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FILED
FEDERAL COURT
COUR FÉDÉRALE
DÉPOSÉ
July 31, 2023
31 juillet 2023
Brigitte Cyr
OTT 1

Court File No.

FEDERAL COURT

B E T W E E N:

AMIR ATTARAN

Applicant

- and -

THE ATTORNEY GENERAL OF CANADA, CANADIAN HUMAN RIGHTS COMMISSION, CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC

Respondents

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Ottawa.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Dated: July , 2023

Issued by: _____
(Registry Officer)

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APPLICATION

This is an application for judicial review in respect of a decision of the Canadian Human Rights Tribunal dated July 4, 2023, in the matter of Amir Attaran against Immigration, Refugees and Citizenship Canada ("IRCC"), Tribunal File No T2163/3716, 2023 CHRT 27 (Decision).

In its Decision, the Tribunal dismissed a human rights complaint in which the Applicant in this judicial review (Dr. Attaran, Complainant before the Tribunal) alleged that IRCC engaged in discriminatory practices based on race, national or ethnic origin, age and family status in the provision of services customarily available to the general public, contrary to section 5 of the *Canadian Human Rights Act*, RSC, 1985, c H-6 (*CHRA*).

The Applicant applies for:

1. An order quashing and setting aside the Tribunal Decision dated July 4, 2023.

2. An order remitting the record of the matter back to a differently constituted panel of the Tribunal for reconsideration in accordance with the directions of this Court, without rehearing.

3. Costs;

4. Such further and other relief as counsel may request and this Court deems just.

The grounds for the application are:

1. The grounds identified by the Canadian Human Rights Commission (the "Commission") in its Notice of Application in Court File T-1539-23, which is relied on by the Applicant and incorporated by reference though not reiterated.

2. The Tribunal unreasonably decided that the Applicant and Commission had not established a *prima facie* case of discrimination arising from IRCC's self-reported differences in application processing times for sponsorship and

permanent residence applications in the Family Class. At the time of the Applicant's human rights complaint, such applications for foreign-based parents and grandparents of Canadian citizens took several *years* in processing to completion, while for spouses and children took only *weeks* or *days*, which on its face is adverse differential treatment based on family status (and relatedly, the typical age of the sponsored relative).

3. The Tribunal erred in refusing to be bound by the *res judicata* of the Federal Court of Appeal that the aforesaid, substantial differences in processing speed are adverse differential treatment on the prohibited ground of family status and thus *prima facie* discrimination, leaving as the only undecided issue whether IRCC had *bona fide* justification to discriminate. In *Attaran v. Canada (AG)*, 2015 FCA 37, being an earlier judicial review in this matter, Webb JA in the majority held (without disagreement of the other judges) that IRCC "was differentiating adversely based on family status in processing sponsorship applications for parents more slowly than those for spouses and children". The Tribunal erred by rejecting this finding as *res judicata*, and subsequently by omitting to do any *bona fide* justification analysis.

4. The Tribunal unreasonably held that the Minister's statutory discretion under *IRPA* to manage the speed of immigration application processing is fettered by Cabinet's setting of annual immigration targets for permanent residents (known as the "Levels Plan"). The Tribunal incorrectly reasoned that "IRCC must implement Cabinet decisions" in the Levels Plan, despite the fact that *IRPA* neither mentions the "Levels Plan", nor contains statutory language that makes it binding, nor assigns Cabinet a target-setting function. Had Parliament intended Cabinet's Levels Plan to legally bind and fetter the Minister's discretion, *IRPA* would be so worded.

Procedural Fairness and Bias

5. The Tribunal erred by not assessing the merits of the case before it in a procedurally fair, impartial manner, with the part of its Decision entitled "Addendum Bias – Allegation" serving as proof of real or apprehended bias

that taints the Decision in its entirety.

6. The Tribunal erred in finding without evidence or procedural fairness that there is an “inherent problem with any allegation of unconscious bias” because it is “controversial within the scientific community”. The Tribunal had no evidence of any such scientific controversy before it, gave parties no notice that the scientific validity of unconscious bias was in issue, and afforded the parties no opportunity to make submissions on the same.

7. The presiding member of the Tribunal erred in choosing to “speak on the record from a personal perspective” in the Decision. The member made comments of a subjective, self-interested nature, such as to call himself “the accused” and complain that “[his] personal reputation was impugned” by the Applicant. By positioning himself antagonistically or as an “accused”, rather than as an impartial adjudicator, the member demonstrated real or apprehended bias that taints the Decision in its entirety.

