Federal Court Cour fédérale

Date: 20211028

Docket: T-951-20

Citation: 2021 FC 1154

Ottawa, Ontario, October 28, 2021

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ABDALLAH ZOGHBI

Applicant

and

AIR CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Abdallah Zoghbi seeks judicial review of the dismissal of his human rights complaint by the Canadian Human Rights Commission [Commission]. The Commission held that, even if Mr. Zoghbi's complaint were well-founded, any meaningful remedy would be foreclosed by the *Carriage by Air Act*, RSC 1985, c C-26 [CAA]. The Commission therefore dismissed the

complaint as trivial pursuant to s 41(1(d) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA].

[2] The CAA incorporates the *Convention for the Unification of Certain Rules for International Carriage by Air*, 2242 UNTS 309 [*Montreal Convention*] into Canadian domestic law. The circumstances that gave rise to Mr. Zoghbi's complaint arose on an international flight from Halifax, Nova Scotia to London, England. The Commission therefore found that the limitation of liability contained in Article 29 of the *Montreal Convention* applied, and precluded any meaningful remedy.

[3] The Commission assumed that the possible unavailability of financial compensation for breaches of human rights in the context of international air travel was a bar to all meaningful remedies. The Commission failed to consider whether other remedies, such as measures to redress the alleged discriminatory practice or prevent similar practices from occurring in future, might be appropriate.

[4] The Commission's decision to dismiss Mr. Zoghbi's complaint as trivial was therefore unreasonable. The application for judicial review is allowed.

II. Background

[5] Mr. Zoghbi is a Canadian citizen of Lebanese origin. In December 2016, he was travelling to visit his elderly father, who had been hospitalized in Lebanon. Mr. Zoghbi was

scheduled to depart Halifax International Airport on December 20, 2016 before connecting to a Beirut-bound flight in London.

[6] Mr. Zoghbi boarded the aircraft and found his seat. He placed his jacket on the empty seat next to his. He then spoke to his wife in Arabic on his mobile phone. A flight attendant approached Mr. Zoghbi and told him to move his jacket in what Mr. Zoghbi considered to be a harsh manner. He complied, but expressed his displeasure with her tone. He asked to speak with a manager.

[7] Shortly thereafter, an Air Canada agent approached Mr. Zoghbi and asked him to step outside on to the bridge leading to the aircraft. Mr. Zoghbi followed the agent, believing he was going to discuss the flight attendant's behaviour. Once he exited the aircraft, he was told that he would not be allowed to travel on the flight due to his misconduct. Mr. Zoghbi protested, and explained that he needed to travel to visit his ailing father.

[8] The gate agent provided Mr. Zoghbi with a toll-free number to re-book his flight. Mr. Zoghbi called the number and left a message, but his call was not returned. Mr. Zoghbi received only a partial refund of his airfare.

[9] Unbeknownst to Mr. Zoghbi, the gate agent placed a note on his Passenger Name Record that he had been "verbally abusive toward a flight attendant and gate staff", and alerted Air Canada's corporate security. Air Canada subsequently imposed a travel ban on Mr. Zoghbi, and

informed him that the ban would remain in place until he convinced Air Canada that he no longer presented a risk.

[10] On December 19, 2017, Mr. Zoghbi filed a complaint with the Commission alleging discrimination by Air Canada on the grounds of race, national or ethnic origin, colour, and/or religion.

[11] On January 10, 2018, the Commission notified Mr. Zoghbi that it was preparing a screening report pursuant to ss 40 and 41 of the CHRA [Section 40/41 Report] due to the possible application of the *Montreal Convention* to his complaint. The Commission advised Mr. Zoghbi that if it lacked jurisdiction to provide him with a useful remedy, then his complaint would be dismissed as trivial in accordance with s 41(1)(d) of the CHRA. Mr. Zoghbi and Air Canada were both invited to make submissions.

