

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2024 CHRT 101
Date: September 13, 2024
File No.: HR-DP-2768-22

Between:

Tayeil Mohammed

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Border Services Agency

Respondent

Decision

Member: Edward P. Lustig

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I. OVERVIEW

[1] Tayeil Mohammed, the Complainant, is a Canadian citizen born in Canada in 1980 who grew up in Sudan after he was two years old. He was born to a Black African father, who was studying at a university in Saskatchewan at the time of his birth, and an Arabian mother. Mr. Mohammed returned to Canada to live in 2000. He travelled to Sudan from Canada for a visit in about December of 2018 and returned to the Vancouver International Airport on his way home to Calgary on February 4, 2019. On his return, after a primary inspection in which he provided his passport and other information through a self-serve primary inspection kiosk (the “kiosk”) at the Vancouver International Airport, he was referred by the Canadian Border Services Agency (CBSA), the Respondent, for a mandatory automatic secondary inspection based upon intelligence information.

[2] The secondary inspection was carried out by Border Services Officer (BSO) Fabian Gutierrez, who had been an employee of the CBSA for less than two years and had been performing inspections for less than a year. The secondary inspection began normally without a problem, but during the inspection tensions arose, and Mr. Mohammed stopped cooperating.

[3] Mr. Mohammed was allegedly asked inappropriate questions by BSO Gutierrez about why he was able to speak English so well, despite his passport showing he was born in Canada and that he was a Canadian citizen. This occurred even after Mr. Mohammed told the BSO that he had lived in Canada for almost nineteen years and attended university in Canada. Mr. Mohammed alleges that BSO Gutierrez asked him several other inappropriate questions and made comments that he thought were insulting and disrespectful, including suggesting that he didn’t look like he was born in Canada. Mr. Mohammed felt that the BSO did not believe that his passport, indicating he was a born in Canada, was authentic. Mr. Mohammed was also asked to unlock his cell phone, which had been taken from him by BSO Gutierrez who put it in his pocket. After initially refusing to provide the password to unlock his cell phone, he agreed to do so when BSO Gutierrez’s supervisor, Superintendent Julia Pringa, arrived at the inspection. The phone was then

inspected and found not to be in violation, as was his luggage, and Mr. Mohammed was allowed to leave the inspection area after his passport was examined again carefully.

[4] Mr. Mohammed says he observed other persons in the secondary inspection area being processed more quickly than he was and without having their phones taken. By the time he was released from the secondary inspection which took several hours, he had missed his flight home to Calgary. He was forced to make alternative travel arrangements, which he said delayed him by eight hours. He says he felt hurt and disrespected by the incident.

[5] Mr. Mohammed filed a complaint with the Canadian Human Rights Commission (the "Commission") on February 8, 2019, alleging that the CBSA had discriminated against him during the secondary inspection. In particular, he alleged that he was adversely differentiated by the actions of BSO Gutierrez in the provision of a service (i.e., border inspection services) customarily available to the general public because of his race, colour and ethnic and/or national origin, contrary to section 5 of the *Canadian Human Rights Act* (CHRA).

[6] The CSBA admits that Mr. Mohammed's secondary inspection was not carried out as well as it should have been due to the inexperience of BSO Gutierrez. However, it denies that it discriminated against Mr. Mohammed during the secondary inspection. The CBSA argues that the complaint should be dismissed as Mr. Mohammed has failed to prove his case.

II. DECISION

[7] Mr. Mohammed's complaint is dismissed as there is insufficient evidence, on the balance of probabilities, to substantiate the allegation that CBSA discriminated against him during the secondary inspection conducted by BSO Gutierrez.

III. ISSUE

[8] The sole issue in this case is whether the CBSA discriminated against Mr. Mohammed during the secondary inspection performed by BSO Gutierrez.

IV. BACKGROUND

[9] Mr. Mohammed was born in Saskatoon, Saskatchewan, to a Black African father and an Arabian mother, and his name is Middle Eastern. He is a Canadian citizen and has a Canadian passport. His father was at a university in Saskatchewan pursuing a doctorate at the time of his birth. Mr. Mohammed left Canada when he was about two years old and grew up in Sudan. He returned to Canada in 2000 to attend university. He said that he had some difficulty in learning English when he returned to Canada. He is fluent in English but has a foreign accent when he speaks it and, at times, searches for the right words and phrases in English, although he is easily understood. He studied in Canada at the post-secondary level in Nova Scotia, Ontario and Alberta where he ultimately received a degree in Business Administration from the University of Lethbridge. He currently works as an auditor for a company in Western Canada but also has two personal businesses involving international trade. He must consequently travel internationally from time to time.

