Date: 20071025

Docket: T-190-05

Citation: 2007 FC 1100

TORONTO, Ontario, October 25, 2007

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

PAUL RICHARDS

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review regarding a decision of the Canadian Human Rights Commission (the Commission), dated December 29, 2004, which dismissed a complaint filed by Paul Richards (the applicant) against the Canadian Border Services Agency (CBSA). The supervision and control of the CBSA is part of the portfolio of the Minister of Public Safety and Emergency Preparedness, the respondent in these proceedings.

BACKGROUND

[2] The applicant is a Black, Canadian citizen, Jamaican-born male who wears his hair in dreadlocks. He is employed with the Ontario Human Rights Commission.

[3] On July 8, 2003, the applicant, returning from vacation in Jamaica, arrived at Lester B. Pearson International Airport in Toronto. The applicant reported to Customs for clearance. Approximately 900 people cleared customs at the same time as the applicant.

[4] The applicant was questioned three times: once by a primary inspector, once by a roving officer, and once by a secondary officer. He was asked to show the contents of his carry-on bag and to answer questions about his trip, including: What was his purpose for going to Jamaica, business or pleasure? What did he do there? Who did he stay with? How long did he stay with them? Was this the only place he stayed? Where did he travel to in Jamaica? Who did he visit? Was he "gainfully employed"? The applicant alleges that the officer at the secondary inspection scrutinized the applicant's unopened bottle of rum as if looking for drugs in the bottle. The applicant also claims that the roving and secondary officers ceased questioning the applicant and inspecting his documents and luggage once he advised them that he worked for the Ontario Human Rights Commission.

[5] On December 9, 2003, some five months after the incident, the applicant filed a human rights complaint with the Canadian Human Rights Commission, alleging that the CBSA officers racially profiled and discriminated against him on the basis of his race, colour, sex, national or ethnic origin and perceived religion. According to the applicant, he was singled out for greater or additional scrutiny:

> For the officers he looked the part of a suspect – he fit the profile of a drug smuggler as a Black man with dreadlocks coming from a "source" country. The officer's actions were based on stereotypical assumptions about the criminality of African Canadian males…and about his perceived religion or lifestyle (Rastafarianism) with drugs being part of that lifestyle. To single out and treat someone differently because of how they look is racial profiling.
>
> (para. 10, Applicant's Memorandum, page 542, Applicant's Record)

DECISION UNDER REVIEW

[6] The Commission appointed Mr. Dale Akerstrom to investigate the complaint. He issued a report dated September 21, 2004 and recommended that "pursuant to paragraph 44(3)(b) of the *Canadian Human Rights Act*…the Commission dismiss the complaint, because the information gathered does not support the allegation" (para. 22, Investigator's Report, page 84, Applicant's Record). The investigator made the following conclusions:

a. Unusual scrutiny – The scrutiny the complainant received was not unusual. "It is clear that Customs officers have a duty to ensure that banned substances and undeclared items are not brought into Canada, and that the Customs Act obligates a traveller to answer 'any questions' asked by the officer in the performance of his or her duties". Although the complainant was of the opinion that the questioning by CBSA officers was intrusive or unwarranted, "no comparative information was obtained…to indicate that this was an unusually-detailed or unreasonably lengthy examination".
b. Unreasonable scrutiny – It was not unreasonable for the complainant to be asked questions and be required to show the contents of his bag by the officers in the performance of their duties. "It would seem reasonable that a Customs officer would have to satisfy himself that a person who appears to be an adherent of a religion that has as one of its practices the use of an illegal substance is not, in fact, bringing that illegal substance with him. Contrary to the complainant's statement that the questions they asked were about his 'character,' the complainant's own information indicates that the questions related to his travel itinerary and occupation, not his innate characteristics".

c. Unusual, unfair scrutiny relating to a prohibited ground – "The information gathered does not support that the complainant was differentially, adversely treated, and therefore there is no cause to determine if the reason for the treatment was related to a prohibited ground". The information does not support the finding that the complainant's treatment was unusual or unreasonable, therefore the question "whether or not that unusual, unfair scrutiny was because of his race, colour, national or ethnic origin, or perceived religion" is moot.