[12] Mr. Zoghbi sought the assistance of Dr. Gabor Lukacs, an advocate for air passengers' rights. On February 17, 2018, Dr. Lukacs made written submissions to the Commission on Mr. Zoghbi's behalf, in which he asserted the following:

> (a) The Commission has strayed into the forbidden territory of considering questions of law, a power that Parliament withheld from the Commission, and reserved to the Canadian Human Rights Tribunal. The Commission's role is only to assess sufficiency of the evidence. The proper avenue for the Commission to resolve questions of law is to seek the assistance of the Federal Court under s. 18.3(1) of the *Federal Courts Act*.
>
> (b) As a matter of law, the *Montreal Convention* does not apply to Mr. Zoghbi's complaint, because no international

> carriage by air was performed. Mr. Zoghbi was refused transportation by Air Canada, and he never left Halifax, Nova Scotia, Canada.
>
> Alternatively, if the *Montreal Convention* did apply and if it did limit Mr. Zhoghbi's [sic] rights under the *Canadian Human Rights Act*, then the *Carriage by Air Act* implementing the *Convention* violates s. 15 of the *Charter*, and as such should be "read down."
>
> (c) The alleged discrimination is serious, and it is not "plain and clear" that there are little or no useful remedies available under the *Act*. The *Montreal Convention* does not affect the Canadian Human Rights Tribunal's broad corrective powers under s. 53(2)(a) of the *Act*.

[13] The Section 40/41 Report was delivered to the parties on July 15, 2019. The conclusion and recommendation were as follows:

> Overall Conclusion
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> 69. The overall conclusion in this report is that the Commission should not deal with the complaint because:
>
> - it is vexatious within the meaning of the Act because it was resolved through a settlement agreement between the parties, or,
>
> - if it is not vexatious, the Commission should refer the complainant to the Canadian Transportation Agency's process, because the complaint could more appropriately be dealt with under the *Canada Transportation Act*; and/or,
>
> - it is trivial within the meaning of the *Act* because there is no practical remedy that the Tribunal could order.
>
> Recommendation
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> 70. It is recommended, pursuant to paragraphs 41(1)(b) and (d) of the *Canadian Human Rights Act*, that the Commission not deal with the complaint because:

- the complaint could more appropriately be dealt with according to a procedure provided for under another Act of Parliament, and/or
- it is trivial and/or vexatious.

[14] Dr. Lukacs responded to the Section 40/41 Report on behalf of Mr. Zoghbi on August 23, 2019. He objected to the conclusion and recommendation of the Report on the following grounds:

I. The Report addresses two issues that were not identified in the Commission's January 22, 2018 invitation for submissions. The Report's author has made up her mind about these issues based on Air Canada's *ex parte* submissions, without first providing the Complainant an opportunity to address them. In addition, the Commission refused to disclose key exhibits.

II. The Report conflates the December 20-21, 2016 incident that is the subject of the Complaint with a separate and distinct incident in 2017 that has been fully settled. The Complainant never received any compensation in connection with the December 20-21, 2016 incident.

III. The Report's conclusion that the Complaint should be referred to the Canadian Transportation Agency is unreasonable and inconsistent with the finding about the Agency's inability to provide remedies (para. 42).

IV. The Report purports to determine questions of law relating to the *Montreal Convention*, even though the Commission has no jurisdiction to do so. Furthermore, the Report erroneously concludes that the *Montreal Convention* applies and operates as a bar to the Canadian Human Rights Tribunal awarding damages to the Complainants.

[15] There followed a protracted exchange of correspondence between Dr. Lukacs and the Commission's investigator, chiefly about the length of Dr. Lukacs' written submissions. The

investigator had agreed to extend the usual five page limit to 10 pages, but Dr. Lukacs' submissions were 15 pages in length.

[16] It appears from the certified tribunal record that all 15 pages of Dr. Lukacs' written submissions were forwarded to the Commission, together with the Section 40/41 Report and the written submissions of Air Canada.

