T.D. 2/91
Decision rendered on April 23, 1991

THE CANADIAN HUMAN RIGHTS ACT
R.S.C. (1985), c. H-6 as amended

HUMAN RIGHTS REVIEW TRIBUNAL

IN THE MATTER OF THE APPEAL filed by the Canada Employment and Immigration Commission dated January 10, 1989 against the Human Rights Tribunal Decision rendered on December 14, 1988;
Mehran Anvari and Canada Employment and Immigration Commission

BETWEEN:

CANADA EMPLOYMENT AND IMMIGRATION COMMISSION

Appellant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

MEHRAN ANVARI

Respondent

DECISION OF THE REVIEW TRIBUNAL

TRIBUNAL: Hugh L. Fraser - Chairman
Joanne DeLaurentiis - Member
Paul Nallanayagam - Member

APPEARANCES:

BRIAN SAUNDERS Counsel for the Appellant

PETER ENGELMANN Counsel for the Canadian Human Rights Commission

KATHRYN BARNARD Counsel for the Respondent

DATE AND PLACE OF HEARING: June 27, 1990
Ottawa, Ontario

Pursuant to Section 55 of the Canadian Human Rights Act a Human Rights Review Tribunal was appointed to inquire into the appeal of the Canada Employment and Immigration Commission dated January 10, 1989 against the decision of the Human Rights Tribunal pronounced on December 14, 1988 in the matter of the complaint of Mehran Anvari against the Canada Employment and Immigration Commission.

The Review Tribunal is to determine if the appeal is to be allowed or dismissed on a question of law or fact or mixed law and fact pursuant to subsections 56(3), (4) and (5) of the Canadian Human Rights Act.

The Facts

On October 16, 1984 Mehran Anvari filed a complaint with the Canadian Human Rights Commission which read as follows:

"I have reasonable grounds to believe that I was adversely differentiated against by reason of a disability contrary to Section 5(b) of the Canadian Human Rights Act."

The Tribunal's original jurisdiction in the person of Elizabeth Anne Garland Leighton was appointed on October 19, 1987 to hear Mr. Anvari's complaint. The facts which were presented to the Tribunal can be summarized as follows. The complainant Mehran Anvari had polio as a child in his native country of Iran. At the time of the hearing he walked with the assistance of a cane and one of the issues placed before the Tribunal was whether Mr. Anvari would require medical treatment to assist him as a result of the lingering effects of the polio.

Mr. Anvari came to Canada in 1981 as a visitor. He later applied for a program initiated by the Canada Employment and Immigration Commission. This program was designed to assist Iranian

nationals in Canada to make application for landed immigrant status from within the country. The program which is called the RAN program facilitated the process of these individuals to become landed immigrants from within Canada as an exception to the normal rule which requires that a person apply for an immigrant visa from outside of Canada. This was done by the exercise of a ministerial discretion through order-in-council.

Mr. Anvari was initially approved and accepted under this program subject to a medical examination by the physicians employed with the Department of Health and Welfare who are in charge of the processing of medical examinations for the Canada Employment and Immigration Commission. These medical doctors found Mr. Anvari to be inadmissible as a result of his medical condition. The Canada Employment and Immigration Commission then refused to process the Respondent for landed immigrant status and required him to leave Canada.

Mr. Anvari alleged that the refusal to process him by way of order-in-council to landed immigrant status in Canada was

discrimination on the basis of his disability.

Mr. Anvari was advised that he was inadmissible to Canada based on Section 19(1)(a) of the Immigration Act. The relevant portion of that section reads as follows:

"No person shall be granted admission if he is a member of the following classes: (a) persons who are suffering from any disease, disorder, disability or other health impairment as a result of the nature, severity or probable duration of which, in the opinion of a medical officer concurred in by at least one other medical officer,... (ii) their admission would cause or might reasonably be expected to cause excessive demands on health or social services."

After examinations by orthopaedic surgeons and after interviews at the Canada Immigration Centre in Ottawa, Mr. Anvari received a letter dated September 19, 1984 from the Manager of the Canada Immigration Centre in Ottawa officially informing him that he was inadmissible to Canada as a landed immigrant and given that his

visitor's status had expired on April 28, 1984, he should prepare to leave Canada.

The original Tribunal outlined the issues to be decided as follows: 1. Did the alleged discriminatory practice take place in Canada, the victim being lawfully present in Canada at the time of the Act as is required under S. 32(5)(a) of the Canadian Human Rights Act?