[10] On February 4, 2019, Mr. Mohammed was returning home to Calgary from Sudan where he had been visiting since December of 2018. When he arrived at the Vancouver International Airport at about 4:19 p.m., he used the kiosk to start the customs and immigration process of re-entering Canada as a returning Canadian. He scanned his passport and provided information, including declarations (nil value), in response to prompts and questions on the screen at the kiosk. He received a receipt that he next presented to the primary inspection BSO who referred him to a secondary inspection.

[11] The information from the kiosk flagged Mr. Mohammed as an individual automatically required to attend a secondary inspection. An intelligence lookout (the "lookout") issued in November of 2018 led to the mandatory secondary inspection referral and instructed BSO Gutierrez, who was chosen randomly, to perform a secondary inspection with a focus on narcotics.

[12] A lookout is an internal document prepared by CBSA investigators based on the intelligence information received. The purpose of the lookout is to identify specific travellers for BSOs, identify any areas of concern BSOs should be aware of, and ensure that the BSOs proceed with the examination into relevant areas of concern. The Respondent says that a “lookout is reliable, accurate and actionable intelligence on actual or suspected infractions or criminal activities and takes the form of an electronic file record. Any individual with an active lookout at the time of their entry into Canada is referred automatically for mandatory secondary examination by the CBSA system”.

[13] The lookout and the CBSA system itself were not matters raised by Mr. Mohammed in his complaint, Statement of Particulars or Reply prior to the hearing in relation to the issue of whether or not he was discriminated against by the CSBA in the secondary inspection in this case. As such, it was not part of what the Commission investigated and referred to the Tribunal for an inquiry in this case. Mr. Mohammed attempted to raise this as an issue at the hearing. I have decided this case without regard to whether the lookout or the CSBA system itself was flawed or biased or acted in a manner that discriminated against Mr. Mohammed in this case, as it is beyond the scope of this inquiry and hearing.

[14] I also did not permit Mr. Mohammed to introduce documents dated after the events of this case, which he attempted to use to demonstrate systemic discrimination by BSOs at the CBSA in other cases. These documents were not presented before the Commission and were not part of what was referred to the Tribunal for an inquiry in this case; therefore, they were also beyond the scope of the case before the Tribunal.

[15] Mr. Mohammed arrived at the secondary inspection at about 4:47 p.m. and was greeted by BSO Gutierrez. His luggage had to be taken off the plane and brought to the secondary inspection area for the actual inspection to begin, and, when it did, he was taken by BSO Gutierrez to a station in the area for inspection. Mr. Mohammed’s luggage consisting of one larger and one smaller piece was searched by BSO Gutierrez and was found not to contain anything that violated any laws or regulations. At the beginning of the inspection, BSO Gutierrez took Mr. Mohammed’s passport, which he checked. He asked Mr. Mohammed a number of standard questions, including where he had travelled to, the purpose and length of his visit and what he did for a living. It is agreed upon by the parties

that the inspection started off without a problem, as Mr. Mohammed shared with BSO Gutierrez some of his own life history and experiences, including his activism in Sudan during the then-recent revolution.

[16] Mr. Mohammed testified that, as he travels internationally frequently, he had undergone secondary inspections before and after this case without a problem, except for one instance in Toronto. In that case, he said that the BSO had also subjected him to an improper inspection but that he had let it go because he hadn't been aware of his rights under the CHRA. Unfortunately, as the secondary inspection in this case proceeded, relations between the two men deteriorated. Mr. Mohammed reached the point where he would no longer cooperate with BSO Gutierrez, who then sought the assistance of other CSBA staff for advice and support in dealing with a situation that he had not faced in his relatively short career as a BSO with the CSBA.

[17] Although Mr. Mohammed was eventually released from the secondary inspection area at some time around 8 p.m., several hours after it began, with no violation of any law or regulation found, it is the events described below during the secondary inspection that led Mr. Mohammed to make a complaint of discrimination by the CSBA BSO Gutierrez in this matter. As will be noted, there was differing testimony between Mr. Mohammed, on the one hand, and BSO Gutierrez (along with Superintendent Pringa), on the other hand, about what happened during the secondary inspection. There were no other witnesses who observed any part of the secondary inspection.

