HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Majid Pourostad

Applicant

-and-

The Law Society of Ontario

Respondent

DECISION

Adjudicator:	Douglas Sanderson
Date:	January 28, 2019
File Number:	2017-28461-I
Citation:	2019 HRTO 130
Indexed as:	**Pourostad v. The Law Society of Ontario**

APPEARANCES

Majid Pourostad, Applicant	)	Self-represented
Law Society of Ontario, Respondent	)	Geoffrey Wiebe, Counsel

[1] This is an Application filed under s. 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), alleging discrimination with respect to vocational association because of citizenship.

[2] The applicant is an Iranian trained lawyer and holds a licence granted by the Iranian Central Bar Association. The applicant states that he applied to the respondent for a Foreign Legal Consultant ("FLC") permit to allow him to give advice about Iranian law. The respondent denied the applicant's application pursuant to section 4(1) of By-Law 14 of the *Law Society Act*, R.S.O. 1990, c.L.8 (the "*LSA*"). Section 4(1) of By-Law 14 imposes a "reciprocity requirement". That is, for a person to be eligible for a FLC permit to give legal advice in Ontario regarding the law of a foreign jurisdiction, that foreign jurisdiction must also have a provision with respect to providing legal advice about Ontario or Canadian law in that foreign jurisdiction. Iran does not have such a provision; therefore, the respondent informed him that he was ineligible for a FLC. The applicant alleges that this requirement discriminates against him because of his citizenship. The applicant also alleges that the reciprocity requirement violates the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The respondent's position is that the reciprocity requirement is not related to a FLC permit applicant's citizenship and that the applicant was neither applying for membership in a vocational association nor in a service relationship with the respondent. The respondent also submitted that the Tribunal has no jurisdiction to adjudicate stand-alone *Charter* claims.

THE HEARING

[3] By Case Assessment Direction dated June 8, 2018, the Tribunal ordered that a summary hearing be held to determine whether the Tribunal should dismiss the Application because it has no reasonable prospect of success and to address the jurisdictional objections raised by the respondent. The Tribunal held the summary hearing by teleconference.

NO REASONABLE APPREHENSION OF BIAS

[4] In his written submissions, the applicant raised the issue of bias because I am a member of the Law Society of Ontario ("LSO"), the respondent. The applicant submitted that, as a result, he has serious doubts about my independence and impartiality from the respondent. The applicant requested that the Tribunal replace me with an adjudicator who is not a member of the LSO.

[5] The test or principles to be applied in considering allegations of reasonable apprehension of bias are set out in the Supreme Court of Canada's decision in *Committee for Justice and Liberty v. National Energy Board* [1970] 1 S.C.R. 369 at page 364:

> …the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[6] In *Wewaykum Indian Band v. Canada,* 2003 SCC 45, the Supreme Court of Canada confirmed the existence and importance of a strong presumption of judicial or quasi-judicial impartiality. In order to overcome the presumption, the party alleging a reasonable apprehension of bias must establish the presence of serious grounds. The inquiry is fact-specific and contextual. During the hearing, I ruled that the applicant did not meet his onus to establish the serious grounds necessary to overcome the presumption of impartiality. The following are my reasons.

[7] The applicant essentially made a bald assertion that an adjudicator who is a member of the LSO cannot be impartial in cases where the LSO is a party. The applicant did not provide any basis for this assertion. As the respondent submitted, lawyers often perform adjudicative functions and it is important for statutory decision makers such as the Tribunal to have experienced adjudicators. The respondent

submitted that litigation involving the LSO would be difficult if lawyers could not act as adjudicators where it is a party. As a practical matter, I also note that at present all the Tribunal's adjudicators are lawyers and presumably members of the LSO. In any event, the applicant provided no real basis for questioning my impartiality and in my view an informed observer would conclude that it is more probable than not that this matter would be decided fairly.

ANALYSIS AND DECISION

[8] Rule 19A.1 of the Tribunal's Rules of Procedure provides:

> The Tribunal may hold a summary hearing, on its own initiative or at the request of a party, on the question of whether an Application should be dismissed in whole or in part on the basis that there is no reasonable prospect that the Application or part of the Application will succeed.

No Reasonable Prospect of Success

[9] In *Dabic v. Windsor Police Service*, 2010 HRTO 1994, the Tribunal made the following comments at paragraphs 8-10:

> In some cases, the issue at the summary hearing may be whether, assuming all the allegations in the application to be true, it has a reasonable prospect of success. In these cases, the focus will generally be on the legal analysis and whether what the applicant alleges may be reasonably considered to amount to a *Code* violation.
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> In other cases, the focus of the summary hearing may be on whether there is a reasonable prospect that the applicant can prove, on a balance of probabilities, that his or her *Code* rights were violated. Often, such cases will deal with whether the applicant can show a link between an event and the grounds upon which he or she makes the claim. The issue will be whether there is a reasonable prospect that evidence the applicant has or that is reasonably available to him or her can show a link between the event and the alleged prohibited ground.
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> In considering what evidence is reasonably available to the applicant, the Tribunal must be attentive to the fact that in some cases of alleged discrimination, information about the reasons for the actions taken by a respondent are within the sole knowledge of the respondent. Evidence about the reasons for actions taken by a respondent may sometimes

> come through the disclosure process and through cross-examination of the people involved. The Tribunal must consider whether there is a reasonable prospect that such evidence may lead to a finding of discrimination. However, when there is no reasonable prospect that any such evidence could allow the applicant to prove his or her case on a balance of probabilities, the application must be dismissed following the summary hearing.

