Federal Court  Cour fédérale

Date: 20110628

Docket: T-1463-10

Citation: 2011 FC 674

Ottawa, Ontario, June 28, 2011

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

CHIMEN MIKAIL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] Pursuant to a case-management conference held via teleconference on April 6, 2011, the Respondent, the Attorney General of Canada, signalled its intention to file a Motion to Strike the Application. Also, a proposed intervenor, the Security Intelligence Review Committee (SIRC) was brought into the fold and sought leave to intervene in the Application. Both matters were scheduled to be heard jointly on May 17, 2011.

[2] Thus, the present Reasons for Order and Order will deal with two aspects of the proceeding: the Attorney General's Motion to Strike and SIRC's proposed intervention.

[3] By the present Order, the Motion to Strike is denied. SIRC is granted a *limited* status as an intervenor in the underlying application for judicial review.

I. The Underlying Proceeding

[4] The Applicant, Ms. Chimen Mikail, filed an application for judicial review of SIRC's decision on September 10, 2010. The Applicant asserts, among other things, that SIRC failed to make certain findings that it ought to have made in relation to her right to be free from harassment.

[5] She first filed a complaint about CSIS' actions to the Canadian Human Rights Commission (CHRC). However, the CHRC declined to hear the complaint as it dealt with security matters that were said to be under SIRC's jurisdiction (see section 45 of the *Canadian Human Rights Act*, RSC 1985, c H-6). SIRC had rendered its decision on May 11, 2010 and communicated it to the Applicant on August 12, 2010. SIRC's decision was the result of an investigation conducted by the Honourable Gary Filmon, P.C. O.C. O.M., pursuant to subsection 52(1) of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 (*CSIS Act*) in relation to the Applicant's complaint made pursuant to section 41 of the CSIS Act, which reads as follow:

Complaints 41. (1) Any person may make a complaint to the Review Committee with respect to any act or thing done by the Service and the Committee shall, subject to subsection (2), investigate the complaint if (a) the complainant has made a complaint to the Director with	*Plaintes* 41. (1) Toute personne peut porter plainte contre des activités du Service auprès du comité de surveillance; celui-ci, sous réserve du paragraphe (2), fait enquête à la condition de s'assurer au préalable de ce qui suit : a) d'une part, la plainte a été

respect to that act or thing and the complainant has not received a response within such period of time as the Committee considers reasonable or is dissatisfied with the response given; and (b) the Committee is satisfied that the complaint is not trivial, frivolous, vexatious or made in bad faith.	présentée au directeur sans que ce dernier ait répondu dans un délai jugé normal par le comité ou ait fourni une réponse qui satisfasse le plaignant; b) d'autre part, la plainte n'est pas frivole, vexatoire, sans objet ou entachée de mauvaise foi.
Other redress available (2) The Review Committee shall not investigate a complaint in respect of which the complainant is entitled to seek redress by means of a grievance procedure established pursuant to this Act or the Public Service Labour Relations Act.	*Restriction* (2) Le comité de surveillance ne peut enquêter sur une plainte qui constitue un grief susceptible d'être réglé par la procédure de griefs établie en vertu de la présente loi ou de la Loi sur les relations de travail dans la fonction publique.

[6] SIRC then investigated the Applicant's complaint. In light of the result of the Motion to Strike, which is denied by the present, this Court will not address in detail the factual issues in which the complaint arises as it is not necessary for the purposes of these reasons. Summarily, actions and the alleged persistence of CSIS agents were said to have been prejudicial to the Applicant. She also contends CSIS had alluded to her not being able to gain her security clearance should she refuse to cooperate with CSIS to provide information. Also, the manner in which interviews were conducted is impugned.

[7] Evidently, some components of SIRC's investigation dealt with issues of national security. As a testament to this, *ex parte* hearings were held, and summaries of them were given to the Applicant. The Applicant was provided with an opportunity to be heard and present her case. Evidence from various government departments involved was heard. Ultimately, SIRC ruled that

"the Complainant has not met the burden of establishing that the Service acted or did anything inappropriately with respect to any of the grounds of the complaint". Thus, the complaint was dismissed in its entirety.