III. Decision under Review

[17] The Commission dismissed Mr. Zoghbi's human rights complaint on March 2, 2020, based solely on the application of the *Montreal Convention*. The Commission held that it was unnecessary to consider the two additional issues raised by Air Canada, for which Mr. Zoghbi had not received notice: the conclusion in the Section 40/41 Report that the complaint was vexatious because it was resolved through a settlement agreement between the parties; or, if it was not vexatious, the recommendation that the Commission refer the complainant to the Canadian Transportation Agency's process, because the complaint could more appropriately be dealt with under the *Canada Transportation Act*, SC 1996, c 10.

[18] The Commission found that the travel ban issued against Mr. Zoghbi by Air Canada on December 30, 2016 had been retracted and was therefore no longer in dispute. It also found that Mr. Zoghbi had received compensation for Air Canada's refusal to transport him on February 23, 2017, and that aspect of his complaint had therefore been settled.

[19] The remainder of the Commission's decision reads as follows:

> The only outstanding matter in this complaint is, therefore, the incident that took place on December 20 and 21, 2016, when the complainant was not permitted to embark on the aircraft. With respect to this event, the Commission adopts the findings, analysis and conclusion in paragraphs 60 to 68 of the [Section 40/41] Report. As a remedy for this incident, the complainant is seeking an apology and compensation, neither of which are available for the reasons explained in the Report. The complaint is, therefore, trivial within the meaning of paragraph 41(1)(d) of the *Act*.
>
> Furthermore, the Commission does not accept the complainant's arguments regarding its ability to apply law beyond its enabling statute. The Commission does not make decisions in a vacuum. It is entitled to take notice of the laws passed by Parliament such as the *Carriage by Air Act*, R.S.C., 1985, c. C-26 which incorporates the *Montreal Convention* into Canadian law.

IV. Issues

[20] This application for judicial review raises the following issues:

A. Is expert evidence of international law admissible in this proceeding?

B. What is the standard of review?

C. Does the Commission have the power to interpret and apply law beyond its enabling statute?

D. Was the decision of the Commission to dismiss Mr. Zoghbi's complaint reasonable?

E. Should this Court decide the constitutional question?

V. Analysis

A. *Is expert evidence of international law admissible in this proceeding?*

[21] On December 18, 2020, Mr. Zoghbi brought a motion in writing pursuant to Rule 359 of the *Federal Courts Rules*, SOR 98-106 for leave to file the affidavit of Phoebe Okowa, Professor of International Law, Queen Mary University of London [Okowa Affidavit]. In her affidavit, Professor Okowa provides her opinion on the legal relationship between the obligations on states parties under the *Montreal Convention* and the *International Convention on the Elimination of All Forms of Racial Discrimination*, Can TS 1970 No. 28 [*CERD*]; more specifically, the legal relationship under international law between Article 29 of the *Montreal Convention*, which regulates certain actions for damages arising out of international air travel, and Article 6 of the *CERD*, which obligates states to provide effective remedies for private racial discrimination.

[22] By order dated February 15, 2021, Prothonotary Kevin Aalto permitted Mr. Zoghbi to file the Okowa Affidavit, but without prejudice to Air Canada’s right to argue at the judicial review hearing that the affidavit was not admissible because it was neither relevant nor necessary, or any other ground Air Canada might raise. Prothonotary Aalto also granted Air Canada leave to file a responding expert affidavit if it chose to do so.

[23] Air Canada responded to the Okowa Affidavit with the affidavit of Paul Dempsey, Professor Emeritus of Air and Space Law and Director Emeritus of the Institute of Air and Space Law at McGill University [Dempsey Affidavit]. Air Canada nevertheless takes the position that expert opinion on international law is unnecessary for judicial review of the Commission's decision.

[24] As will become clear in the analysis that follows, this application for judicial review may be determined without recourse to expert opinion on international law. While they provide interesting context, the Okowa Affidavit and the Dempsey Affidavit are unnecessary and not relevant to any issue properly before the Court in this application for judicial review. Expert evidence regarding international law is therefore not admissible in this proceeding.