(See paragraph19-21 of the Investigator's Report found in the Respondent's Record at page 83.)

[7] On December 29, 2004, the Commission adopted the recommendations of the investigator and dismissed the applicant's complaint on the ground that "the information gathered does not support the allegation" (Letter from Lucie Veillette, Secretary to the Commission, page 478, Applicant's Record).

ISSUES

[8] The respondent raised a preliminary issue concerning the admissibility of the Minutes of Settlement from *Pieters v. Department of National Revenue (Canada Customs and Revenue Agency)*, (2002), File No. T650-3801 (CHRT), which the applicant included in his record in support of his application for judicial review. The respondent submits that, although the issue of the settlement was raised by the applicant at the Commission, the settlement document itself was not before the Commission when it rendered its decision. According to the respondent, this document is not admissible evidence on this judicial review, since it was not part of the certified Rule 318 Record filed in this proceeding and is a confidential settlement document negotiated between parties unrelated to this proceeding.

[9] It is a well established principle that applications for judicial review are conducted on the basis of the material that was before the administrative decision-maker. However, affidavit evidence may be admitted on issues of procedural fairness and jurisdiction (*Assn. of Architects (Ont.) v. Assn. of Architectural Technologists of Ontario* (2002), 215 D.L.R. (4th) 550 (F.C.A.), leave to appeal to S.C.C. refused, (2003), 23 C.P.R. (4th) vii).

[10] It is unclear whether the Minutes of Settlement were properly introduced as evidence before the Commission. In the applicant's Response to the Investigator's Report, he mentioned the settlement between Pieters and Canada Customs Revenue Agency without any specific reference to the file number, the date of the settlement, or any other information about the settlement that would indicate to the Commission, with clarity, the settlement agreement to which he was referring (Letter from applicant to Mr. Harry Monk, October 14, 2004, page 490, Applicant's Record). More importantly, although the applicant submitted copies of other documents that he referred to in his Letter of Response, the applicant did not provide the Commission with a copy of the Minutes of Settlement. Therefore, it is difficult to ascertain whether the Minutes of Settlement were properly introduced as evidence before the Commission and were therefore before the original decision-maker. Another reference to the settlement agreement appeared in a letter, dated October 20, 2004 from the applicant's counsel, Mr. James A. Girvin, to Mr. Harry Monk, the Director BC and Yukon Region of the Canadian human Rights Commission in which he refers to the settlement as a complaint relating to racial profiling settled by Canada Customs in 2002 (see Applicant's Record, page 476). Although this letter goes on to outline specific terms in the settlement agreement, it is not

known whether it is the Canada Customs agreement with Pieters that is referred to or some other agreement between CBSA and another individual. Regardless, this second reference to the agreement appeared in a letter that was not included in the record as it was received by the Commission after the submission deadline and no extension was given (see Memorandum to File from Dale Akerstrom, October 20, 2004, page 523, Applicant's Record). Thus, this reference to the settlement agreement is irrelevant.

[11] Despite this uncertainty, the applicant has raised a question of procedural fairness and has included this material in his record in support of arguments on that issue. Thus, the Court would normally be inclined to accept the new material as it relates to this matter. However, after scrutinizing the document more closely, it is clear that it is a confidential settlement document between two parties unrelated to these proceedings. The applicant was not involved in the settlement and so he cannot rely on the terms of that settlement to further his own case as each case is decided on its own facts. It is for all of the above reasons that the Minutes of Settlement will not be given much weight on this judicial review of the Commission's decision.

[12] I am satisfied the issues in this case can be framed as follows:

1. What is the appropriate standard of review?
2. Did the Commission commit an error of law in making its decision to refer or reject the applicant's complaint during the screening process?
3. Did the Commission breach the principles of procedural fairness by failing to investigate the complaint in a neutral and thorough manner?