[8] The Applicant, seeking judicial review of SIRC's dismissal of her complaint, brought an application under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

II. SIRC's Motion to Intervene

[9] SIRC sought leave to intervene in the application for judicial review for the purpose of filing confidentially and under seal the materials received by SIRC *ex parte* the complainant. The Court indicated during the hearing that it would deal with the Motion to intervene with the materials placed before the Court. Also, for the purpose of the Motion to Strike, the Applicant consented to SIRC's intervention, and the Respondent took no position. Thus, SIRC intervened in the Motion to Strike.

[10] SIRC's intervention proved beneficial as neither the Applicant nor counsel for the Attorney General could properly speak to the extraordinary nature of SIRC's investigative process under section 41 of the *CSIS Act* with the nuances that proved essential for a complete filing of the "Tribunal Record". As explained during the hearing, SIRC's investigation spans wider than the sole hearings, both public and *ex parte*, and includes more information. Hence, the complete record before SIRC needed to be filed. Consent was granted by the Attorney General for the filing of this record, with the necessary safeguards for the protection of national security information pursuant to Rules 151 and 152 of the *Federal Courts Rules*, SOR/98-106. This filing and SIRC's intervenor

status proved necessary as the Applicant's request under Rule 317 was too narrow to properly encompass what could be seen as SIRC's "Tribunal Record".

[11] A second portion of SIRC's proposed intervention proved contentious. SIRC's Motion indicated that it also wanted, through counsel, to "explain the record" that was before it. Evidently, there are important reservations in granting leave to an administrative tribunal such as SIRC in a judicial review application of one of its decisions. Traditionally, an administrative tribunal's role in an application for judicial review is limited to questions of its jurisdiction, the chief concern being that the administrative tribunal will seek to defend its decision, something incompatible with the impartiality of the administrative tribunal (see, *inter alia*, *Select Brand Distributors Inc. v Canada (Attorney General)*, 2010 FCA 3; *Canada (Attorney General) v Georgian College of Applied Arts and Technology*, 2003 FCA 123; *Li v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 267).

[12] However, during the course of the hearing, it became apparent that counsel for SIRC clearly understood the limits governing its possible intervention before the Court. Counsel for SIRC provided strong arguments in support of its intervention. Firstly, as the application will likely have an *ex parte*, *in camera* portion to deal with the record, SIRC's intervention in this aspect should be seen as positive, as it can clarify any questions arising from the record itself. Secondly, "explaining the record" was nuanced and was explained as being an intervention that is purely descriptive in essence. Thirdly, SIRC's intervention aims to clarify its jurisdiction in the matter, an important issue considering that its inquiry under section 41 of the *CSIS Act* also dealt with other ministries and government offices.

[13] Thus, SIRC will be granted a *limited* intervenor status. In no instance shall SIRC use this status to defend its decision before the judge hearing the Application, whether through its written representations or its intervention at the hearings. Its intervention will be limited to explaining its jurisdiction and the record, including how it processes section 41 complaints and how the Applicant's complaint was handled before a decision was made. No representations shall be made as to the final determination made by SIRC or any underlying justifications for this determination, whether they arise in public or *in camera*.

III. The Respondent's Motion to Strike the Application

Arguments of the Respondent

[14] The Respondent indicated its intent to file a Motion to Strike the Application, and did so with supporting materials. The main ground for the Motion to Strike is that the Federal Court does not have jurisdiction to hear an application for judicial review brought under section 41 of the *CSIS Act*.

[15] It is argued by the Respondent that SIRC "did not make any decision or order directly affecting the Applicant's rights" and that its jurisdiction was limited to making recommendations concerning CSIS' conduct. More specifically, it is argued that the Court's lack of jurisdiction is such that the high test for the striking of a notice of application is met in the present circumstance. Summarily, the crux of the Respondent's argumentation goes to the fact that the SIRC Report is not a "decision, order, act or proceeding within the meaning of section 18.1 of the *Federal Courts Act*" and that, because SIRC only makes recommendations, these cannot be reviewed by the Court, in light of the case of *Thomson v Canada (Deputy Minister of Agriculture)*, [1992] 1 SCR 385.