B. *What is the standard of review?*

[25] Decisions by the Commission to dismiss complaints under s 41(1)(d) of the CHRA are ordinarily subject to review by this Court against the standard of reasonableness (*Stukanov v Canada (Attorney General)*, 2021 FC 49 at para 28). However, Mr. Zoghbi argues that the Commission's decision in this case is subject to review against the standard of correctness, because the Commission interpreted and applied legislation beyond its enabling statute (citing *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 [*Cooper*]).

[26] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court of Canada ruled that reasonableness is the presumptive standard of review in

all cases, subject to only limited exceptions. The presumption may be rebutted in one of three circumstances: (a) where the legislature has indicated that courts are to apply the correctness standard; (b) where there is a statutory appeal mechanism from an administrative decision to a court; or (c) where the rule of law requires courts to apply the standard of correctness, *e.g.*, constitutional questions, general questions of law of central importance to the legal system, and questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov* at para 53).

[27] In this case, the Commission did not consider the conclusion in the Section 40/41 Report that Mr. Zoghbi's complaint could more appropriately be dealt with under the *Canada Transportation Act*. There was therefore no need for the Commission to assess its jurisdictional boundaries against those of the Canadian Transportation Agency. Neither the Section 40/41 Report nor the Commission addressed Mr. Zoghbi's assertion that any limitation of his rights under the CHRA by the CAA is contrary to s 15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[28] Mr. Zoghbi maintains that the interpretation and application of the CAA, which necessarily involves the interpretation of an international treaty, is a general question of law of central importance to the legal system. He has offered no authority in support of this proposition.

[29] Mr. Zoghbi has failed to rebut the presumption that the Commission's decision is subject to review against the standard of reasonableness. Accordingly, the Court will intervene only if

"there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). These criteria are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

C. *Does the Commission have the power to interpret and apply law beyond its enabling statute?*

[30] Mr. Zoghbi says that the Commission cannot determine questions of law beyond its enabling statute. Rather, the central role of the Commission is to assess the sufficiency of the evidence before it (citing *Cooper* at para 53).

[31] In *Cooper*, the Supreme Court of Canada held that the Commission had no jurisdiction to consider the constitutional validity of its enabling statute. The Canadian Human Rights Tribunal [Tribunal] was also found to be without jurisdiction to subject the CHRA to constitutional scrutiny.

[32] Seventeen years later, the Supreme Court of Canada substantially revisited *Cooper* in *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 [*Martin*]. Mr. Zoghbi nevertheless asserts that *Cooper* remains good law.

[33] In *Martin*, the majority of the Supreme Court held as follows (*per* Gonthier JA at para 47):

> In my view, the result reached in *Cooper* could have been reached under the current restated rules, given La Forest J.'s finding that the Commission had no authority, either explicit or implicit, to decide questions of law arising under s. 15(*c*) of the *Canadian Human Rights Act*. It is thus unnecessary at this time to revisit the holding in that case. To the extent that it is incompatible with the present reasons, however, I am of the view that the *ratio* of the majority judgment in *Cooper* is no longer good law. This is particularly true insofar as it implies that the distinction between general and limited questions of law is generally relevant to the analysis of an administrative tribunal's jurisdiction to apply the *Charter*, or that the adjudicative nature of the administrative body is a necessary (or even preponderant) factor in the search for implicit jurisdiction. Likewise, the views expressed by Lamer C.J. in his concurrence are at odds with the current approach and should not be relied on.

[34] Both *Cooper* and *Martin* concerned the power of the Commission and Tribunal to decide constitutional questions. There is no dispute that the Commission has the power to determine legal questions pertaining to the limits of its own jurisdiction. Section 41 of the CHRA mandates the Commission to deal with any complaint "unless in respect of that complaint it appears to the Commission that [*inter alia*] (c) the complaint is beyond the jurisdiction of the Commission."

[35] The Commission rejected Mr. Zoghbi's argument that it lacked jurisdiction to interpret and apply law other than the CHRA:

> Furthermore, the Commission does not accept the complainant's arguments regarding its ability to apply law beyond its enabling statute. The Commission does not make decisions in a vacuum. It is entitled to take notice of the laws passed by Parliament such as the *Carriage by Air Act*, R.S.C., 1985, c. C-26 which incorporates the *Montreal Convention* into Canadian law.