ANALYSIS

1. What is the standard of review?

[13] Where the Commission makes a screening decision pursuant to section 44(3) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [the "CHRA"]), adopts an investigator's recommendations, and provides no reasons or only brief reasons, as in this application, the Courts have treated the Investigator's Report as constituting the Commission's reasoning (*Sketchley v. Canada (Attorney General)*, [2006] 3 F.C.R. 392 at para. 37; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 [SEPQA]). The investigator is not someone independent of the Commission. Rather the investigator is an extension of the Commission and prepares the report for the Commission. Thus, the reasons in the Investigator's Report are the subject of review in this application.

[14] I am satisfied the appropriate standard of review with respect to breaches of procedural fairness is correctness (*Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221 at para. 65). No deference is owed to the decision-maker when reviewing questions of this nature.

[15] In order to determine the appropriate standard of review for whether the Commission committed an error of law in its decision to refer or reject the applicant's complaint during the screening process, a pragmatic and functional analysis must be applied.

The presence or absence of a privative clause or statutory right of appeal

[16] The CHRA contains neither a privative clause nor a statutory right of appeal. The Supreme Court has indicated that a statute's silence is neutral and does not imply a high standard of scrutiny (*Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 27). Thus, the first factor, the presence or absence of a privative clause, is neutral in this case.

The expertise of the tribunal relative to that of the reviewing court on the issue in question

[17] The issue here is the Commission's decision to reject a complaint or refer it to conciliation or to the Tribunal. This question directly engages the expertise of the Commission in its fact-finding role with respect to human rights. As this Court recognized in *MacLean v. Marine Atlantic Inc.*, 2003 FC 1459 at para. 38, like a finding of discrimination, fact-finding in screening complaints based on an investigation report is impregnated by facts, facts which the Board of Inquiry is in the best position to evaluate. In this context, the Commission's expertise is superior to the courts, which suggests greater deference on judicial review.

The purpose of the legislation and the provision in particular

[18] The purpose of the CHRA is found in Section 2 of the Act:

> The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

In carrying out its statutory purpose, Parliament has given the Commission wide discretion to dismiss complaints where it is satisfied that further inquiry is not warranted. As noted by the Federal Court of Appeal in *Bell Canada v. Communications, Energy and Paperworker's Union of Canada* (1998), [1999] 1 F.C. 113 (C.A.), Parliament intended the Commission to enjoy a great degree of latitude when performing its screening function on receipt of an investigation report. The language in subsections 40(2) and 40(4) and sections 41 and 44 leaves no doubt that Parliament did not want the Court to intervene lightly in the screening decisions of the Commission. This factor suggests that deference be given to the Commission's decision.

The nature of the question – law, fact or mixed law and fact

[19] The issue of whether the Commission committed an error of law in making its decision to refer or reject the applicant's complaint during the screening process is a question of mixed fact and law. In making its decision to reject or refer the complaint, the Commission assessed the information gathered by the investigator and decided, pursuant to subsection 44(3) of the CHRA, that the evidence did not support the allegations in the complaint. This final factor favours deference on judicial review.

[20] The pragmatic and functional analysis indicates that the standard of review in determining whether the Commission erred in law when making its decision to refer or reject the applicant's complaint during the screening process is reasonableness *simpliciter*.

2. Did the Commission commit an error of law in making its decision to refer or reject the applicant's complaint during the screening process?

[21] The applicant submits that the investigator, and therefore the Commission, omitted and, consequentially, did not apply the appropriate test for racial profiling and discrimination. According to the applicant:

> [t]he legal analysis which the investigator was required to apply under the *Act* is simply not addressed in the Investigator's Report. Instead, the investigator characterizes the issues as whether the Applicant received unusual scrutiny by the Customs officers, whether the scrutiny was unfair and unreasonable, and whether it was because of the pleaded prohibited grounds.
>
> (para. 37, Applicant's Memorandum, page 552, Applicant's Record)

[22] The applicant goes on to suggest that the investigator undertook the wrong analysis, which "demonstrates a fundamental misapprehension of what constitutes racial discrimination in the form of racial profiling" (para. 37, Applicant's Memorandum, page 552, Applicant's Record). This analysis was flawed, argues the applicant, because it did not acknowledge elements of racial profiling, namely: the types of anti-Black stereotypes that may have operated at the time of the incident; the role that such anti-Black stereotypes may have played in the officers' decisions to single out the applicant for questioning and search, and does not examine the surrounding circumstances and take the required inferential approach. In the applicant's view, this is a fundamental error of law.