[16] Other cases are cited in support of the contention that determinations which do not create a legal effect are not subject to judicial review. The Respondent also distinguished the case of *Morneault v Canada (Attorney General)*, [2001] 1 FC 30 (FCA) in which the Federal Court of Appeal held that factual findings and recommendations of commissions of inquiry were amenable to judicial review. The Respondent contends that as no adverse findings were made against the Applicant, there was no similar interest to that in *Morneault*, above. Furthermore, it is argued that section 52(1)(b) of the *CSIS Act* makes clear that "a person will only be entitled to know the Committee's recommendations if the Committee sees fit." As such, a complainant under section 41 of the *CSIS Act* is only entitled to a report of SIRC's findings, but no other substantive relief carrying legal consequences is available.

[17] A SIRC report made pursuant to section 41 of the *CSIS Act* is also argued to be distinguishable from other, otherwise reviewable, reports of SIRC. Relying on *Al Yamani v Canada (Solicitor General)*, [1996] 1 FC 174 (FCTD) and *Moumdjian v Canada (Security Intelligence Review Committee)*, [1999] 4 FC 624 (CAF), the Respondent states that the nature of the decision in those applications was wholly different as the reports had clear effects on individual rights and were different in light of the statutory scheme. Contrasting the reports found in those applications, the Respondent argues that a section 41 report is more akin to that of section 42 of the *CSIS Act*: a recommendation.

[18] Finally, the Respondent argues that the case of *Omary v Canada (Attorney General)*, 2010 FC 335 should be distinguished on the basis that the impugned decision was different in that case.

In *Omary*, SIRC stayed a section 41 investigation pending the outcome of a recourse brought before a superior Court and it was this decision which was reviewed by the Court.

Arguments of the Applicant

[19] The Applicant takes a strong stance against the Motion to Strike. Relying on the fact that "judicial review is a summary procedure" and that the inherent jurisdiction to strike an application is exceptional, the present case is not one that meets the "clear and obvious" threshold necessary for the striking of the application.

[20] Counsel for the Applicant insists on the fact that the SIRC report is a "decision, order, act or proceeding" within the meaning of section 18.1 of the *Federal Courts Act*. SIRC's investigation under section 41 of the *CSIS Act* is not discretionary, once the complaint is seen to be not trivial, frivolous or vexatious. The sole fact that SIRC makes recommendations that are not binding is not enough to support the contention that the Applicant's interests are not engaged in the complaints process of section 41 of the *CSIS Act*. Counsel emphasizes the fact that the Court's jurisdiction should not be unduly limited, and that the issue is whether the Applicant's rights or interests are involved. In effect, it is argued that SIRC's report under section 41 of the *CSIS Act* does carry legal consequences for the Applicant, namely as she seeks to pursue her complaint before the CHRC.

[21] Redress was sought and denied under section 41 of the *CSIS Act* by SIRC, and it is argued that this determination should be reviewable by the Court. Depriving the Applicant of her judicial review application would make the SIRC complaints process under section 41 a "meaningless sham", in using the language of the Federal Court of Appeal in *Canadian Tobacco Manufacturers'*

Council v National Farm Products Marketing Council, [1986] 2 FC 247 (FCA). The Applicant also distinguished the cases cited by the Respondent in support of the Motion, which will be dealt with in the Court's analysis.

[22] Alternatively, it is argued that if the SIRC Report does not meet the threshold to be considered a "decision" under section 18.1, then the Court must rely on *Shea v Canada (Attorney General)*, 2006 FC 859, which stands for the proposition that any "matter" which affects a party is reviewable by the Court.

[23] In any event, counsel for the Applicant states that the high threshold for striking the application is not met by the Respondent.

SIRC's Position

[24] SIRC's position on the Motion to Strike is substantially the same as the Applicant's. Counsel for SIRC held that a report under section 41 is final and profoundly affects the complainant, CSIS as well as Canada as a country. Counsel for SIRC also countered the Attorney General's argument to the effect that the complainant is not directly affected by the SIRC Report with the fact that "any person" can make a complaint under section 41 of the *CSIS Act*. It is argued that this aspect of section 41 tends to hedge against the traditional notions of "interest" in litigation arising from the common law and the principles of administrative law and judicial review.

