the application for judicial review is far advanced, will be heard shortly and "is expected to take place in the spring of 2024" if the Commission's motion to strike is unsuccessful.

[21] According to a summary of the status of the outstanding Federal Court proceedings provided by the Commission on April 16, 2024, this application is suspended pending the Commission's motion to strike the application as premature, as described below. NSIRA

also brought a motion for leave to intervene in the Respondents' application for judicial review.

(ii) Commission's Motion to Strike the Respondents' Application as Premature

[22] On July 7, 2023, the Commission brought a motion to the Federal Court to strike the Respondents' application for judicial review of the NSIRA Investigation Report on the basis that the application was premature. The Commission argued that the NSIRA report only forms part of the Commission's decision-making and is not reviewable on a stand-alone basis. Rather, the Commission argued that the Respondents ought to await the outcome of the Commission process. In the meantime, the Commission made its determination and re-referred the complaints in October 2023.

[23] According to information the parties provided on April 16, 2024, the Commission's motion to strike was argued on January 30, 2024, supplemental submissions were filed on March 4, 2024, and a decision by the Federal Court is pending.

[24] The Commission explained that if its motion to dismiss is granted, that would finalize the issue of the challenge to the NSIRA process. If the Commission's motion to strike is dismissed, then the motion for intervention from NSIRA would need to be dealt with. NSIRA's request to intervene could be granted or dismissed, and the application for judicial review would proceed, with the court setting new deadlines for all the parties' submissions and affidavits to be filed, including NSIRA, if it is granted leave to intervene and is allowed to file materials. The hearing of the judicial review would then need to be scheduled by the Federal Court.

(iii) Respondents' application for judicial review of the Commission's decisions to refer the complaints to the Tribunal and its motion to extend the time to file this application

[25] On December 5, 2023, the Respondents filed an application for judicial review of the Commission's decision to re-refer the complaints to the Tribunal for inquiry (Federal Court File 23-T-129). Because its application was late, the Respondents were required to bring a

motion seeking an extension of time to file this application. As of the April 16, 2024, update provided by the Respondents, motion records have been served and filed, and a court decision is pending. According to the Respondent(s), if it is successful in its application for judicial review, the matter will be sent back to the Commission for reconsideration, pending a new NSIRA Investigation Report.

IV. ANALYSIS

[26] It is only in the most exceptional cases that the hearing of a complaint should be suspended (*Bailie et al. v. Air Canada and Air Canada Pilots Association*, 2012 CHRT 6 at para 22 and C*anadian Association of Elizabeth Fry Societies and Acoby v. Correctional Service of Canada*, 2019 CHRT 30 at para 14).

[27] The Act requires the Tribunal to balance the principles of natural justice with expeditiousness (s. 48.9(1)). In considering stays of proceedings, the Tribunal can consider whether it is in the "interests of justice" to do so (*Duverger v. 2553-433-Quebec Inc (Aeropro)*, 2018 CHRT 5 at paras 58-60 [*Duverger*]). This approach relies on a reasonable and flexible assessment of factors relevant to stay requests, including but not limited to principles of procedural fairness, whether a serious question of fact or law is to be judged, irreparable harm, the balance of convenience between the parties, and the public interest in dealing with human rights complaints expeditiously. The factors and interests to be taken into consideration by the Tribunal may vary depending on the circumstances of each case (*Williams v. Bank of Nova Scotia*, 2021 CHRT 24 at para 38 and *Duverger* at para 58).

[28] It is generally not in the interests of justice for the Tribunal to grant stays of proceedings pending a judicial review of the Commission's decision to refer a complaint to the Tribunal (*Duverger* at 68 and 71).

[29] The burden is on the party seeking the stay to adduce clear and non-speculative evidence that irreparable harm will follow if their motion is denied (*Canada (Attorney General) v. Amnesty International Canada*, 2009 FC 426 at para 29). A waste of time and financial resources, the impossibility of recovering costs and the stress and anxiety involved in judicial and quasi-judicial processes do not, in and of themselves, constitute irreparable

harm to the parties (*Duverger* at paras 64-65 and 70, citing *Bell Canada v. Communication, Energy and Paperworkers Union of Canada* (1997), 127 FTR 44, 1997 CanLII 4851 (FC), [*Bell Canada*] at para 40).

