

**Date: 20051125**

**Docket: T-1054-04**

**Citation: 2005 FC 1600**

**Ottawa, Ontario, November 25, 2005**

**PRESENT: THE HONOURABLE MADAM JUSTICE JOHANNE GAUTHIER**

**BETWEEN:**

**MOSTAFA BEN KIRANE**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR ORDER AND ORDER**

**GAUTHIER, J.**

[1] Mr. Ben Kirane asks the Court to set aside the decision of the Canadian Human Rights Commission dismissing his complaint against the Canadian Security Information Service (CSIS) on the following ground:

[TRANSLATION]

The evidence does not support the complainant's allegation that the annual report by the respondent discriminates against the Sunni Muslim community.

[2] In his complaint of July 3, 2003, Mr. Ben Kirane stated, *inter alia*, the following:

[TRANSLATION]

I believe that I have been discriminated against on the grounds of my religion . . . . I read an article . . . (in daily newspaper *La Presse*) entitled “Le Canada, cible de choix des terroristes,” which was defended by Wayne Easter, the Solicitor General, in the House of Commons in Ottawa. However, the linking of “terrorists” with “Islamic” and “Sunni” was intolerable. To single out “Sunnis” discriminates in a way that deprives them of their right to equality and peaceful enjoyment . . . . These terms are used in CSIS’ annual report, which seems discriminatory to me in a way that could and indeed does spread hatred against the Muslim community and misleads Canadian society . . . . I believe that by targeting “terrorists,” the article (Report) also targets the “Muslims” appearing in the same article by linking the two groups and in turn targets Islam, the religion to which I belong.

[3] It should be noted that, before the Commission delivered its decision, Mr. Ben Kirane had not read the CSIS annual report for 2002, although he has since done so.

[4] In her report dated December 16, 2003, the CHRC investigator noted that section 12 of the *Canadian Security Intelligence Service Act*, R.S. 1985, c. C-23, (CSISA) defines the principal function of CSIS in terms of investigation and states that CSIS shall report to the Government of Canada respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada.

[5] The investigator also stated that, in her opinion, a reasonable person reading the report (objective standard) would not think that the wording expressed or implied discriminatory practices

against the Sunni Muslim community to which Mr. Ben Kirane belongs. She recommended that the complaint be dismissed.

[6] The investigation report was submitted to the applicant to give him an opportunity to file additional submissions with the Commission before it made its decision. He exercised this right and submitted his comments on January 19, 2003.

[7] In his letter, Mr. Ben Kirane stated that his complaint was made under section 13 of the *Canadian Human Rights Act*, R.S. 1985, c. H-6 (the Act), not under section 12, as stated by the investigator (text appended). He also noted that the ground of discrimination on which he relied was religion.

[8] Essentially, Mr. Ben Kirane argued before the Commission that the very wording of the CSIS report, in which the extremist terms “Islamic” and “Sunni” were juxtaposed in the context of a terrorist threat, certainly appeared [TRANSLATION] “to intentionally express or suggest discrimination against the Islamic/Sunni Muslim community”. Therefore, the investigator’s reading of the CSIS report was, in his opinion, flawed.

[9] Basing its decision on paragraph 44(3)(b) of the Act (text appended), the Commission dismissed the applicant’s complaint, as I stated above.

[10] In his first Memorandum of Facts and Law, Mr. Ben Kirane, who represented himself, did not raise a reviewable error by the Commission.

[11] In his supplementary memorandum and at the hearing, the applicant raised the following errors:

- (i) the Commission was unable to consider the annual report containing the discriminatory comments, because it had not been filed in evidence;
- (ii) the Commission's finding that the report did not contain discriminatory comments is unreasonable, since Islam preaches the middle path. Therefore, terrorism could not be Islamic, and an extremist could not be a Sunni;
- (iii) although it is true that section 12 of the Act covers the gist of his complaint, the Commission should still have considered section 13 of the Act, since the presentation of the CSIS report to the government was broadcast, and the contents of the presentation by Mr. Easter were definitely communicated by telephone to *La Presse*, which discussed them in its article of June 6, 2003; and
- (iv) the Commission's investigation was incomplete, since it held no hearings.

[12] The applicant also argued that he had been more severely discriminated against on the basis of his religion since publication of the report and had observed the same effect on the Sunni Muslim community in general.