[25] Counsel for SIRC also clearly stated SIRC's position: SIRC believes its report made under section 41 should be reviewed. Firstly, this is argued on a rule of law perspective: SIRC takes its

role seriously and expresses its wish to be held accountable to the supervisory role of the Court through judicial review. Counsel for SIRC also hinted at other situations where, clearly, SIRC's hypothetical actions would be reviewable. As an example, blatant examples of discrimination or breaches of procedural fairness would surely be reviewable. These examples were stated in a manner where, clearly, either CSIS or a complainant could benefit from judicial review.

[26] Counsel for SIRC also drew the attention of the Court to other aspects of the cited case law, which will be dealt with in the Court's analysis.

Analysis

[27] In all simplicity, the Attorney General's argument can be summarized as follows: a SIRC Report made under section 41 of the *CSIS Act* is not reviewable by the Court. This argument goes against the principles of administrative law which clearly apply to SIRC as an important investigative body within the statutory framework. It also arguably runs counter to the rule of law and jurisprudential developments dealing with the reviewability of actions made by administrative boards and tribunals.

[28] The SIRC Report made pursuant to section 41 of the *CSIS Act* has two components: the acceptance or dismissal of the complaint itself and the corollary findings and recommendations, if any. Counsel for the Attorney General focused solely on the second aspect of the Report: the dismissal aspect of the complaint ("I dismissed the complaint in its entirety"). Yes, in this case, the Report of SIRC clearly states that the complaint is dismissed in its entirety, yet, the Report also makes findings and recommendations (such as a recommendation for the Service to liaise with

government officials: Treasury Board officials and Departmental officers) which presumably was of relevance to the specific case of the Applicant and of general application. The Attorney General's arguments emphasized solely the recommendatory nature of SIRC's report to argue that it is not reviewable.

[29] Arguing that a complainant under section 41 of the *CSIS Act* has no interest in SIRC's report, its findings and recommendations and that is not affected by the complaint lacks sound logic and is not founded in law.

[30] Firstly, proper recognition must be taken of the context in which this section 41 complaint was brought. Initially, the Applicant had brought the matter to the CHRC. However, for reasons of national security and the protection of information, the complainant was referred to SIRC. The reason for this is the clear legislative intent in the *CSIS Act* and the *Canadian Human Rights Act*, above, namely at section 45, to create a specific forum for dealing with the actions of CSIS, that is, SIRC. This also stems from the investigations undertaken by the *Royal Commission of Inquiry into Certain Activities of the RCMP*, known as the MacDonald Commission, which gave birth to CSIS and SIRC.

[31] Surely, the sole fact that a complainant takes issue with the actions or policies of CSIS cannot deprive him of rights he or she would otherwise benefit from if any other government institution's conduct was impugned. For example, if the complaint could have proceeded to the CHRC, the Applicant would have benefited from, among others, a judicial review of CHRC's breach of procedural fairness (*Radulesco v Canadian Human Rights Commission*, [1984] 2 SCR

407); of the review of the recommendation to pursue a complaint before the Human Rights Tribunal (see, for example, *Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574 (FC)); and even the CHRC's decision to dismiss a complaint at a preliminary stage (see, for example, *Valookaran v Royal Bank of Canada*, 2011 FC 276). Evidently, once SIRC investigates a complaint, the matter can again be brought before the CHRC. However, it is clear a dismissal by SIRC of the complaint could prove to be prejudicial to the Applicant's complaint.

[32] Thus, the referral to SIRC by the CHRC, as provided by section 41 of the *Canadian Human Rights Act*, cannot have the effect of denying a complainant of a right of judicial review of SIRC's report. Again, the Court emphasizes the fact that if any other government institution than CSIS' actions were complained about; judicial review would be available to the Applicant. The creation of CSIS and SIRC was meant, in light of the MacDonald Commission's findings, to provide *more* oversight of intelligence activities, not less. Clearly, section 41 is an important part of the civilian oversight which constitutes SIRC's mandate. The rule of law, as well as the transparency and legality of SIRC's investigations of section 41 complaints, require that SIRC's reports made under section 41 be reviewable by the Court. The reason applications proceed to SIRC is for the necessary protection of national security information, as highlighted by Justice Addy in the seminal case of *Henrie v Canada (Security Intelligence Review Committee)*, [1989] 2 FC 229 (FCTD).

[33] It is also interesting, to say the least, that SIRC's obligations in terms of procedural fairness have been at least implicitly recognized by SIRC and the Attorney General in *Nourhaghighi v Canada (Security Intelligence Service)*, 2005 FC 148. This was an application for judicial review of

a different determination, but the principle remains. No jurisdictional issue seems to have been raised in that case.