[18] Before describing the events, it is worth noting that BSO Gutierrez was hired by the CSBA partly because of his diverse background. He is a visible minority. He came to Canada as an immigrant from Mexico in 2008. Like Mr. Mohammed, at the hearing, he was able to communicate fluently in English but also speaks with an accent and searches at times for the correct English words or expressions. Like Mr. Mohammed, he admitted to having had difficulty in learning the English language when he came to Canada to live and work. BSO Gutierrez acknowledged that he had made mistakes in the secondary inspection that he would not make today given his greater experience and training and that he took more time than he would take today to do the inspection. However, he denies that he is a racist or that he discriminated against Mr. Mohammed during the secondary inspection by

adverse differentiation in the provision of border services based on race, colour or ethnic and/or national origin.

[19] Generally, BSO Gutierrez feels that he followed the correct protocols and proper practices of the CBSA in questioning and inspecting Mr. Mohammed, who had been flagged by the CBSA system and automatically referred to a secondary inspection as a result of a narcotics based lookout. He did not choose to inspect Mr. Mohammed; rather, he was given his passport and directed to do a secondary inspection of him by the system over which he had no control. BSO Gutierrez feels that he treated Mr. Mohammed the same as he would have treated any other traveller in the same circumstances at the same time without regard to their protected characteristics. He feels that he was trying to be complementary in commenting about how well Mr. Mohammed spoke English despite not having been raised in Canada in order to advance cooperation in the investigation. He denies that he said that Mr. Mohammed didn't look like he was born in Canada. He feels that some of the circumstances he noticed during his inspection were indicators that reasonably led him to ask certain questions and take certain actions, in accordance with acceptable and appropriate practices for BSOs, including inspecting Mr. Mohammed's luggage and cell phone. He feels that Mr. Mohammed was being evasive in some of his responses as he probed further with questions about business and travels plans and that, as a result, Mr. Mohammed eventually became hostile and completely uncooperative. This was something he had never experienced or been confronted with before in his relatively short experience as a BSO and something for which he sought the support of his colleagues, which turned out not to be sufficient.

[20] Generally, Mr. Mohammed alleges that he was adversely differentiated during the secondary inspection compared to other travellers in the secondary inspection area he saw being inspected at the same time. He claims that, unlike him, they weren't detained for as long, their cell phones were not confiscated, and they were released more quickly after being questioned and inspected. He alleges that he was subjected to inappropriate and unnecessary questions, comments and actions by BSO Gutierrez based upon unfounded suspicions about his language, birth, citizenship, business and travel plans. He alleges that he was harassed and punished by the actions of BSO Gutierrez during the secondary

inspection based upon unfounded and unreasonable suspicions about what was on his cell phone and the authenticity of his passport.

[21] Mr. Mohammed rejects as unreasonable or illogical, the explanations given by BSO Gutierrez and the CSBA, which claim the events were not discriminatory, even if the inspection was handled improperly in part by BSO Gutierrez because of his inexperience and lack of training. Mr. Mohammed infers that there was the subtle scent of discrimination in how the secondary inspection was carried out, implying that it wouldn't have occurred in the same manner if not for his protected characteristics under the CHRA.

[22] Mr. Mohammed never specifically testified that it was his belief that BSO Gutierrez was a racist or that he displayed unfounded and unreasonable suspicions based upon an untrue negative stereotypical racist image of a Black Muslim man of Sudanese background or that the events took place because of racism. But Mr. Mohammed suggested that racism may have been a factor or reason for the events, questioning how they could have happened despite him producing a valid passport that established his citizenship and place of birth as well as providing a forthright account of his crime-free personal history, travel plans and business documents to BSO Gutierrez. Nothing was found in his luggage, his cell phone or elsewhere in violation of any law or regulation, yet he had to endure a lengthy examination that included aspects that made him so angry that he refused to continue to participate.

[23] Mr. Mohammed feels that he suffered adverse impacts because of what he was subjected to during the secondary inspection both in terms of the unnecessary delay it caused him in getting home and in his hurt feelings, including being humiliated and disrespected. He rejects the notion that this was solely a case involving a BSO without proper training, experience and support who simply failed to provide the level of service in a secondary inspection that he should have from a process and operational point of view or that the events would have also happened to other travellers in secondary inspection who did not possess his protected characteristics.