[30] In my view, it is in the interests of all parties, and in the public interest, to move forward at this stage and to avoid further delay. The procedural history and circumstances of these complaints are unique, but I do not find there are exceptional circumstances present that warrant staying these proceedings or reinstating the abeyance based on the limited information available. The circumstances of these complaints and the information available to the Tribunal do not currently justify a stay.

[31] The Respondents allege that they were deprived of the opportunity to provide submissions to NSIRA during the investigation, which led to a flawed Investigation Report, which in turn led to a flawed Commission decision to refer the complaints. While I am willing to accept on the face of the limited information available that the Respondents have raised a serious issue with respect to the procedural fairness of the NSIRA process, I am not persuaded that the Tribunal proceedings should be stopped based on speculation about the outcome and timing of the judicial reviews.

[32] The Respondents submit that they would suffer irreparable harm if the complaints proceed before the Tribunal. They argue that the Tribunal process would involve a waste of irrecoverable time and money for all parties in preparing and participating in what might ultimately be an unnecessary hearing if the Federal Court finds that the NSIRA proceeding was procedurally unfair and that the Commission decision to refer the complaints was based on a faulty record. The Respondents also submit they would suffer irreparable harm in the event of inconsistent findings between the Federal Court and the Tribunal.

[33] The Tribunal has rejected similar arguments on the basis that the alleged harm was based on the hypothetical premise that the Federal Court would allow the judicial review applications (*Duverger* at para 64 and *Williams* at para 43). The Respondents' arguments about wasting time and money are not sufficient to constitute irreparable harm in and of themselves. The Respondents have not provided the clear and non-speculative evidence required to establish that they would suffer irreparable harm if these complaints proceeded.

[34] I acknowledge that the Respondents are challenging what they allege was a procedurally flawed NSIRA and Commission investigation process and that this is currently a live issue before the Federal Court. However, the Commission's investigation is not evidence before this Tribunal, and the Tribunal's process is *de novo*. In very basic terms, what the Commission investigated or decided at this point is water under the bridge and has no bearing on the Tribunal's inquiry. While the Commission's investigation is material to its decision to refer, once a complaint is referred to the Tribunal, the Tribunal's inquiry begins. The parties can make their cases before this Tribunal as they see fit. The complainants must make their case out, and the respondents can defend against a claim of discrimination and make any arguments they wish to at that point.

[35] I also reject the Respondents' claim that the balance of inconvenience favours them and that any "stress and anxiety that the complainants may experience because of a few months' delay in the Tribunal's proceedings should be no more than equal to the stress and anxiety that the Respondents would experience if the matter were not held in abeyance". According to the Respondents, if the judicial review application challenging the NSIRA report is denied, the Tribunal case could resume in a few months, whereas the time and energy the Respondents will be required to incur if the Tribunal refuses to hold the matter in abeyance "eclipses" the time and energy the complainants would incur if the stay were allowed.

[36] The complainants argue that the Respondents' attempt to equate the generalized stress and anxiety of the process with the acute and pervasive consequences they face demonstrates a fundamental misunderstanding of the complainants' situation. They say that suggesting that job loss, career disruption, inability to reunite with family and being denied access to critical medical treatments can be boiled down to mere stress and anxiety is not only dismissive but also indicative of a deep disconnect from the reality of their circumstances. The complainants argue that their lives have been in a state of limbo and that the discrimination they have faced has not been just a source of distress but has also materially deprived them of opportunities, stability and crucial life moments.

[37] I accept the complainants' arguments on these points. The Respondents' claims about the stress and anxiety they face, or their attempts to suggest that the pressures are

uniformly experienced between the complainants and the Respondents, is a mischaracterization of the nature of the parties in these proceedings.

[38] The Respondents are large institutional litigants, represented by counsel from the Department of Justice. The complainants appear to be represented by five individuals who are not lawyers and who filed complaints years ago seeking redress for alleged discrimination. The Respondents have made bald assertions about the “stress and anxiety” they would experience as compared to the complainants. Comparing their relative resources and stress and anxiety in defending claims under the Act to that experienced by the complainants is disingenuous at best.

[39] I also reject the Respondents’ submissions that the resolution of “all pending matters currently before the Federal Court” is a “matter of months”. This is potentially a significant understatement given the complexity of the issues involved in judicial review applications and the uncertainty that remains, as well as the possibility of any subsequent appeals. A “matter of months” has already passed since the Respondents made this request in December and the matters are not all resolved, as the Respondents and the Commission reported on April 16, 2024.