[34] However, there is more to be said about the Attorney General's Motion to Strike on the basis of the alleged lack of jurisdiction.

[35] Firstly, there is a clear tendency in the case law to broaden the scope of judicial review to include broader issues than a narrow conception of "decision or order" that is argued by the Attorney General. This is echoed in *Shea v Canada (Attorney General)*, 2006 FC 859 by Madam Justice Mactavish. More recently, the Federal Court of Appeal stated in the following in *May v CBC/Radio Canada*, 2011 FCA 130, at para 10, that:

> While it is true that, normally, judicial review applications before this Court seek a review of decisions of federal bodies, it is well established in the jurisprudence that subsection 18.1(1) permits an application for judicial review "by anyone directly affected by the matter in respect of which relief is sought". The word "matter" embraces more than a mere decision or order of a federal body, but applies to anything in respect of which relief may be sought: *Krause v. Canada*, 1999 CanLII 9338 (F.C.A.), [1999] 2 F.C. 476 at 491 (F.C.A.).

[36] In this light, "anyone directly affected by the matter" in this application would clearly encompass CSIS and the Applicant. A presumed general public interest in section 41 of the *CSIS Act* has also been alluded to by all counsel, including the Attorney General. Thus, "anyone directly affected by the matter", which is provided for in section 18.1 of the *Federal Courts Act*, should be read with section 41 in mind, whereby "anyone" can bring a complaint under section 41.

[37] Moreover, the Applicant's interest is clearly found in the first determination made by the SIRC Report, that of the dismissal of her complaint. The Applicant has an interest in this determination: why else would a complaint be brought under section 41 if not to see it granted? It can be seen that a complainant's dignity is the source of this interest when the complaint arises from actions of CSIS which were perceived to be detrimental or abusive. An applicant's interest could be different in other circumstances and may become the subject matter of other proceedings. Therefore, the Court will not opine further on this matter.

[38] To focus solely on the second aspect of the SIRC Report, namely, the recommendations, as the Attorney General suggests, misses the point. While the recommendations made by SIRC are essential, they are arguably not the main focus for a complainant. Much emphasis was placed on the following statements made by Justice de Montigny in *Omary v Canada (Attorney General)*, 2010 FC 335:

> It is worth repeating that SIRC, unlike the Superior Court, does not make judicial decisions and does not have the power to order the respondent to compensate the applicant or take any measure whatever. It is authorized only to make recommendations to the Minister to ensure that CSIS carries out its mandate in accordance with the laws governing it. Consequently, there is, properly speaking, no risk of contradictory "decisions", since only the Superior Court is authorized to make a decision that is enforceable on the parties. More fundamentally, the Committee's mission is systemic and consists not in giving redress to an individual who may have been injured by the Service's actions, but rather in ensuring that such behaviour does not recur in future.

[39] This remains true: SIRC's powers are limited in the context of section 41 to a decision as to whether the complaint should be granted as well-founded or dismissed but it also includes the making of a Report containing findings and recommendations. However, Justice de Montigny also

offered in *Omary*, above, the following, stating that SIRC is an administrative tribunal and is the master of its own procedure:

> From this perspective, it matters little whether a tribunal chooses to formally suspend a proceeding or adjourn it sine die; form must not be elevated over substance. *In both cases, the tribunal makes a decision, and the Court may be called upon to review its lawfulness*. Each time that an application for judicial review is allowed, the administrative body is required to comply with the Court's decision; in the event that the stay of proceedings ordered by SIRC is set aside, the Committee will be obliged to proceed with its investigation without it being necessary for the applicant to seek a mandamus to compel the Committee to comply with the Court's decision. (emphasis added)

[40] Thus, Justice de Montigny implies that SIRC's decisions within its investigations are reviewable.