[24] The events include the following:

- i. the length time of the inspection;
- ii. the questions, comments and alleged statements of BSO Gutierrez;
- iii. the confiscation and examination of the cell phone;
- iv. the examination of the passport; and
- v. the failure to allow Mr. Mohammed to sit down for periods during the inspection.

Some of these events intersect with each other.

A. the length of the inspection

[25] The evidence about the length of the inspection varied between about three and four hours. The BSO's notes showed that the inspection started at 4:47 p.m. and ended at 7:55 p.m. Mr. Mohammed disputes the accuracy, authenticity and completeness of the notes and felt that the inspection was longer than that. He was further delayed by another approximately three hours due to missing his connecting flight home to Calgary, forcing him to catch a later flight. There is no doubt that the inspection took several hours, which would have made any traveller unhappy, particularly if he was innocent of anything and felt he was being treated unfairly. Undoubtedly, the inspection was longer than it would have been had Mr. Mohammed not become uncooperative and had BSO Gutierrez been more experienced and better trained and supported. BSO Gutierrez had to consult with other officers and supervisory staff during the inspection on several occasions because of the difficulties he was encountering in dealing with Mr. Mohammed and his uncertainties about how to best deal with him.

[26] Mr. Mohammed testified that he saw other travellers in the secondary inspection area who were processed more quickly than he was and without having their cell phones taken for inspection; however, no specifics regarding these other travellers' experiences were provided, such as the reason for their referral to secondary inspection. BSO Gutierrez, as confirmed by Superintendent Pringa, testified that the length of time for secondary inspections can vary significantly from case to case. It can take a much shorter time than was the case here or a much longer time, depending on various factors, including the reason for the referral which can be either random or can be mandatory for other reasons than narcotics. It also depends on the complexity of the case and the dynamics of the interview

between the BSO and the traveller. As noted, in this case, the interview became fractious and uncooperative, and BSO Gutierrez admitted that he was inexperienced and sought help which took additional time than it would have if he were doing the inspection now.

B. the questions, comments and alleged statements of BSO Gutierrez

[27] It is uncontested that the inspection started on a friendly basis with BSO Gutierrez asking standard opening questions about identification, the purpose of the trip, employment/business, final destination and similar questions that Mr. Mohammed responded to cooperatively. In fact, Mr. Mohammed testified that he was very open and friendly and talked about his own personal background and his trips to Sudan where he had been an activist in the recent revolution and had been tortured. He also spoke about having been born in Saskatchewan and having left to go to Sudan when he was about two years old where he grew up and then returned to Canada when he was about twenty in 2000 to attend university and colleges, ultimately earning a business degree from University of Lethbridge. BSO Gutierrez had his passport which showed he was born in Canada and was a Canadian citizen, yet Mr. Mohammed testified that during the inspection he was asked how he could speak English so well. This demonstrated to him that the BSO didn't believe him or his passport, and he found it disrespectful and hurtful. It angered him, especially when BSO Gutierrez allegedly said that Mr. Mohammed "didn't look Canadian" or words to that effect and also allegedly asked him where he was born repeatedly. Mr. Mohammed was unclear in his evidence about exactly what was said and how many times it occurred, but he was convinced that it was unjustified as part of a proper and fair inspection.

[28] BSO Gutierrez had quite a different take on the discussion about Mr. Mohammed's proficiency in speaking English. BSO Gutierrez testified that he examined the passport at the beginning of the inspection to prepare himself for how the inspection would go and was well aware of Mr. Mohammed's place of birth and citizenship and didn't doubt it or the validity of the passport as that was not an issue in the inspection. He disputed that he ever suggested that Mr. Mohammed didn't look Canadian or words to that effect or asked him where he was born. Most importantly, he testified that his comment about how well Mr. Mohammed spoke English was a complement, as he was genuinely impressed, given the

time he was away and growing up in Sudan. He also noted his own difficulties in learning to speak English when he came to Canada from Mexico and acknowledged that he was still facing some difficulties at the time of the inspection. He also testified that he wanted to complement Mr. Mohammed as a way of gaining his trust and confidence during the inspection as he was aware of how difficult secondary inspections can be for both the BSO and the traveller.