8. The presiding member of the Tribunal erred in concluding *ad hominem* that the Applicant (who is Persian, ethnically and racially) “does not even appear to me to be a visible minority”. This statement is irreconcilable with the member also finding that there is “no dispute between the parties that Dr. Attaran has established that he has characteristics [including of race] which are protected under the CHRA”. The member also erred by writing “I also highly doubt that I have a subconscious bias against people with a Persian ethnic background [because] … Some of my closest friends are from Iran, including my college roommate”. These *ad hominem* anecdotes about the Applicant’s race or racism generally cast doubt on the member’s ability to perceive racism, and evince real or apprehended bias on the member’s part that taints the Decision in its entirety.

9. The Tribunal violated procedural fairness by relying on the evidence of a witness for IRCC who it excused from attendance midway through his cross-examination. The Tribunal excused the witness, Mr. Glen Bornais, from

completing cross-examination ostensibly for medical reasons, but without admitting *any* authenticated or sworn evidence into the record of his medical condition. Mr. Bornais dropped out of the hearing before the Commission was given *any* opportunity of cross-examination, and before the Applicant could recall him for cross-examination about documents that IRCC disclosed late, midway through the hearing.

The "Extended Family" Arguments and Evidence

10. The Tribunal erred unreasonably by failing to consider and give reasons on the "extended family" discrimination argument advanced by the Applicant and the Chinese and Southeast Asian Legal Clinic. Both argued using evidence from a qualified expert witness, Professor Susan Chuang, that IRCC's processing of Family Class immigration applications has systemic adverse effects within multigenerational households where children, parents and grandparents live together as an extended family, and that these adverse effects rise to the level of discrimination on the grounds of race, national or ethnic origin, age and/or family status in the *CHRA*, whether those grounds are taken individually or intersectionally. The Tribunal's reasons for decision entirely omit to consider that argument and omit to summarize—much less consider—Professor Chuang's expert evidence, without justification, intelligibility, or transparency as to why.

Section 5 of the *CHRA* and "Services"

11. The Tribunal acted unreasonably in parsing and analyzing the "service" that the Applicant alleged was implicated under s. 5 of the *CHRA*, namely the processing of sponsorship and permanent resident applications for parents and grandparents. The Tribunal unreasonably rejected an explicit concession on the record agreeing with the Applicant that "we [IRCC] don't dispute that the processing of an application is a service".

12. The Tribunal acted unreasonably by failing to assess relevant evidence that, according to case law in *Gould*, *Watkin*, and other decisions, demonstrate the

immigration application processing has the hallmarks of a "service": *e.g.* that it is held out by IRCC to the public at large, that there is a transitive act where something of benefit passes from IRCC to the applicant, that a fee is paid to IRCC for the service, *etc*.

13. Instead the Tribunal unreasonably sundered the "service" of immigration application processing into its individual bureaucratic pieces or steps—some of which occur *outside* IRCC even *before* the filing of an immigration application—and reasoned that no single dissected piece or step could represent a "service". In other words, the Tribunal unreasonably sausage-sliced the overall act of immigration application processing, such that the severed pieces lacked the hallmarks of a "service" in the case law.

14. The Tribunal unreasonably and overbroadly interpreted jurisprudence on s. 5 "services", such *Matson* and *Andrews* (*CHRC*, 2018, SCC), not just to exclude statutory acts from *CHRA* jurisdiction, but mistakenly also *administrative acts* taken under statutory discretion. The net result is to render IRCC's discretionary processing of sponsorship and permanent residence applications immune from human rights scrutiny under the *CHRA*, despite that statute being quasi-constitutional and superior to *IRPA*. The potential consequences of human rights immunity reanimating historical travesties in immigration are far-reaching (e.g. exclusion of non-white immigrants).

Further grounds of the application are:

15. Sections 3, 5, 15(1) and (2) of the *CHRA.*

16. The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27;

17. *Federal Courts Act*, RSC 1985, c F-7, as amended, section 18.1; and

18. Such further and other grounds as counsel may advise and this Court may permit.

This application will be supported by the following material:

1. Affidavits to be sworn and filed in accordance with the *Federal Courts Rules*.

2. A copy of the Certified Tribunal Record.

3. Such additional materials as counsel may advise and this Honourable Court may permit.

Pursuant to Rules 317 and 318, the Applicant requests that the Tribunal send a certified copy of the following material that is not in his possession but is in the possession of the Tribunal to the Applicant and to the Registry:

1. Certified copies of all the documents, exhibits, and submissions that were filed during the course of the hearing and/or relied upon by the Tribunal in rendering the Decision, in addition to any existing official transcripts of the hearing.

2. A certified copy of the Decision dated July 4, 2023 (2023 CHRT 27).

3. Pertaining to bias, a copy of any conference presentation, whether written speaking notes or contained in video or audio recordings, by the presiding member of the Tribunal (formerly Chair Thomas) in which he mentions or discusses the subject of unconscious bias or affirmative action.

Date: July 31, 2023

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