[41] Madam Justice Tremblay-Lamer also envisaged in *Tremblay v Canada*, 2005 FC 728 that SIRC was an administrative tribunal whose recommendations on the matter of a security clearance could be reviewed. It is true that section 42 of the *CSIS Act* provides for a complaint process for questions of security clearances. The Attorney General argued that while a complainant had clear interests under section 42 and could seek judicial review; this was not the case under section 41 of the *CSIS Act*. However, section 42 is a recommendation as well, and the Supreme Court of Canada clearly emphasized the actual decision on the security clearance was not made by SIRC (*Thomson v Canada (Deputy Minister of Agriculture)*, [1992] 1 SCR 385). Thus, the argument going to the "recommendatory" nature of a section 41 report no longer holds true in light of the fact that recommendations under section 42 are reviewable as well. What *Thomson*, above, clarified was that the recommendation under section 42 was not *binding*; but *Thomson*, above did not hold that it was not *reviewable* as a decision in and of itself. This distinction is essential.

[42] The Attorney General further distinguished the reports made by SIRC under section 19 of the *Citizenship Act*, RSC 1985, c C-29 with the report under section 41 of the *CSIS Act*. It was argued that "a section 41 report, which focuses on the conduct of the Service, is not at all akin to a report by the Committee pursuant to section 19 of the *Citizenship Act*, which focuses on an individual, the type of report considered reviewable in *Yamani* and *Moumdjian*". Clearly, this argument misapprehends the nature of a section 41 complaint, which may involve factual issues in which a complainant's conduct is also at play. The fact that CSIS' conduct, and not the Applicant's, is reproached by complaints under section 41 does not have as a corollary that the Report is not reviewable. Evidently, a complainant has a direct interest in seeing the complaint investigated and ruled upon and the distinction argued by the Attorney General whereby the source of the impugned actions (i.e. the complainant's vs. CSIS') is relevant simply has no basis. A complainant has an interest in seeing his or her complaint adjudicated, and clearly, the basis of a complaint is CSIS' conduct. Thus, a complainant has an interest in his or her complaint and, consequently, in the legality or reasonableness of the adjudication process and its outcomes.

[43] The Court's analysis does not need to go so far as to imply there are credibility or integrity issues to be found in the dismissal of a complaint, something that could liken SIRC's findings to that of a commission of inquiry, whose findings are reviewable, even though they often are of a recommendatory nature (*Morneault v Canada (Attorney General)*, [2001] 1 FC 30; *Chrétien* v *Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 802).

[44] The Attorney General relies on the cases of *Yamani*, above, and *Moumdjian*, above, to argue that SIRC's decisions under the current statutory regime of section 19 of the *Citizenship Act* and the provisions of the previous *Immigration Act* are reviewable, but not those under section 41 of the *CSIS Act*. For the purpose of clarity, section 19 of the *Citizenship Act* provides investigatory powers to SIRC, under the same premise as section 42 of the *CSIS Act*, when the Minister refers a report to SIRC that an individual is not to be administered the oath of citizenship or granted citizenship when a person is engaged in activities

> a. that constitutes a threat to the security of Canada, or
> b. that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of any offence that may be punishable under any Act of Parliament by way of indictment (subsection 19(2) of the *Citizenship Act*)

[45] Evidently, there is an inherent difference between SIRC's determinations under section 19 of the *Citizenship Act* and section 41 of the *CSIS Act*. Under section 19 of the *Citizenship Act*, a clearly serious and likely prejudicial determination is made in regards to an individual. Justice Mackay noted in *Yamani* that:

> The unique and significant role of SIRC in reviewing determinations affecting persons, on security grounds, in relation to employment in the public service, and in relation to matters specified under the Immigration Act, the Citizenship Act [R.S.C., 1985, c. C-29] and the Canadian Human Rights Act [R.S.C., 1985, c. H-6], and the historic evolution of that role, is outlined for the Court in the memorandum of argument of the intervenor SIRC.

[46] While this passage only relates SIRC's *representations* in the *Yamani* case, this passage was quoted by counsel for the Attorney General in support of the Motion to Strike. This passage also clearly hints at other grounds in which SIRC acts. The most relevant in the case at bar is clearly the

Human Rights Act. Justice Mackay further determined that the fact that the SIRC report under section 19 of the *Citizenship Act* was not an intermediary step, indeed it was stated that:

> It is urged that SIRC's decision is not a final decision in the process of considering the applicant's situation, but *I note it is a final, not an interlocutory, decision of SIRC itself*. By statute, subsection 39(9) of the Act, SIRC is directed to "make a report to the Governor General in Council containing its conclusion whether or not a certificate should be issued under subsection 40(1) and the grounds on which that conclusion is based". That is more akin to a final decision, in my view, than SIRC is directed to make under section 42 of the CSIS Act which, in *Thomson v. Canada (Deputy Minister of Agriculture)*, 1992 CanLII 121 (S.C.C.), [1992] 1 S.C.R. 385, was characterized as an authority to make a recommendation. (emphasis added)

[47] Indeed, in the case of a section 41 complaint, SIRC's report is a final decision by SIRC itself. The section 41 Report also resembles the process followed under section 42 of the *CSIS Act*, in that SIRC indeed has "an authority to make a recommendation". In this sense, SIRC's Report under section 41 can be seen as an *adjudicative recommendation*. Qualifying the SIRC section 41 Report as such properly considers the two aspects of the report: the dismissal or acceptance of the complaint, and the corollary findings and recommendations, if any.

[48] In this sense, the following passage of the case of *Moumdjian*, above, at para 23, is determinative:

> The jurisprudence reveals that the term "decision or order" has no fixed or precise meaning but, rather, depends upon the statutory context in which the advisory decision is made, having regard to the effect which such decision has on the rights and liberties of those seeking judicial review.

[49] This was the Federal Court of Appeal's conclusion to the effect that the determinations made by SIRC in the citizenship process described above were to be reviewed. Hence, the Court

considers that a SIRC report made pursuant to section 41 of the *CSIS Act* affects a complainant's interests, if not their rights. In the case at bar, the Court considers the complainant's undertaking of a human rights complaint, the nature of the allegations, and the finality of the SIRC report to be illustrative of these interests.

[50] However, the Court would be remiss if it did not state the following appellate authority, which was not cited by any of the parties. *Prima facie*, the *Moumdjian* case and indeed the development of the case law in respect to the interpretation of "decision or order" for the purpose of judicial review, are at odds with the appellate authority of the Federal Court of Appeal in *Russell v Canadian Security Intelligence Service*, 1989 CarswellNat 996, where it is stated that:

> It is indeed our view that the letter of March 22, 1988, conveying to the applicant the reaction of the Security Intelligence Review Committee to his complaint under section 41 of the Canadian Security Intelligence Act, R.S.C. 1985, c. 23, is *merely a report of findings that are devoid of any legal effect and do not affect the rights and obligations of the applicant*. (emphasis added)

[51] Two things can be said in respect to this case. Firstly, it is a dated case and one which provides no detailed analysis. Hence, its analysis may not be reconcilable with the broadening of what constitutes reviewable actions by an administrative tribunal or government entity, as highlighted in *May*, above. Secondly, it refers to a simple letter. It may be a case where SIRC had exercised its discretion to not produce a report to the complainant, as it is empowered to do under paragraph 52(1)(b) of the *CSIS Act*.

[52] Finally, the Court considers that its jurisdiction to hear applications for judicial review of SIRC's actions should not be fragmented. As highlighted by counsel for SIRC, the case of *Gestion*

Complexe Cousineau (1989) Inc. v Canada (Minister of Public Works and Government Services), [1995] 2 FC 694, cited in *Larny Holdings Ltd. v Canada (Minister of Health)*, 2002 FCT 750 stood for the following proposition:

> As between an interpretation tending to make judicial review more readily available and providing a firm and uniform basis for the Court's jurisdiction and an interpretation which limits access to judicial review, carves up the Court's jurisdiction by uncertain and unworkable criteria and inevitably would lead to an avalanche of preliminary litigation, the choice is clear.

[53] Indeed, in this case and others, it has been implicitly recognized that areas of SIRC's jurisdiction were amenable to judicial review. To nuance that a complainant has no "interest" in the section 41 Report or to focus on the recommendations made indeed "carves up the Court's jurisdiction by uncertain and unworkable criteria". Indeed, the case of *Omary*, above, would introduce such a scenario, as would the review of SIRC's investigations under procedural fairness rules.

[54] To use the words of Justice Décary in *Gestion Complexe Cousineau (1989) Inc.*, above, the "choice is clear": SIRC, as an administrative tribunal and as an investigative body whose supervisory role is a key component of the *CSIS Act*, must be submitted to the Court's supervisory role insomuch as its reports under section 41 of the *CSIS Act* are reviewable.