C. the taking and examination of the cell phone

[29] It is somewhat unclear on the evidence exactly when BSO Gutierrez took Mr. Mohammed's cell phone during the inspection, but it is uncontested that, when he did so, he put it into his pocket, which is not an appropriate thing to do with a cell phone taken from a traveller during a secondary inspection. The BSO admitted that it was wrong for him to put it in his pocket, and he would not do so now, but that is what he did to everyone whose phone he seized at the time, regardless of their protected characteristics. Mr. Mohammed felt that this showed a lack of respect for him as the cell phone was something that he owned that had private and personal information on it such as pictures of his children. He also felt that others in the inspection area undergoing secondary inspections were not subjected to the seizure of their cell phones, although there was no specific evidence about anyone else in the inspection area and what the nature of their inspections were about.

[30] However, BSO Gutierrez testified that it was appropriate in a narcotics search for an BSO to seize and inspect a cell phone if there was reasonable cause to do so based on indicators arising out of the inspection. BSO Gutierrez testified that, although he had not yet finally completed all of the current training procedures on such seizures at the time and may have made some mistakes in his implementation of the CBSA procedure, he had the appropriate indicators to allow him to seize and search the cell phone in the context of an inspection based on a narcotics lookout. Among the indicators he mentioned were the change in attitude from cooperative to non-cooperative by Mr. Mohammed in responding to questions, including his refusal of the request to open the phone. Other indicators included flying alone, the change in his companions' travel plans, having someone else's credit card, the late minute travel arrangement, incomplete business information as well as others.

According to the BSO, these indicators, considered collectively as a combination of multiple indicators, rather than any single one, may suggest grounds for legitimate suspicion by the BSO. This, in turn, justified further investigation and examination in order to do his job properly and protect Canadians.

[31] These indicators were disputed by Mr. Mohammed who testified that he felt that the request to open his phone was made to punish and harass him. He also stated that he was threatened with the possibility of his phone being confiscated and sent to a lab in Ottawa to be opened if he did not provide the access code. He disputed the BSO's claim that the phone had actually been inspected as Mr. Mohammed had refused to give him the code. In fact, he alleged that he had specifically requested that Superintendent Pringa, who was called to the scene to resolve the issue at the end of the inspection, not allow the BSO to inspect the phone and only gave her the code to inspect the phone herself in his office. Superintendent Pringa testified that BSO Gutierrez was with her and inspected the phone, that she supervised him in the inspection and that they found nothing wrong with the cell phone, at which time they informed Mr. Mohammed that he could leave the inspection, which he did without further problems or complaint.

D. the examination of the passport

[32] Before Mr. Mohammed finally left the secondary inspection area, his passport was re-examined by both BSO Gutierrez and Superintendent Pringa. According to the BSO, there was a loose stitch on the passport, which had raised concerns because it might give Mr. Mohammed difficulties in the future when using it. Mr. Mohammed denied that the purpose of the inspection of his passport at the end of the inspection was for that reason. Instead, he testified that he viewed this further inspection as another disrespectful example of the BSO continuing to harass and punish him for no good reason. He pointed out that his passport had already been checked by the BSO, and there was no valid reason to suspect its authenticity. Mr. Mohammed testified that the BSO remained suspicious of him and the passport without any reasonable grounds.

[33] BSO Gutierrez testified that, when Mr. Mohammed was cleared to leave after his phone was returned to him, the inspection was over as he had already inspected the passport at the start of the process and was satisfied with it at the time. He testified that the further inspection of the passport was to assist Mr. Mohammed and was never the subject of the secondary inspection. There was widely conflicting evidence about how long the final inspection of the passport took, but that is not relevant. Mr. Mohammed disputed the BSO's notes regarding this event, arguing that they were not contemporaneous, authentic or complete. He pointed out that the note about the passport was only written down at the end of the inspection, not at the beginning, and that it was submitted into the system the day after the event. BSO Gutierrez testified that he could not make notes of everything that happened while he was conducting the inspection and that the notes were only made to allow him to recall things.

E. the failure to allow Mr. Mohammed to sit down for periods of time during the inspection

[34] At the hearing, Mr. Mohammed alleged that he was not permitted to sit down for periods of time during the secondary inspection despite the fact that he had injuries that he had sustained by torture during the time he was in Sudan. He said that he did not go to the doctor because of this and had no medical reports as he depended on self-healing. BSO Gutierrez testified that he was not told of any injuries during the inspection and that he did not prevent Mr. Mohammed from sitting down during the inspection as he would never do that to anyone and that there were chairs available in the inspection area for this purpose.