[36] In *Canada (Attorney General) v Ennis,* 2021 FCA 95, the Federal Court of Appeal affirmed that the Commission has broad discretionary power and enjoys a remarkable degree of latitude when performing its screening function (at para 57). In *Gregg v Air Canada Pilots Association*, 2019 FCA 218, another recent decision of the Federal Court of Appeal, Justice Donald Rennie (dissenting, but not on this point) observed at paragraph 14 that "[d]ismissing a complaint on the basis that it is plain and obvious that it cannot succeed requires an assessment of the complaint against objective benchmarks or criteria. Those include the facts, statutory and jurisprudential requirements and precedent".

[37] *Northcott v Canada (Attorney General)*, 2021 FC 289 [*Northcott*], a case that bears some resemblance to this one, concerned a decision by the Commission to dismiss a complaint because any useful remedy was precluded by the *Indian Act*, RSC 1985, c I-5 (at para 23):

> […] the investigator found section 10.1 [of the *Indian Act*] also prevented the Tribunal from ordering any useful remedy in respect of this part of the complaint. Having concluded damages could not be awarded for either claim, the investigator found that "there does not appear to be any practical remedy that the Tribunal could order with respect to the issue of obtaining Indian Status." Without a practical remedy, the investigator concluded all the allegations were trivial as provided for at paragraph 41(1)(d) of the CHRA and recommended that the CHRC not deal with the complaint.

[38] Justice Patrick Gleeson applied the standard of reasonableness to his review of the Commission's interpretation and application of law beyond its enabling statute, implicitly finding that the Commission had the power to do so (*Northcott* at para 31):

> Decisions by the CHRC to dismiss complaints under *CHRA* section 41(1)(d) are reviewed on a reasonableness standard (*Stukanov v Canada (Attorney General)*, 2021 FC 49 at para 28). A decision maker's interpretation of statute is also to be reviewed against a standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 115 [*Vavilov*]). In interpreting legislation "[a]dministrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case," although the merits of their interpretation must still accord with the provision's text, context, and purpose (*Vavilov* at para 119-120). "Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements" (*Vavilov* at para 120).

[39] As in *Northcott*, the Commission in this case made a determination respecting its capacity to offer remedies for the alleged breach of Mr. Zoghbi's human rights. The Commission reasonably held that the question of whether certain remedies were precluded by the CAA and the *Montreal Convention* fell within the powers, duties and functions conferred upon it by ss 41(1)(c) and (d) of the CHRA.

D. *Was the decision of the Commission to dismiss Mr. Zoghbi's complaint reasonable?*

[40] The Commission based its decision to dismiss Mr. Zoghbi's complaint solely on the CAA, which incorporates the *Montreal Convention* into Canadian law. The Commission adopted the findings, analysis and conclusion in paragraphs 60 to 68 of the Section 40/41 Report. The Commission found that neither of the remedies sought by Mr. Zoghbi, specifically an apology and financial compensation, were available for the reasons explained in the Section 40/41 Report.

[41] The author of the Section 40/41 Report [Investigator] noted that Mr. Zoghbi's complaint arose in the context of international air travel, and the *Montreal Convention* therefore applied. Article 29 of the *Montreal Convention* creates exclusive rules governing an airline's liability for incidents that occur during international air travel, and bars all monetary damages except for death or bodily injury.

[42] The Investigator referred to *Thibodeau v Air Canada*, 2014 SCC 67 [*Thibodeau*], a decision of the Supreme Court of Canada that concerned claims for financial compensation after the Commissioner of Official Languages upheld complaints against Air Canada under the *Official Languages Act*, RSC 1985, c 31 [OLA]. The Investigator found that, pursuant to *Thibodeau*, the bar on damages contained in the *Montreal Convention* applied to fundamental, quasi-constitutional rights. The Investigator continued (at para 62):

> *Thibodeau* was about a breach of language rights, but the same principles could apply to breaches of the *Canadian Human Rights Act*. This means that, even if the complainant were to be successful at Tribunal, the Tribunal may not be able to order damages to compensate him for pain and suffering. [Emphasis added.]