2. Were immigration officials involved in the processing of persons applying for landed status under the RAN policy providing a service customarily available to the general public as is required under Section 5 under the Canadian Human Rights Act i.e. in this instance, does the administration and application of the Immigration Act fall under the Canadian Human Rights Act?

3. If number 2 is answered affirmatively, did those officers discriminate, without bona fide justification, against Mr. Anvari based upon his disability.

With regard to the first question the Tribunal found that there was no evidence that would contradict Mr. Anvari's ability to bring his complaint under the Canadian Human Rights Act based upon the fact that the act which was the subject of his complaint occurred in Canada and Mr. Anvari was lawfully in Canada at that time.

On the second ground the Tribunal found that the fact that the RAN program applicants were a specific and special group did not

negate their status as members of the general public. The Tribunal also found that notwithstanding the fact that the officials were dealing with the RAN program that they were providing services in exactly the same manner pursuant to the regulations and established policies under the Immigration Act as they would at any time and in any case of an application for landed immigrant status. The Tribunal therefore accepted the premise that it had jurisdiction to make a decision under the Canadian Human Rights Act based upon Section 5(b) of the Act.

As to whether or not the Appellant can justify their decision regarding Mr. Anvari based on a finding that his disability would

cause or would reasonably be expected to cause excessive demands on health and social services, the Tribunal found that the medical evidence placed before it did not meet this test.

The Tribunal therefore found that the complaint of Mr. Anvari was substantiated and the following Order was made:

1. Canada Employment and Immigration Commission shall process Mehran Anvari to "landed immigrant" status forthwith.

2. Mr. Anvari shall receive a sum which represents his personal payment of medical expenses from September 19, 1984 until the present upon receipt from him of an account substantiating those expenses.

3. Mehran Anvari is awarded the sum of $3,000.00 for compensation for injury to his feelings and self respect.

Subsequent to the decision of the Tribunal which was rendered on December 14, 1988 the Respondent Canada Employment and Immigration Commission appealed the Tribunal's decision to a Review Tribunal. The Review Tribunal receives its power by virtue of Section 56 of the Canadian Human Rights Acts. This section reads as follows:

56(1) Where an appeal is made pursuant to section 55, the President of the Human Rights Tribunal Panel shall select three members from the Human Rights Tribunal Panel, other than the member or members of the Tribunal whose decision or order is being appealed from, to constitute a Review Tribunal to hear the appeal.

(2) Subject to this section, a Review Tribunal shall be constituted in the same manner as, and shall have all the powers of, a Tribunal appointed pursuant to section 49, and subsection 49(4) applies in respect of members of a Review Tribunal.

(3) An appeal lies to a Review Tribunal against a decision or order of a Tribunal on any question of law or fact or mixed law and fact.

(4) A Review Tribunal shall hear an appeal on the basis of the record of the Tribunal whose decision or order is appealed and of submissions of interested parties but the Review Tribunal may, if in its opinion it is essential in the interests of justice to do so, admit additional evidence or testimony.

(5) A Review Tribunal may dispose of an appeal under section 55 by dismissing it, or by allowing it and rendering the decision or making the order that, in its opinion, the Tribunal appealed against should have rendered or made.

The Appellant's grounds for appeal are as follows:

1. The Tribunal erred in reviewing the issue of whether there was sufficient evidence before the Appellant to reject the Respondent's application for landed immigrant status.

2. The Tribunal erred in finding that the Appellant differentiated adversely against the Respondent in making its decision under Section 19 of the Immigration Act 1976.

3. Alternatively the Tribunal erred in finding that the medical evidence upon which the Appellant based its decision did not

meet the requirements of the Immigration Act 1976 and of the Canadian Human Rights Act.

4. Alternatively, the Tribunal erred in directing the Appellant to process the Respondent forthwith and absent any other consideration, on which point the Appellant shall seek to introduce evidence not available at the time of the hearing, to "landed immigrant status".

5. The Tribunal erred in ordering that the Appellant is to receive all medical expenses incurred from September 19, 1984 to the present.

6. The Tribunal's award of compensation under Subsection 31(3) of the Canadian Human Rights Act is in the circumstances of the case excessive.

