Federal Court Cour fédérale

Date: 20160309

Docket: T-1508-14

Citation: 2016 FC 300

Ottawa, Ontario, March 9, 2016

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

DANILO MAALA ALMACÉN

Plaintiff
(Appellant)

and

HER MAJESTY THE QUEEN

Defendant
(Respondent)

ORDER AND REASONS

I. INTRODUCTION

[1] This is a motion brought by the Appellant (Plaintiff), pursuant to Rule 51 of the *Federal Court Rules*, SOR/98-106 [Rules], for an order setting aside the Order and Reasons of Prothonotary Aalto, dated August 10, 2015 [Decision], which struck the Appellant's Amended Statement of Claim of September 23, 2014 [Claim].

II. BACKGROUND

[2] The Appellant is a male Filipino national who is married to a woman in the Philippines. In 2005, the Appellant resided in Doha, Qatar where he worked at a clothing store. That same year, he met and entered into a romantic relationship with Mr. Tim Leahy.

[3] In August 2009, the Appellant returned from Qatar to the Philippines to run an internet café that he had opened in January 2009 alongside his business partner, who he subsequently bought out in April 2010. At some point after this, Mr. Leahy arranged for the Appellant to move to Edmonton to work as an assistant manager in a Chinese Restaurant. The Appellant sold his business in the Philippines and moved to Canada.

[4] Following the closure of the Chinese restaurant in Edmonton, the Appellant moved to Toronto in January 2013 to live with Mr. Leahy who has supported him since that time.

[5] In October 2013, the Appellant applied on humanitarian and compassionate [H&C] grounds, based on his homosexual relationship, to remain in Canada, pursuant to s 25 of the *Immigration and Refugee Protection Act*, SC 2011, c 27 [IRPA]. The Appellant alleges that an H&C application was the only option available to him as he was not eligible, given his marriage in the Philippines and the duration of his relationship with Mr. Leahy, to be sponsored as a common-law spouse.

[6] On February 10, 2014, the Appellant's H&C application was denied. On October 28, 2014, Justice Shore denied leave and judicial review of the H&C decision (IMM-883-13). A subsequent motion for reconsideration of this dismissal was dismissed on January 27, 2015.

A. *The Claim*

[7] The Appellant commenced a contemporaneous tort action against the Crown asserting several causes of action against the officer who decided the negative H&C decision [Officer], including claims that the Officer committed the following acts in order to generate a negative decision:

> (1) Knowingly misapplied the law with respect to s 25 of *IRPA*;
>
> (2) Deliberately made the following misstatements of fact:
>
> > (a) The [Appellant] was in Canada without lawful status;
> >
> > (b) The [Appellant] had not resided in the Philippines for the last 3 ½ years; and
> >
> > (c) Mr. Leahy could sponsor the [Appellant] to immigrate to Canada (which is untrue as the Plaintiff is married to a woman in the Philippines and divorce is not legal in the Philippines).
>
> (3) Knowingly chose not to give articulated reasons addressing the [Appellant's] factors and application;
>
> (4) Knowingly chose not to make the only reasonable decision in the circumstances, a positive decision, in order to generate a negative decision;
>
> (5) Discriminated against the [Appellant] and his partner based on sexual orientation in order to generate a negative decision;
>
> (6) Knowingly ignored section 3(1)(d) of the *IRPA* in order to generate a negative decision.

[8] The Claim also pleads that the Officer further abused and exceeded her authority by notifying Canadian Border Services Agency [CBSA] of her negative decision for the purposes of preparing the Appellant for removal from Canada, which is beyond her scope and authority and which breaches the *Privacy Act*, RSC 1985, c P-21.