[40] Further, the complainants and the public have a vested interest in human rights complaints being heard expeditiously, and unnecessary delays jeopardize the preservation of evidence (*Duverger* at para 68).

[41] Finally, as set out above, it is not even clear what the legal status is of the re-referrals or the implications of dismissing or choosing not to deal with complainants that are already before this Tribunal. Similarly, it is not clear what the consequence may be for an application for judicial review of a re-referral when it appears no such application was made when the complaints were initially referred in 2020 and 2021.

[42] The initial complaints have not been declared a nullity, or withdrawn, and the Tribunal will proceed with its task, which is to conduct an inquiry into complaints the Commission refers to it. Whether, when or how the Commission should or should not have referred these complaints is not the Tribunal’s task to evaluate. In any event, the Tribunal has no authority to review the exercise of the Commission’s discretion.

V. PRIVACY AND CONFIDENTIALITY

[43] The complainants expressed concerns about their privacy due to actions they say the Respondents took in relation to the applications for judicial review. It asks the Tribunal to take measures to "ensure the respondent does not further violate our privacy during these proceedings".

[44] Tribunal proceedings are open to the public, subject to any confidentiality measures or orders under s.52 of the Act.

[45] Further, rule 47 of the *Canadian Human Rights Tribunal Rules of Procedure, 2021*, SOR/2021-137 sets out what is in the official record. The public may access the Tribunal's official record under such terms and conditions as specified by the Chairperson (s.47(2)). The official record contains:

> (a) the complaint;
> (b) the request to institute an inquiry by the Commission;
> (c) the statements of particulars and any responses or replies; (d) any motion materials;
> (e) any correspondence between the Registrar and the parties;
> (f) any summaries of case management conferences;
> (g) any book of authorities;
> (h) any written submissions;
> (i) any orders, rulings or decisions;
> (j) any exhibits;
> (k) any recordings of the hearing and any transcripts of those recordings; and
> (l) any other documents that are designated by the Panel.
>
> (Rule 47(1))

[46] The parties may raise any confidentiality issues they believe the Tribunal must consider in case management or in writing.

NEXT STEPS

[47] The Tribunal has identified the following non-exhaustive list of preliminary issues from reviewing the limited materials in this file. The Tribunal will canvass the parties to schedule a case management conference call (CMCC) to address these issues. The parties

may have others to add. Following the CMCC, the Tribunal will set deadlines for the filing of particulars, disclosure and witness lists.

1. Relevance of the initial complaints compared to the re-referrals: status of the nine complaints that the Commission did not re-refer and the scope of complaints in light of Commission's amendment to initial complaints

2. Confirmation of lists of individuals in the Irannejad complaints;

3. Application of s.40(1) of the Act. Did the Commission interpret the complaints as a group of complaints under s. 40(1) such that a single contact point can represent the entire group, or did the Commission refer the Irannejad complaints together at the outset? The Respondents take the position that while organizing the individuals into "group complaints" at the outset was efficient at earlier stages of the proceedings, there is no formal vehicle of a "group complaint", and the complainants should be treated as separate parties themselves if the individuals wish to pursue remedies before the Tribunal.

4. Confidentiality and privacy

VI. ORDER

[48] The Respondents' request for an abeyance is denied. The Registry will canvass the parties to schedule a CMCC, following which it will send its initial letter setting out a schedule for the filing of particulars, disclosure and witness lists.

Signed by

Jennifer Khurana
Tribunal Member

Ottawa, Ontario
April 19, 2024

Canadian Human Rights Tribunal

Parties of Record

File Nos.: T2511/6820; T2512/6920; T2661/3721 and T2667/4321

Style of Cause: Milad Irannejad et al. v. Immigration, Refugees and Citizenship Canada, Public Safety Canada, Canada Border Services Agency and Canadian Security Intelligence Service

Ruling of the Tribunal Dated: April 19, 2024

Motion dealt with in writing without appearance of parties

Written representations by:

Mahdi Yousefi, Keivan Monfared, Alireza Mansouri, Mahdi Zamani and Amin Jafari Sojahrood, for the Complainants

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Sandy Graham, Helen Gray, Alexander Gay, Jennifer Francis and Alexandra Pullano, for the Respondents