V. CREDIBILITY OF THE WITNESSES

[35] All of the witnesses, including Superintendent Eliza Oman who testified to a complaint filed by Mr. Mohammed on February 8, 2019, with the CBSA, were basically credible witnesses. Superintendent Oman conducted a phone interview of Mr. Mohammed and concluded that his internal complaint, which covered most of the same facts as his Commission complaint, was justified from a procedural standpoint. Her finding was that BSO Gutierrez was ill prepared, given his limited experience, for the secondary inspection at that

time and made a number of mistakes. She testified that BSO Gutierrez required support from on-duty staff and further training, which she recommended. Her telling comment was that he had been “hung out to dry” at the secondary inspection. Superintendent Oman’s evidence was that the internal complaint was not about discrimination and that, in her interview, that subject did not arise until the end when she was told by Mr. Mohammed that he was going to be filing a complaint with the Commission, which she said surprised her.

[36] Superintendent Pringa was a credible witness who de-escalated the situation at the end of the inspection and testified that Mr. Mohammed left the inspection without complaining about discrimination. She was present for only part of the inspection involving the cell phone and confirmed BSO Gutierrez’s account of that part of the inspection, as well as the final inspection of the passport, in which she also participated.

[37] The credibility of the two main witnesses, Mr. Mohammed and BSO Gutierrez, is of primary significance to this case, given their conflicting testimony and the fact that they were the only witnesses to the whole of the events.

[38] That said, I find that both men honestly and deeply believed in their respective impressions of whether or not discrimination was a factor in the events. For genuine reasons, both men were credible witnesses. As discrimination rarely manifests itself in overt behaviour or actions, it is largely an impressionistic feature of thought. In this case, there was no overt discrimination, and, for reasons explained later in this decision, each man had different impressions of what had occurred based upon their feelings at the time. This situation was by its very nature difficult and emotionally charged for both men.

[39] BSO Gutierrez used the word “evasive” to describe a number of indicators he felt related to Mr. Mohammed’s behaviour, responses and information during the secondary inspection. He did this to justify his line of questions and his actions, including requesting Mr. Mohammed’s cell phone access code to open the phone. However, nothing was found in Mr. Mohammed’s luggage, in his phone or elsewhere to justify BSO Gutierrez’s suspicions resulting in any contravention. Mr. Mohammed was found to be innocent after spending almost four hours in secondary inspection, with an additional three-hour delay as a result of missing his flight connection home. He was inspected by a BSO who himself and his

supervisors admitted was not yet ready in experience and training to handle a secondary inspection like this one without making errors. However, BSO Gutierrez was doing his job on the day in question with the experience, knowledge and training he had at the time—a job that requires making decisions about suspicious matters in order to protect the public.

[40] It's not difficult to see why, on the one hand, Mr. Mohammed would form the impression that he was being discriminated against by the events of February 4, 2019, while BSO Gutierrez would have an opposite impression of the events. It's very difficult in these circumstances to retrospectively look into the heart and mind of BSO Gutierrez and determine whether Mr. Mohammed's race, colour or ethnic and/or national origin was a factor in the decisions he made that day.

[41] In the end, I have concluded that, while both were credible witnesses and while Mr. Mohammed was definitely negatively impacted and felt hurt and disrespected, I accept the impressions of the events given by BSO Gutierrez respecting discrimination over those of Mr. Mohammed.

VI. LEGAL FRAMEWORK

[42] Section 5 of the CHRA provides, in part, that it is a discriminatory practice in the provision of services customarily available to the general public to differentiate adversely in relation to any individual on the basis of their race, colour or ethnic and/or national origin or any other protected characteristics under section 3(1) of the CHRA. It is common ground in this case that the provision of border services, including secondary inspections of individuals entering or re-entering Canada by the CBSA, is a "service" within the meaning of section 5.

[43] A complainant alleging an infringement of the CHRA bears the onus of showing a *prima facie* case of discrimination. A *prima facie* case is "one which covers the allegations made and which, if they are believed complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent" (*Ontario Human Rights Commission and O'Malley v Simpsons-Sears* [1985] 2 SCR 536 at para 28). The applicable standard of proof is the civil standard of a balance of probabilities (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc.*

(*Bombardier Aerospace Training Centre*), 2015 SCC, [2015] 2 SCR 789 [Bombardier], at para 65).