[43] The Investigator rejected Mr. Zoghbi's argument that the *Montreal Convention* did not apply to his circumstances because he was never permitted to travel on the Air Canada flight. The Investigator found that the *Montreal Convention* applied to embarkation and disembarkation, and reproduced the following excerpt from *Thibodeau*:

> [67] In *King v. American Airlines, Inc.*, 284 F.3d 352 (2d Cir. 2002), Mr. and Ms. King claimed damages before the United States District Court for the Northern District of New York, alleging that they had

> been racially discriminated against in violation of their equal rights under the law, as protected by 42 U.S.C. § 1981. The Kings also relied on the *Federal Aviation Act*, 49 U.S.C. § 41310(a), and various other state and federal laws. They contended that American Airlines "bumped them from an overbooked flight because of their race": p. 355. The U.S. Federal Court of Appeals, Second Circuit, had to decide whether the *Warsaw Convention* applied to the Kings' damages claim. If it did, then this claim would be excluded, as it had been filed outside the two-year limitation period provided at Article 29 of the *Warsaw Convention*.
>
> [68] Circuit Judge Sotomayor (as she then was) for the court concluded that the claim fell within the substantive scope of Article 17 of the *Warsaw Convention*, which exhaustively covers claims for injuries suffered while "in the course of [one of] the operations of embarking": pp. 359-60.

[44] The Investigator continued at paragraph 65 of the Section 40/41 Report:

> The Supreme Court in *Thibodeau* agreed with the analysis in *King* and the application of the *Montreal Convention* to matters of embarkation. Based on all of the above, <u>it appears that</u> the *Montreal Convention* would apply to the allegations in this complaint, given that they occurred in the course of embarkation. As a result, further damages could be awarded to the complainant based on the allegations in the present complaint. <u>However, the *Montreal Convention/Carriage by Air Act* only prevents compensation for damages, and the Tribunal could still make other remedial orders if they were appropriate</u>. [Emphasis added.]

[45] Mr. Zoghbi notes that the language chosen by the Investigator was much less emphatic than that used by the Commission in its decision. The Investigator found that the principles enunciated in *Thibodeau* could apply to human rights complaints, not that they inevitably would. Furthermore, the Investigator noted that the CAA and the *Montreal Convention* prevented only compensation for damages, and the Tribunal could make other remedial orders if they were

appropriate. Dr. Lukacs made the same point in his written submissions to the Investigator on February 17, 2018:

> The alleged discrimination is serious, and it is not "plain and clear" that there are little or no useful remedies available under the *Act*. The *Montreal Convention* does not affect the Canadian Human Rights Tribunal's broad corrective powers under s. 53(2)(a) of the *Act*.

[46] Despite adopting the findings, analysis and conclusion in paragraphs 60 to 68 of the Section 40/41 Report, the Commission does not appear to have considered whether remedies other than financial compensation might be appropriate in the event that Mr. Zoghbi's complaint were upheld. This may be due to the Investigator's conclusion at paragraph 68 that there was "no practical remedy that the Tribunal could order for the complainant in this matter". However, the Investigator's conclusion was premised, at least in part, on her conclusion that Mr. Zoghbi's complaint had been fully and finally settled. The Investigator reasoned that if Mr. Zoghbi had felt strongly about corrective measures, he could have insisted that they be included in the settlement he had negotiated.

[47] In his submissions on behalf of Mr. Zoghbi to the Commission, Dr. Lukacs objected that the Section 40/41 Report contained findings and conclusions respecting two issues based on Air Canada's *ex parte* submissions, without first providing Mr. Zoghbi an opportunity to address them. Dr. Lukacs asserted that a separate and distinct incident occurring in 2017 had been fully settled; however, Mr. Zoghbi never received any compensation in connection with the incident that occurred on December 20 and 21, 2016.