## **ANALYSIS**

[13] As the Federal Court of Appeal noted recently in *Sheradan Gardner v. Attorney General of Canada (Canadian Human Rights Commission)*, 2005 FCA 284, [2005] F.C.J. No. 1442 (QL)

(F.C.A.), the standard of review applicable to decisions by the Commission rejecting a complaint under paragraph 44(3)(b) of the Act is reasonableness *simpliciter*.

[14] As was explained to the applicant at the hearing, this does not mean that the Court can simply substitute its own opinion or assessment of the evidence on record for that of the Commission. A decision is unreasonable only if none of the reasons that are sufficient to support it can stand up to a somewhat probing examination (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at paragraph 55).

[15] Furthermore, if a rule of natural justice has been breached, the Court must intervene and overturn the decision (*Ha v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 74 (QL) (F.C.A.), at paragraphs 42-45).

[16] In its review, the Court must examine all the documents considered by the Commission, including the report by the investigator who examined the article in *La Presse* quoted by the applicant as well as the CSIS' annual report for 2002.

[17] As the applicant acknowledged in the hearing, it is clear that the Commission and the investigator considered the CSIS annual report for 2002 before making their decision.

[18] Although the applicant did not file that document as evidence, the Commission had a duty to obtain it, since the article from *La Presse* was only a secondary source and, as the investigator noted, the Commission had no jurisdiction to entertain a complaint relating to the print media.<sup>1</sup>

[19] As to whether the Commission breached its duty of fairness, the Court notes that the Commission was never required to hold a hearing. The Commission is not a tribunal. Obviously, it had to obtain the applicant's version and allow him to add particulars to his complaint, where necessary.

[20] On reading Mr. Ben Kirane's affidavit (paragraph 9) and memorandum (paragraph 8, at page 55), it is clear that the investigator and Mr. Ben Kirane communicated with each other regularly during the investigation. Moreover, as I noted above, the applicant had an opportunity to comment on the investigator's report and to add particulars before a decision was rendered.

[21] From a reading of the Commission's decision, it is clear that the Commission considered the additional comments submitted by the applicant before dismissing his complaint. Therefore, the Court is satisfied that, under the circumstances, the rules of natural justice were not breached.

[22] Moreover, the Commission did not commit a reviewable error when it failed to consider as part of the investigation whether, since the presentation of the CSIS report, the applicant had been discriminated against in a way that could be attributed the report's dissemination. In fact, Mr. Ben Kirane never referred to such discriminatory practices in his complaint or in his submissions to the

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<sup>1</sup> Apparently, the applicant also filed a complaint against the journalist Joël-Denis Bellavance of *La Presse* with the Commission des droits de la personne et des droits de la jeunesse du Québec.

Commission. There is no evidence that he referred to such discriminatory practices in his communications with the investigator.

[23] On judicial review, the Court cannot consider evidence that was not before the decision maker.

[24] In this respect, it should also be noted that there is no indication that the applicant explained to the Commission why the juxtaposition of the terms “extremists” or “terrorists” with “Islamic” or “Sunni” was in itself contrary to the principles of Islam.

[25] At the hearing, the parties agreed that the most relevant excerpts from the CSIS report were the following:

Terrorism in Canada can be divided into roughly four categories: religious extremism, with various Sunni Islamic groups being the most serious threat at present; state-sponsored terrorism; secessionist violence, which encompasses Sikh extremism, and separatist movements in Sri Lanka, Turkey, Ireland and the Middle East; and domestic extremism, including some anti-abortion, animal rights, anti-globalization and environmental groups, a small but receptive audience for militia messages emanating from the United States, and white supremacists).

...

Sunni Islamic extremism remains the primary focus of the CSIS Counter Terrorism program. The September 11, 2001 attacks on the United States clearly demonstrated the threat that Sunni Islamic terrorist networks pose.  
[Emphasis added.]

[26] The Court acknowledges the applicant’s *bona fides* and personal conviction when he states that these passages target the Sunni community in general, rather than terrorists. However, the Court cannot conclude on that basis alone that the Commission has committed a reviewable error.