[23] I disagree with the applicant. The investigator's role is to investigate complaints, collect evidence, and submit a report of his or her findings to the Commission. It is essentially a fact-

finding mission. It is not the investigator's duty to apply the law to a set of facts and determine whether a case of discrimination has been made out.

[24] Likewise, the Commission did not err by omitting or misapplying the test for racial profiling and discrimination. Contrary to the argument of the applicant, the test that the Commission must apply upon receiving an Investigation Report is not the same legal test that a Tribunal applies when conducting a hearing into a complaint of discrimination. While a Tribunal appointed by the Commission considers whether a complaint has met the *prima facie* test for discrimination, the Commission assesses the sufficiency of the evidence before it to determine whether a full Tribunal hearing into a complaint is warranted:

> The Commission is not an adjudicative body; that is the role of a tribunal appointed under the Act. When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it.
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> (*Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 at para. 53.)

Although the Supreme Court of Canada later determined in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504, that the ratio in *Cooper* was no longer good law, I am satisfied the Supreme Court's statement in *Cooper*, as it relates to the role of the Commission, remains true.

[25] The test to be applied by the Commission was not to determine if the actions of the CBSA officers constituted a *prima facie* case of racial profiling, and thus, racial discrimination. Instead, the Commission was to examine the evidence and dismiss the complaint if it was satisfied that, having regard to all the circumstances of the complaint, an inquiry into the complaint was not warranted (s. 44(3)(b), CHRA). Thus, the Commission did not commit an error of law by omitting or failing to apply the correct test.

[26] In addition, in *SEPQA*, the Supreme Court discussed the analysis undertaken by the Commission when determining whether to dismiss a complaint or proceed to appoint a Tribunal, stating:

> [Subsection] 44(3) of the [CHRA] provides that, upon receipt of the report of the investigator, the Commission may request the appointment of a tribunal if it is satisfied that, having regard to all the circumstances, an inquiry into the compliant is warranted.
>
> The other course of action is to dismiss the complaint. In my opinion, it is the intention of s. 36(3)(b) [now section 44(3)(b)] that this occur where there is insufficient evidence to warrant appointment of a tribunal under s. 39. It is not intended that this be a determination where the evidence is weighed as in a judicial proceeding but rather *the Commission must determine whether there is a reasonable basis in the evidence for proceeding to the next stage*.
>
> (*SEPQA*, above, at 899.)

[27] I am satisfied it was not unreasonable for the Commission to conclude that, based on the evidence before it, there was no reasonable basis in the evidence to refer the complaint to the next stage. In his complaint, the applicant alleged that he was treated in an adverse differential manner by

the respondent in the provision of a service (Customs clearance), in that he was subjected to greater scrutiny, on the basis of his race, colour, sex, national or ethnic origin, and perceived religious practice.

[28] As the investigator noted in his report, the applicant, himself, admitted that he looks like a member of a religious group that uses marijuana as part of its religious practice. The applicant also agreed that the officer's who interviewed him were trying to determine if he was bringing marijuana or drugs with him into Canada and that this was a legitimate duty of Customs officers to do so. In the applicant's mind, however, the questioning was "intrusive" because the second officer asked him detailed questions about his movements and itinerary and he was asked "more than the standard questions". According to the applicant, the Customs officers did not need to ask him questions to determine if he was smuggling drugs but instead should have determined this using x-ray machines and sniffer dogs.

[29] The Customs officers, in exercising their duties, must ensure that the *Customs Act*, R.S.C. 1985, (2nd Supp.), c. 1, and any other Act of Parliament enforced by the officer or any regulations thereunder are not contravened. In their questioning of the applicant and their inspection of his carry-on bag, the bottle of rum, and his luggage, the Customs officers acted in compliance with the powers conferred upon them by the *Customs Act*. They did not act in a manner that extended beyond the scope of authority granted to them by law. The *Customs Act* authorizes Customs officers to ask questions and to inspect goods in the performance of their duties under the *Act* (see sections 11-13, 99). The Commission found that, based on this evidence, the applicant was not subjected to

unusual or unreasonable scrutiny. Thus, there was no reasonable basis on the evidence for the compliant to proceed to the next stage. Furthermore, had the Customs Officers not asked the ordinary questions that they did, or inspected the Applicant's carry-on bag and/or his luggage, they would have failed to perform their duty as was expected of them.