[48] The Commission specifically declined to consider the two issues for which Mr. Zoghbi had not received notice, including whether the complaint had been fully and finally settled. It was therefore unreasonable for the Commission to adopt the finding in the Section 40/41 Report that corrective measures other than financial compensation would not be useful, only because Mr. Zoghbi had not sought to include them in a settlement.

[49] More importantly, a complainant's preferences regarding remedies and corrective measures does not bind either the Commission or the Tribunal. When a complaint is found to be worthy of investigation or is ultimately substantiated, both of these administrative bodies have an independent power and duty to identify remedies that are appropriate in the circumstances (CHRA, s 53(2)).

[50] Even if the principles enunciated by the Supreme Court of Canada in *Thibodeau* would preclude financial compensation for breaches of human rights that occur in the context of international air travel, that is not the end of the matter. As the majority of the Supreme Court held in *Thibodeau* (*per* Cromwell JA at paras 89 and 90):

> [89] Courts presume that legislation passed by Parliament does not contain contradictions or inconsistencies and only find that they exist when provisions are so inconsistent that they are incapable of standing together. Even where provisions overlap in the sense that they address aspects of the same subject, they are interpreted so as to avoid conflict wherever this is possible.
>
> [90] When we apply these principles, we see that the provisions in issue here do not conflict. They have markedly different purposes. The remedial provisions in the *OLA* cannot be understood to be an exhaustive code that requires damages to be available in all settings and without regard to all other relevant laws. Moreover, the power to grant an "appropriate and just" remedy may easily be

> reconciled with the specific and limited exclusion of damages in the context of international air travel. A remedy is not "appropriate and just" if awarding it would constitute a breach of Canada's international obligations under the *Montreal Convention*.

[51] Counsel for Mr. Zoghbi argues that the remedial provisions of the OLA differ from those contained in the CHRA, and the latter are in direct conflict with the *Montreal Convention*. For the purposes of this proceeding, I note only that s 53(2) of the CHRA confers upon the Tribunal a power to order a broad range of terms "that the member or panel considers appropriate". These include ordering that a person cease the discriminatory practice and take measures, in consultation with the Commission, to redress the practice or to prevent the same or a similar practice from occurring in future, including (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or (ii) making an application for approval and implementing a plan under s 17 of the CHRA.

[52] The Commission assumed that the possible unavailability of financial compensation for breaches of human rights in the context of international air travel was a bar to all meaningful remedies. The Commission failed to consider whether other remedies, such as measures to redress the alleged discriminatory practice or prevent similar practices from occurring in future, might be appropriate. Its decision to dismiss Mr. Zoghbi's complaint as trivial was therefore unreasonable.

E. *Should this Court decide the constitutional question?*

[53] In his written submissions on behalf of Mr. Zoghbi dated February 17, 2018, Dr. Lukacs raised the following constitutional issue:

> Alternatively, if the *Montreal Convention* did apply and if it did limit Mr. Zhoghbi's [sic] rights under the *Canadian Human Rights Act*, then the *Carriage by Air Act* implementing the *Convention* violates s. 15 of the *Charter*, and as such should be "read down."

[54] The Investigator acknowledged Dr. Lukacs' *Charter* argument at paragraph 57 of the Section 40/41 Report, but did not address it further. The Commission did not acknowledge or address the *Charter* argument at all.

[55] Mr. Zoghbi's counsel issued a Notice of Constitutional Question on November 2, 2020, and filed it with this Court on November 6, 2020. The Notice of Constitutional Question was served on the Attorney General of Canada and the Attorneys General of all provinces and territories. None of them have sought to intervene in this proceeding.

[56] Air Canada has not responded to Mr. Zoghbi's constitutional arguments, beyond asserting that they are improperly framed, unsupported by evidence, and unnecessary to resolve the application for judicial review.