[44] In a case like this, the burden of proof is on the complainant to establish that they were the victim of discrimination. To do so, they must prove that 1) they possessed one or more of the protected characteristics under the CHRA; 2) they experienced an adverse impact with respect to the service; and 3) one or more protected characteristics was a factor in the adverse impact (*Stewart v Elk Valley Coal Corp.*, 2017 SCC 30, at para 24).

[45] There must be a tangible connection between the impugned actions and the prohibited grounds of discrimination (*Bombardier* at paras 52, 56 and 88). If no such linkage can be established, the complaint cannot succeed (*Starr v BMO Financial Group*, 2023 CHRT 54 at para 56 [*Starr*]).

[46] As per *Starr* at para 54, “In cases involving racial discrimination, the following five principles have been summarized and repeatedly emphasizes by courts and tribunals as being of particular importance:

- a) The prohibited ground or grounds of discrimination need not be the sole or major factor leading to the discriminatory conduct; it is sufficient if they are a factor;
- b) there is no need to establish an intention or motivation to discriminate; the focus of the enquiry is on the effect of the respondent’s actions on the complainant;
- c) the prohibited ground or grounds need not be the cause of the respondent’s conduct; it is sufficient if they are a factor or operative element;
- d) there need be no direct evidence of discrimination; discrimination will more often be proven by circumstantial evidence and inference; and
- e) racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices”.

[47] The law recognizes that it may be difficult to identify discrimination as there is often no direct or overt evidence of discrimination. The role of the Tribunal is to examine all of the circumstances and determine whether there exists a “subtle scent” of discrimination (*Turner v Canada Border Services Agency*, 2020 CHRT 1 at para 48).

[48] If a complainant can establish a *prima facie* case, a respondent can either present evidence to refute the allegation of *prima facie* discrimination, put forward a defence justifying the discrimination, or do both (*Bombardier* at para 64).

[49] The Federal Court has held that, while crossing the border, routine questioning by CBSA Officers, such as questions about an individual's employment, is not discriminatory (*Canada (Attorney General) v Davis*, 2017 FC 159 at para 27).

[50] The Federal Court of Appeal has held that it is reasonable for CBSA Officers to rely upon their training, knowledge and experience when interacting with individuals at the border, and to do so is not racial profiling (*Attorney General of Canada v Ting Tang Tam*, 2014, FCA 220 at paras 10-14).

VII. ANALYSIS

[51] Mr. Mohammed clearly possesses protected characteristics under section 3 of the CHRA.

[52] On February 4, 2019, Mr. Mohammed received a service available to the general public, within the meaning of section 5 of the CHRA, namely, border immigration and customs services. This included services involving the secondary inspection conducted by the CBSA at the Vancouver International Airport.

[53] Mr. Mohammed did receive treatment in the course of the secondary inspection that was adverse to his interests as a traveller and person. This inspection significantly delayed him and caused him to feel badly treated by the CBSA. But was this adverse treatment different from what a person without his protected characteristics would have experience during the provision of this service and were his protected characteristics a factor in this adverse treatment? Or was it simply a case of a secondary inspection that was poorly conducted by a BSO who lacked training and experience?

[54] As noted above, there was no evidence of any overt act of discrimination during the secondary inspection. Further, there was no specific evidence regarding the reasons other travellers in secondary inspection at the same time as Mr. Mohammed were there, how long

they were detained or what happened to them during their inspections. There is evidence that the duration of secondary inspections can vary, taking either longer or shorter than Mr. Mohammed's inspection, depending on the particular circumstances of the referral from the primary inspection.

[55] Accordingly, if there was discrimination as alleged by Mr. Mohammed in this complaint, it would have been either because BSO Gutierrez consciously or unconsciously acted in a manner that was discriminatory however subtle those actions might have been. There is no doubt that emotions ran high and that the two men were in a state of conflict during the secondary inspection. This could have caused BSO Gutierrez to act in a manner where any negative stereotypical bias that he may have held about Mr. Mohammed, based on his race, colour or ethnic and/or national origin, was a factor in the way he treated Mr. Mohammed.

[56] To Mr. Mohammed, his impression of the actions of BSO Gutierrez was shaped by something that he knew or felt from his experiences in dealing with people that made him believe that BSO Gutierrez was treating him in a discriminatory manner. To him, the explanations of BSO Gutierrez about his various comments, questions and actions involving the events during the inspection did not make sense. For example, Mr. Mohammed felt that there was no good reason to repeatedly be asked about his English language skill when his passport showed him to be a Canadian citizen born in Canada. He believed that his answers and the information he provided in response regarding BSO Gutierrez's unfounded suspicions about his late purchase of an airline ticket, the last-minute cancellation of his colleagues' travel plans, and his businesses and employment were all honest and forthright, not evasive. In his view, these factors did not reasonably justify the extended delay, the request to open his cell phone or the re-inspection of his passport.