The first ground of appeal which was not immediately clear was clarified by Mr. Saunders, counsel for the Appellant. The Appellant submits that the Tribunal at first instance incorrectly decided that it had jurisdiction to entertain the complaint. In arguing that the service being rendered to Mr. Anvari is a service customarily available to the general public, counsel for the Canadian Human Rights Commission drew the Tribunal's attention to the case of Jacques LeDeuff and The Canada Immigration and Employment Commission 9 C.H.R.R. D/4479 which is a Review Tribunal decision, page 4481, paragraph 34974 quoting a statement made by the Tribunal at first instance:

"The present Tribunal is of the opinion that the Canada Employment and Immigration Commission derives its authority from an Act passed by the Parliament of Canada. The scope of this Act is general and whenever the Government of Canada applies an Act of general scope, it is providing a service to the public. The Canada Employment and Immigration Commission was carrying out its official duty as an agent of the Crown and thus was providing a service to the public.

The present Tribunal therefore judges that, in taking the steps that it did in the LeDeuff case, the Canada Employment and Immigration Commission was providing a service to the public and consequently was obliged to refrain from acting on a prohibited ground of discrimination."

The Review Tribunal in LeDeuff upheld the decision of the first Tribunal on that point and found that Section 5 of the Canadian Human Rights Act did in fact apply to the Canada Employment and Immigration Commission and its officers were providing a service to the public and were therefore obliged to refrain from acting

on a prohibited ground of discrimination.

Ms. Barnard submitted that the case of Minister of Employment & Immigration v. Jiminez-Perez (1984) 2 S.C.R. 565 had also clearly established that immigration officers provided a service to the general public. In the Jiminez-Perez case the Minister of Employment and Immigration through his officers was found to be under a duty to consider applications for exemption on

compassionate or humanitarian grounds from the requirement of Section 9 of the Immigration Act and to advise the applicants of the results of their application.

We accept the Respondent's argument that the Canada Employment and Immigration Commission in considering Mr. Anvari's application for governor-in-council exemption to the provisions of the Immigration Act was in fact providing a service customarily available to the general public. We find therefore that the Tribunal of first instance did not err in reviewing the issue of whether there was sufficient evidence before the Appellant to reject the Respondent's application for landed immigrant status.

On the second ground of appeal the Appellant argued that the Tribunal was incorrect in finding first of all a prima facie case of discrimination and then finding that there is no bona fide justification which would have resulted in the practice not being found to be discriminatory. Mr. Saunders' argument was that Section 19(1)(a) of the Immigration Act provided a bona fide

justification for any practice that might otherwise be found to be discriminatory and since there was no evidence to suggest that Mr. Anvari was the subject of adverse differentiation with regard to the assessment of his medical problems he was therefore within the provisions of 19(1)(a). This Tribunal accepts the argument put forward by counsel for the Canada Employment and Immigration Commission that Section 19(1)(a) of the Immigration Act must be read

"subject to the provisions of the Human Rights Act which said that you cannot discriminate in the provision of services,...unless there is a bona fide justification, and a bona fide justification means that the reason for excluding the individual must meet the test of bona fide justification so that the statute will go together, there will be a point at which the health care will be excessively used, there will be a case where someone will be a risk to the public safety with perhaps a contagious disease".

The Tribunal agrees with the distinction made with the Druken case where a particular section of a statute was rendered

inoperative. As counsel for the Canada Human Rights Commission argued, Section 19(1)(a) of the Immigration Act must be lawful in the sense of complying with the bona fide justification provision of the human rights legislation. Simply applying Section 19(1)(a) without demonstrating that it has been applied in a reasonable fashion or that its application is justified will not be sufficient to avoid a prima facie finding of discrimination.

An alternative ground for appeal put forward by the Appellant was that the Tribunal erred in finding that the medical evidence upon which the Appellant based its decision did not meet the requirements of the Immigration Act of 1976 and of the Canadian Human Rights Act. In order to uphold the Appellant's argument, this Review Tribunal must find that the Tribunal of first instance has erred in a manifest or palpable fashion in its assessment of the evidence.

The Tribunal of first instance considered the evidence of Dr. Gold that the operation facing Mr. Anvari would not result in undue hardship to the Ontario Health Care System. Dr. Gold testified that there should be no delay or occupying of beds with this type of procedure. Dr. Armstrong testified that the procedure would require Mr. Anvari to be in the hospital for approximately two weeks.