[57] In *Fraser v Canada (Attorney General)*, 2020 SCC 28 [*Fraser*], the Supreme Court of Canada (*per* Abella JA) recognized that two types of evidence will be especially helpful in

proving that a law has a disproportionate impact on members of a protected group. The first is evidence about the situation of the claimant group. The second is evidence about the results of the law (*Fraser* at para 56).

[58] Courts will benefit from evidence about the physical, social, cultural or other barriers which provide the "full context of the claimant group's situation". This evidence may come from the claimant, from expert witnesses, or through judicial notice. When evaluating evidence about the group, courts should be mindful of the fact that issues which predominantly affect certain populations may be under-documented. These claimants may have to rely more heavily on their own evidence or evidence from other members of their group, rather than on government reports, academic studies or expert testimony (*Fraser* at para 57).

[59] Courts will also benefit from evidence about the outcomes that the impugned law or policy (or a substantially similar one) has produced in practice. Evidence about the "results of a system" may provide concrete proof that members of protected groups are being disproportionately affected. This evidence may include statistics, especially if the pool of people adversely affected by a criterion or standard includes both members of a protected group and members of more advantaged groups (*Fraser* at para 58).

[60] The Commission dismissed Mr. Zoghbi's complaint without assessing its merits. There is scant evidence before this Court about the circumstances that gave rise to his human rights complaint, and none of this has been tested by cross-examination or otherwise. There is no evidence before this Court about the physical, social, cultural or other barriers which provide the

"full context of the claimant group's situation". Nor is there any evidence of the outcomes that the impugned law or policy, or a substantially similar one, has produced in practice. Instead, Mr. Zoghbi says that "[t]his Court should take judicial notice that groups defined by race and/or ethnic origin and/or colour and/or religion have been disproportionately affected by the effective exclusion of international aviation from the *CHRA*" (Applicant's Memorandum of Fact and Law at para 62).

[61] This Court has not had the benefit of any substantive argument or evidence from Air Canada, nor from the Attorney General of Canada or any of the provincial or territorial Attorneys General. Given the dearth of evidence and argument, the Court is not in a position to determine Mr. Zoghbi's multi-faceted and potentially far-reaching *Charter* challenge, particularly given the potential implications for Canada's compliance with its international obligations. Nor is it necessary for the Court to decide the constitutional question in order to determine the application for judicial review.

[62] This Court must therefore decline to decide the constitutional question.

VI. Conclusion

[63] The application for judicial review is allowed, and the matter is remitted to the Commission for redetermination in accordance with these Reasons for Judgment.

[64] In its redetermination of whether to proceed with Mr. Zoghbi's complaint, the Commission should permit Mr. Zoghbi a further opportunity to adduce evidence and arguments respecting all factual and legal issues raised by his complaint. To the extent necessary, the Commission should adjust its usual administrative proceedings to ensure the process is fair to both Mr. Zoghbi and Air Canada.

[65] If the Commission concludes that Mr. Zoghbi's complaint has not been fully and finally settled, and is not barred by s 41(1)(b) of the CHRA, then the Commission may choose to defer the question of remedies until it has decided whether to refer the complaint to the Tribunal. The Tribunal may ultimately be better placed than the Commission to identify appropriate remedies if, following a full factual enquiry, the Tribunal determines that the complaint is well-founded.

VII. Costs

[66] If the parties are unable to agree upon costs, they may make written submissions, not exceeding five (5) pages, within fourteen (14) days of the date of these Reasons for Judgment. Responding submissions, not exceeding two (2) pages, may be made within seven (7) days thereafter.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, and the matter is remitted to the Canadian Human Rights Commission for redetermination in accordance with the Reasons for Judgment.

2. If the parties are unable to agree upon costs, they may make written submissions, not exceeding five (5) pages, within fourteen (14) days of the date of this Judgment. Responding submissions, not exceeding two (2) pages, may be made within seven (7) days thereafter.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	BY VIDEOCONFERENCE BETWEEN TORONTO AND OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 21, 2021
JUDGMENT AND REASONS:	FOTHERGILL J.
DATED:	OCTOBER 28, 2021

APPEARANCES:

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Clay Hunter Jiwan Son	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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