[57] In other words, Mr. Mohammed felt that the various indicators that BSO Gutierrez pointed to as justifying his actions were not legitimate. In the heat of the conflict, being unnecessarily detained despite being completely innocent of any violations understandably made Mr. Mohammed feel he was being discriminated against because of his protected characteristics. This was his impression of the events, and he certainly had reason to be upset about his treatment and hurt by the experience. Given that the CBSA admitted that

Mr. Mohammed was not treated properly during the secondary inspection because of the inexperience and lack of training of BSO Gutierrez, I think, although I have no power to order it, that Mr. Mohammed should have been given a formal letter of apology.

[58] To conclude that discrimination occurred, rather than simply poor service by an inexperienced, poorly trained BSO, I am required to examine the evidence as a whole to try to understand what was going through BSO Gutierrez's mind when he conducted the secondary examination. This is not an exact science, and I am neither a mind reader nor a trained psychologist. My finding is based on the balance of probabilities regarding what occurred during a difficult situation for both men.

[59] BSO Gutierrez didn't choose to examine Mr. Mohammed. He was compelled to conduct the inspection because the CSBA system automatically flagged Mr. Mohammed for a secondary inspection, and BSO Gutierrez was randomly selected to carry out the examination. Such an examination is always difficult, not only for the traveller but also for the BSO, who knows that the traveller will be upset. However, the BSO must remain diligent and suspicious in order to do their job to protect the public—particularly in cases where the referral involves a potential criminal aspect, such as this one. This is a very difficult task, especially for a new inexperienced BSO who the Respondent has admitted made mistakes, needed more training and, when he sought support, was "hung out to dry" by his colleagues and supervisory staff. To add to the difficulty, Mr. Mohammed was very unhappy, hostile and uncooperative, adding to the heightened atmosphere.

[60] BSO Gutierrez shouldn't have put Mr. Mohammed's cell phone in his pocket or spent so much time on the inspection. This was partly due to the fact that BSO Gutierrez's need to consult with others because of his inexperience and partly due to Mr. Mohammed's unwillingness to cooperate. However, BSO Gutierrez had the right and responsibility to probe into Mr. Mohammed's travel plans and business documents and information as well as to inspect his cell phone when he concluded that there were legitimate indicators to do so. A more experienced and better trained and supported BSO may or may not have done so. In sum, I feel that while BSO Gutierrez did not do a good job of the inspection as was confirmed by Superintendent Oman on her review of the internal complaint, this was due to his inexperience, lack of training and support—not because of any discrimination.

[61] On the balance of probabilities on the evidence before me, despite my sympathy for Mr. Mohammed in needlessly having been delayed and upset by the events, it is very difficult for me to find that at any time during any of the events BSO Gutierrez was motivated by a bias against Mr. Mohammed because of his race, colour or ethnic and/or national origin.

[62] In my opinion, there is simply insufficient evidence that one or more of Mr. Mohammed's protected characteristics were a factor in the adverse impact he suffered during or as a result of the secondary inspection. He was justifiably angry at the way in which the inspection was conducted and the time it took. However, tying this frustration to the discrimination by BSO Gutierrez, rather than attributing it to a poorly managed secondary inspection by an inexperienced BSO, is too speculative and impressionistic. There was no evidence presented at the hearing that established a tangible connection between the events and discrimination, including the comments about his proficiency in speaking English. There was no evidence that the BSO or Superintendent Pringa treated him differently than they would have any other traveller in his position on account of a protected ground under the CHRA. As such, I find that the complaint of Mr. Mohammed in this case has not been substantiated.

VIII. ORDER

[63] The complaint is dismissed.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
September 13, 2024

Canadian Human Rights Tribunal

Parties of Record

File No.: HR-DP-2768-22

Style of Cause: Tayeil Mohammed v. Canada Border Services Agency

Decision of the Tribunal Dated: September 13, 2024

Date and Place of Hearing: June 10 – 14, 2024

Vancouver, British Columbia

Appearances:

Tayeil Mohammed, Self-represented

No one appearing, for the Canadian Human Rights Commission

Benjamin Bertram, for the Respondent