[30] It is not for this Court, on judicial review, to undertake a reweighing of the evidence. As Parliament has clearly indicated, the Court must not interfere lightly in the decisions of the Commission when it is exercising its discretion to refer or reject complaints. The Court must defer to the expertise of the Commission. As such, I do not find that the Commission's conclusion was unreasonable and, consequentially, I see no reason to interfere with its decision on these grounds.

3. Did the Commission breach the principles of procedural fairness by failing to investigate the complaint in a neutral and thorough manner?

[31] In *Miller v. Canada (Canadian Human Rights Commission (Re Goldberg*, [1996] F.C.J. No. 735 (QL) at para. 10*)*, Justice Jean-Eudes Dubé of the Federal Court of Canada summarized the evolution of the jurisprudence concerning procedural fairness after the Supreme Court of Canada's decision in *SEPQA*:

> [P]rocedural fairness requires that the Commission have an adequate and fair basis upon which to evaluate whether there was sufficient evidence to warrant the appointment of a Tribunal. The investigations conducted by the investigator prior to the decision must satisfy at least two conditions: neutrality and thoroughness. In other words, the investigation must be conducted in a manner which cannot be characterized as biased or unfair and the investigation must be thorough in the sense that it must be mindful of the various interests of the parties involved.

[32] The requirement of thoroughness in an investigation stems from the essential role that investigators play in determining the merits of particular complaints (*Slattery v. Canada (Human Rights Commission*), [1994] 2 F.C. 574 at 599). Judicial review is warranted only where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence (*Slattery*, above, at 600). Where there exists a deficient investigation, the Commission's decision will be tainted, since "[i]f the reports were defective, it follows that the Commission was not in possession of sufficient relevant information upon which it could properly exercise its discretion" (*Grover v. Canada (National Research Council)*, 2001 FCT 687 at para. 70; see also *Singh (S.K.) v. Canada (Attorney General)*, 291 N.R. 365 at para. 7 (C.A.) and *Kollar v. Canadian Imperial Bank of Commerce*, 2002 FCT 848 at para. 40).

[33] In the case at bar, the applicant submits that the investigation lacks thoroughness, because the investigator failed to apply the correct legal test. He suggests that, by failing to apply the correct legal test, the investigator failed to conduct his investigation and analyze the facts with a critical understanding of what constitutes racial profiling. As a result, argues the applicant, the investigator made investigative omissions such as the failure to examine the totality of the circumstances, failure to make critical inquiries related to the test for racial profiling, failure to investigate the matter with neutrality, and failure to conduct the thorough investigation needed where there is unconscious, subtle or systemic racism (para. 42, Applicant's Memorandum, pages 553-554, Applicant's Record).

[34] I have already concluded that the investigator did not err by omitting or misapplying the correct legal test. Thus, I must also disagree with the applicant's assertion that the misapplication of the correct legal test caused the investigator to make investigative omissions. I see no reason to question the thoroughness or neutrality of the investigation in the case at bar. Thus, I am satisfied that the Commission did not breach the rules of procedural fairness.

[35] At the conclusion of the Respondent's submissions, counsel for the Respondent asked that the Applicant's application be dismissed with costs.

[36] At the conclusion of the Applicant's reply to the Respondent's submissions, the Applicant asked the Court to allow the application with costs but also asked that, in the event the Court should dismiss the application for judicial review, it should be without costs.

[37] After considering the above request, I can see no reason why the Court should dismiss the Applicant's application without costs.

JUDGMENT

THIS COURT ADJUDGES that the application for judicial review be dismissed with costs in favour of the Respondent.

"Max M. Teitelbaum"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-190-05
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