[10] The Tribunal has stated on many occasions that it does not have a general power to deal with allegations of unfairness. See, for example, *Forde v. Elementary Teachers' Federation of Ontario*, 2011 HRTO 1389; *Szabo v. Office of a Member of Parliament of Canada*, 2011 HRTO 2201; and *Badvi v. Voyageur Transportation*, 2011 HRTO 1319. Discrimination generally involves an allegation of unfair treatment on the basis of one or more of the grounds under the *Code*, such as race, colour or ethnic origin. Unfair treatment is not discriminatory in the legal sense unless there is proof that one or more of these personal characteristics was a factor in the treatment the applicant experienced. At the summary hearing stage, the Tribunal does not determine whether the applicant is telling the truth or assess the impact of the treatment they experienced. There is no question that acts of unfairness that are not legally discriminatory can cause significant harm.

[11] At a summary hearing, the test the Tribunal applies is that of no reasonable prospect of success, which is determined by assuming the applicant's version of events is true unless there is some clear evidence to the contrary. Accepting the facts alleged by the applicant does not include accepting the applicant's assumptions about why they were treated unfairly. The mere fact that a person identified by a prohibited ground of discrimination experiences some kind of disagreeable or unfair treatment is not generally sufficient to support an inference of discrimination. The question that the Tribunal must decide at a summary hearing is whether there is likely to be sufficient direct or indirect evidence available to connect the unfair treatment experienced by the applicant with the applicant's personal characteristics. However, if the applicant is unable to point to circumstances beyond his or her own assumptions or belief, the application may be found to have no reasonable prospect of success.

[12] The applicant submitted that there is an implied reciprocity agreement in place between Ontario and Iran. In support of this argument, the applicant pointed to evidence of three lawyers in Iran who give advice about Ontario law. The applicant submitted that if the respondent accepted that such an implied agreement was in place, then it was unnecessary to address the other issues identified in the Case Assessment Direction of June 8, 2018. I pointed out to the applicant that the Tribunal is not an appellate body that reviews the respondent's decisions for correctness. Accordingly, I asked the applicant to explain, assuming an implied reciprocity agreement was in fact in place, how the respondent's decision not to consider his application for a FLC permit was a violation of the *Code*. The applicant submitted that if the respondent accepts that there is an implied reciprocity agreement, then the decision to deny him a FLC permit is a violation of section 6 of the *Code*.

[13] The applicant also submitted in his written submissions that the discrimination in this case is based on the national laws of Iran. The applicant submitted that "national laws" is a subcategory of the prohibited ground of "citizenship" and therefore falls within *Code* and that "national law" is an analogous ground to citizenship.

[14] "National law" is not a *Code* ground. The Tribunal has accepted that certain personal characteristics that are not enumerated under the *Code* can be proxies for prohibited grounds of discrimination. For example, the Tribunal has stated that language may be a proxy for *Code* grounds such as race, ethnic origin or place of origin. See, *Chau v. Olymel*, 2009 HRTO 1386. At a summary hearing, the applicant bears the onus of pointing to evidence in his possession or that maybe reasonably available to the applicant that a distinction made on an unenumerated characteristic is in fact a proxy for a *Code* ground. In this case, the applicant pointed to no evidence that would support a finding that the respondent's reliance on Iranian "national law", i.e., the lack of a reciprocity agreement, can be taken as disapproval of the applicant's Iranian citizenship. In fact, the applicant did not point to any evidence that could connect the respondent's actions to a *Code* ground or to evidence that "national law" was a proxy or analogous ground for his citizenship. As the respondent noted, the Supreme Court of Canada has

defined an “analogous ground” as personal characteristic that is immutable or changeable only at an unacceptable cost. See, *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at paragraph 13. The national law of Iran is neither a personal characteristic of the applicant nor immutable and therefore cannot be an analogous ground.

[15] The respondent acknowledged that three Iranian nationals had been granted FLC permits in error, but these permits were not renewed when the error was discovered. The respondent did not concede that there was an implied reciprocity between it and Iran. The respondents submitted that whether an implied reciprocity agreement existed is in any event irrelevant to the issues before the Tribunal. I agree. The Tribunal has no jurisdiction to determine whether the applicant met the criteria, written or implied, for receiving a FLC licence. Rather the issue before the Tribunal is whether there is a reasonable prospect that evidence the applicant has or that is reasonably available to him can show a link between the respondent’s decision not to consider his FLC application and his citizenship. Again, the applicant pointed to no such evidence.

[16] Finally, the Tribunal has held that it does not have jurisdiction to decide a stand-alone constitutional issue unless it is necessary to the Tribunal’s decision making under the *Code*. See, *MacLennan v. Ontario (Transportation)*, 2013 HRTO 714; *Barber v. South East Community Care Access Centre*, 2010 HRTO 581; *Wilson v. Toronto Catholic District School Board*, 2011 HRTO 1040; *Hendershott v. Ontario (Community and Social Services)*; *Kostiuk v. Toronto Community Housing Corporation*, 2012 HRTO 388; and *Alturki v. Ontario (Transportation),* 2018 HRTO 1496. Consequently, the applicant’s allegation that the reciprocity requirement violates the *Charter* is not an issue that the Tribunal has authority to decide.

[17] For the foregoing reasons, I find the Application has no reasonable prospect of success and it is unnecessary to address the respondent’s other arguments.

[18] The Application is dismissed.

Dated at Toronto, this 28th day of January, 2019.

"Signed by"

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Douglas Sanderson
Vice-chair