[27] Although the investigator referred only to section 12 of the Act in her report, the wording of her report clearly indicates that she examined the issue of whether the CSIS report implied discrimination against the Sunni Muslim community (hate propaganda), which speaks to the applicability of section 13. Moreover, nowhere in his complaint or comments did the applicant refer to the use of a telephone company or a telecommunication undertaking. He only raised these scenarios in the hearing before this Court.

[28] In any case, the Commission noted in its decision that it had considered all of the applicant's comments and thus his allegation that section 13 of the Act was applicable.

[29] The Court is satisfied that the Commission's decision to dismiss the complaint pursuant to that section was not unreasonable.

[30] Having thoroughly reviewed the file, the Court must conclude that the decision is reasonable.

**ORDER**

**THE COURT ORDERS that:**

The application is dismissed.

“Johanne Gauthier”

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Judge

Certified true translation  
Michael Palles

## ANNEX A

*Canadian Human Rights Act**Loi canadienne sur les droits de la personne*

**12.** It is a discriminatory practice to publish or display before the public or to cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation that

(a) expresses or implies discrimination or an intention to discriminate, or

(b) incites or is calculated to incite others to discriminate

if the discrimination expressed or implied, intended to be expressed or implied or incited or calculated to be incited would otherwise, if engaged in, be a discriminatory practice described in any of sections 5 to 11 or in section 14.

**13.** (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

(2) For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in

**12.** Constitue un acte discriminatoire le fait de publier ou d'exposer en public, ou de faire publier ou exposer en public des affiches, des écriteaux, des insignes, des emblèmes, des symboles ou autres représentations qui, selon le cas :

a) expriment ou suggèrent des actes discriminatoires au sens des articles 5 à 11 ou de l'article 14 ou des intentions de commettre de tels actes;

b) en encourageant ou visent à en encourager l'accomplissement.

**13.** (1) Constitue un acte discriminatoire le fait, pour une personne ou un groupe de personnes agissant d'un commun accord, d'utiliser ou de faire utiliser un téléphone de façon répétée en recourant ou en faisant recourir aux services d'une entreprise de télécommunication relevant de la compétence du Parlement pour aborder ou faire aborder des questions susceptibles d'exposer à la haine ou au mépris des personnes appartenant à un groupe identifiable sur la base des critères énoncés à l'article 3.

(2) Il demeure entendu que le paragraphe (1) s'applique à l'utilisation d'un ordinateur, d'un ensemble d'ordinateurs connectés ou reliés les uns aux autres, notamment d'Internet, ou de tout autre moyen de communication semblable mais qu'il ne s'applique pas dans les cas où les services d'une entreprise de radiodiffusion sont utilisés.

part by means of the facilities of a broadcasting undertaking.

(3) For the purposes of this section, no owner or operator of a telecommunication undertaking communicates or causes to be communicated any matter described in subsection (1) by reason only that the facilities of a telecommunication undertaking owned or operated by that person are used by other persons for the transmission of that matter.

(3) Pour l'application du présent article, le propriétaire ou exploitant d'une entreprise de télécommunication ne commet pas un acte discriminatoire du seul fait que des tiers ont utilisé ses installations pour aborder des questions visées au paragraphe (1).

**44** (3) On receipt of a report referred to in subsection (1), the Commission

...

(b) shall dismiss the complaint to which the report relates if it is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

**44** (3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :

...

b) rejette la plainte, si elle est convaincue :

(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,

(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).

***Canadian Security Intelligence Service Act***

*Duties and Functions of Service*

**12.** The Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, shall report to and advise the Government of Canada.

***Loi sur le service canadien du renseignement de sécurité***

*Fonctions du Service*

**12.** Le Service recueille, au moyen d'enquêtes ou autrement, dans la mesure strictement nécessaire, et analyse et conserve les informations et renseignements sur les activités dont il existe des motifs raisonnables de soupçonner qu'elles constituent des menaces envers la sécurité du Canada; il en fait rapport au gouvernement du Canada et le conseille à cet égard.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1054-04

**STYLE OF CAUSE:** MOSTAFA BEN KIRANE v. ATTORNEY GENERAL  
OF CANADA

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** November 15, 2005

**REASONS FOR JUDGMENT BY:** The Honourable Madam Justice Johanne Gauthier

**DATED:** November 25, 2005

**APPEARANCES:**

Mostafa Ben Kirane FOR THE APPLICANT

Paul Deschênes FOR THE RESPONDENT

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