[55] As *obiter*, it should be noted that both eventual complainants and CSIS stand to gain from recognizing the Court's jurisdiction to review section 41 reports as both parties may have their interests adversely affected by a SIRC report under section 41. The fact remains that CSIS can

disregard recommendations made by SIRC in this case. A complainant has no such prerogative and the complaint is a determinative procedural vehicle for the redressing of alleged wrongdoings.

[56] Not only is the high test for the Motion to Strike not met, but the Court found it necessary to resolve the jurisdictional issue so as to not unduly hinder the course of the application for judicial review by leaving this determination to the judge hearing the application.

IV. Declaratory Relief Sought by the Applicant

[57] Counsel for the Attorney General has argued that some of the conclusions sought by the Applicant should be struck as they lack any grounds on which to rely under an application for judicial review.

[58] Counsel for the Applicant has hinted that amendments to the Application may be brought.

[59] In light of the early stage of the proceeding, and in keeping with the fact that counsel for the Attorney General has no prejudice in responding to the relief sought, as it already has responded to it in its Motion to Strike, the judge hearing the Application shall decide upon the declaratory relief sought and its validity.

V. Costs

[60] There are two competing interests to consider here. Firstly, it can be said that the "high test" for the Motion to Strike has clearly not been met. Counsel for the Attorney General stated that her client was conscious that arguable authorities could be found to argue both perspectives on the

jurisdictional issue and brought the Motion nonetheless. Clearly, the issue here was not one where the application was clearly bereft of any chance of success.

[61] In another perspective, the jurisdictional issue would have likely come up in the Attorney General's response to the jurisdictional issue and would have needed to be dealt with by the judge hearing the application.

[62] Hence, the Court's conclusion as to costs is that costs, for the purpose of the Motion to Strike, based on a jurisdictional issue should be in favour of the Applicant and the lump sum amount of $5,000.00 in accordance with Rule 400(4) of the *Federal Courts Rules*.

ORDER

THIS COURT ORDERS that:

1. The Motion to Strike is denied;
2. SIRC is granted a limited intervenor status in compliance with the terms of the present Order and in a manner consistent with its Reasons;
3. An amount of $5,000.00 shall be paid by the Respondent to the applicant within a reasonable delay;
4. SIRC is to be granted a limited status as intervenor to make representations as to its jurisdiction, the section 41 complaint process and how this process was followed for the Applicant's complaint;
5. No representations shall be made by SIRC as to the final determination made by SIRC or any underlying justifications for this determination, whether they arise in public or *in camera*;
6. SIRC is to file all records concerning the complaint in the following manner, in three copies:
    (a) File on the public record of the Court the record that was received by the Committee in the presence of the Applicant in respect of the SIRC Report;
    (b) File confidentially and under seal, pursuant to Rules 151 and 152 of the *Federal Courts Rules*, the materials that were received by the Committee *ex parte* the Applicant, both for its investigation and the hearings, in accordance with the following terms and conditions:
        (i) The record is to be filed only with the registry of the Designated Proceedings and Citizenship Revocation Section of the Court, and the portion of the record that is filed under seal will not be disclosed to any

person other than the designated case management judge, the designated judge hearing the application, counsel for the Respondent and counsel for the intervenor;

(ii) The Application be assigned to a judge who is designated to hear proceedings involving matters of national security confidentiality; and

(iii) When dealing with the confidential record, the Application be held in the Court's Designated Proceedings facility *ex parte* the Applicant and *in camera*;

7. The intervenor is to attend the public and *ex parte* hearings to make representations on its jurisdiction and to clarify the section 41 complaint process, in keeping with the present Reasons and Order;

8. The case shall continue as a case-managed proceeding.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1463-10
STYLE OF CAUSE:	CHIMEN MIKAIL v AGC
PLACE OF HEARING:	Ottawa
DATE OF HEARING:	May 17, 2011
REASONS FOR ORDER AND ORDER:	NOËL S. J.
DATED:	June 28, 2011

APPEARANCES:

Mr. Khalid Elgazzar	FOR THE APPLICANT
Ms. Helen Grey	FOR THE RESPONDENT
Mr. Gordon Cameron	FOR THE PROPOSED INTERVENOR

SOLICITORS OF RECORD:

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