The Tribunal of first instance also considered the evidence of Dr. Leslie, that cost is a major factor in the determination of whether the demands on the health care system of such an

operation would be excessive and in his evidence he acknowledged that he had no data as to what the exact costs would be. Dr. Leslie acknowledged that without facts to what the actual costs are it would simply be a judgment call as to whether the demands of Mr. Anvari's corrective surgery would be excessive. While this Tribunal finds that the investigation of the medical officials employed by the Immigration Department was certainly more than cursory, a review of the evidence does support the submission of Mr. Anvari's counsel that his medical file contains certain shortcomings and that the medical authorities employed by Health and Welfare were not as thorough in assessing their case as they might have been. We therefore accept the submission of counsel for the Canadian Human Rights Commission that the factual conclusions that the

Tribunal came to at first instance do not demonstrate any form of manifest or palpable error.

With regard to the fourth ground of appeal the parties agreed to a modification of the Order of the first Tribunal so that in the event that the first Tribunal's decision was upheld the Order would provide that Mr. Anvari be processed to landed immigrant status without consideration being given to his medical disability.

The Appellant also argues that the Tribunal erred in ordering that the Respondent is to receive all medical expenses incurred since September 19, 1984 to the present. The Appellant submitted that in circumstances where the doctors in question were called upon by statute to exercise their discretion and to provide their medical opinion and where damages arise as a result of the Appellant doing its duty as required by statute, as a matter of policy the damages should not be awarded. Alternatively the Appellant argued that expenses including medical expenses that the claimant can properly recover should only be those which the person can recover under a medical health care plan such as OHIP. In other words the claimant should be in no better position than he would have been had he been granted landed immigrant status.

With regard to the first argument the Tribunal cannot accept the Appellant's position that there are policy reasons that dictate that the Respondent should not be compensated for his medical expenses. If the Tribunal at first instance correctly found the Appellant to be discriminated against then the Respondent is entitled to be put back in the position that he would have been were it not for the discriminatory act. The Respondent testified to expenses that he incurred covering the time frame after which he believed he would have been a landed immigrant in Canada. To reimburse the Respondent for such expenses would not place him in a better position then he would have been had he been granted landed immigrant status.

The final ground of appeal was that the Tribunal's award of compensation under subsection 31(3) of the Canadian Human Rights Act is in the circumstances of the case excessive. Section 31(3)

now Section 53(3) provides as follows:

"In addition to any Order that the Tribunal may make pursuant to Subsection 2, if the Tribunal finds that (a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or (b) the victim of the discriminatory practice has suffered in respect of feelings or self respect as a result of the practice, the Tribunal may order the person to pay such compensation to the victim, not exceeding $5,000.00, as the Tribunal may determine."

The Tribunal at first instance found that the complainant suffered in respect of feelings and self respect as a result of the discriminatory practice. We see no reason to alter such a finding. A review of the evidence indicates that the Respondent did suffer hurt feelings and loss of self respect knowing that many of his countrymen were accepted in the program while he was not. We do however disagree with the amount of the award that was made under the circumstances of this case. Mr. Anvari in submitting his application for the RAN program would have been aware of the fact that he had to pass the medical admissibility criteria. While he appeared to be confident that he would be successful and was given an initial indication that he would be processed for landed immigrant status, he certainly must have appreciated that the test was a subjective one. His evidence also indicates that one of his reasons for coming to Canada was to seek special medical treatment.

The Tribunal finds that this evidence would have a mitigating effect on the extent of the hurt feelings and loss of self respect that Mr. Anvari would have suffered from. His own counsel has submitted that medical officers look at all the overall categories and come out with what is a subjective kind of perception rather than objective measurement in determining whether the Applicant meets all the criteria. For these reasons we find that the award of compensation made by the Tribunal in the first instance was excessive.

Pursuant to Section 56(5) of the Canadian Human Rights Act which reads as follows:

"A Review Tribunal may dispose of an appeal under Section 55 by dismissing it, or by allowing it and rendering the decision or making the Order that, in its opinion, the Tribunal appealed against should have rendered or made."

The Review Tribunal now amends the Order of Elizabeth Anne Garland Leighton rendered on December 14, 1988 as follows:

1. The Canada Employment and Immigration Commission shall

process Mehran Anvari to landed immigrant status forthwith without considering his medical disability.

2. Mehran Anvari shall receive a sum which represents his personal payment of medical expenses from September 19, 1984 until the present, upon receipt from him of an account substantiating those expenses.

3. Mehran Anvari is awarded the sum of $1,500.00 as compensation for injury to his feelings and self respect.

Dated this 5th day of April, 1991

Hugh L. Fraser
Chairman

Joanne DeLaurentiis

Paul Nallanayagam