[9] Additional allegations in the Claim include that the Officer:

- Engaged in abuse and excess of jurisdiction and authority as historically contemplated and set out by the Supreme Court of Canada in *Roncarelli v Duplessis*, [1959] SCR 121;
- Engaged in abuse of process at common law and s 7 of the *Charter* as enunciated *inter alia*, by the Supreme Court in *USA v Cobb*, [2001] 1 SCR 587;
- Breached the [Appellant's] constitutional right to the Rule of Law and Constitutionalism as well as his s 7 and s 15 *Charter* rights by placing his very life, liberty and security of person under threat of deportation, based on sexual orientation; which tortious conduct has caused the damages set out in the Claim.

[10] The Appellant claimed damages for lost wages, mental suffering, and distress arising from the following causes of action:

(1) The Crown's breach of sections 7 and 15 of the *Charter*;

(2) The tort of abuse and excess of authority;

(3) The tort of abuse of process;

(4) Misfeasance in public office; and

(5) Negligence.

[11] The Claim concludes by stating that the Appellant will bring a constitutional challenge by way of application to strike s 49 of the *Federal Courts Act*, RSC, 1985, c F-7, which bars jury

trials and thus violates the constitutional imperatives of the rule of law, constitutionalism and the right of the jury trial grounded in the *Magna Carta*, and continued in ss 11(f) and 7 of the *Charter*, as well as the residual clause of s 7 of the *Charter* in the civil context.

[12] In response, the Respondent brought a motion to strike the Claim as disclosing no reasonable cause of action and for being an abuse of the Court process.

III. DECISION UNDER REVIEW

[13] On August 10, 2015, Prothonotary Aalto granted the Respondent's motion and struck the Claim in its entirety, with no leave to amend.

[14] The Decision applied the following legal tests, respectively, when considering the issues of striking a pleading under Rule 221 of the Rules, misfeasance in public office, and whether there is a duty of care owed by the Crown to a Plaintiff under the tort of negligence: (1) whether it is plain and obvious on the material facts pleaded that the action cannot succeed: *Sivak v Canada*, 2012 FC 272 [*Sivak*]; *R v Imperial Tobacco Canada Ltd,* 2011 SCC 42 [*Imperial Tobacco*]; (2) whether the cause of action requires deliberate and unlawful conduct which would likely harm the Plaintiff: *Odhavji v Woodhouse*, [2003] 3 SCC 263 [*Odhavji*]; and (3) whether the facts as pleaded disclose a proximate relationship between the Plaintiff and Defendant wherein failure to take reasonable care might foreseeably cause loss or harm to the Plaintiff; and if yes, whether there are policy considerations which exist that outweigh recognizing a duty of care: *Cooper v Hobart*, 2001 SCC 79.

[15] The Decision engaged in a thorough overview of both the Appellant and Respondent's submissions on the motion before proceeding to analyze the misfeasance, negligence and other miscellaneous torts alleged by the Appellant to have been committed by the Officer.

[16] The miscellaneous torts alleged by the Appellant included the torts of abuse of process, abuse and excess of authority, and arguments related to the *Charter*. Prothonotary Aalto noted that the Appellant spent little time substantiating these arguments and agreed with the Respondent that the Claim disclosed no reasonable cause of action related to them. Specifically, as regards the tort of abuse of process, the Prothonotary found that *USA v Cobb*, [2001] 1 SCR 587 [*Cobb*] did not support the Appellant's submission that the tort exists. Looking next to the tort of abuse and excess of authority, the Prothonotary took guidance from *Odhavji,* above, and *Roncarelli v Duplessis*, [1959] SCR 121 [*Roncarelli*]. Finally, in terms of the Appellant's *Charter* arguments, the Prothonotary noted that such claims should not be made in a "factual vacuum": *MacKay v Manitoba*, [1989] 2 SCR 357 (SCC). The Prothonotary found each of these three tortious allegations to be unsupported and unsubstantiated; they were bald conclusions with no material facts. As such, they were struck.

[17] The Prothonotary next considered the law relating to misfeasance in public office, noting that as per *Odjavji*, above, there were two fundamental elements to make out the tort: (1) did an officer of the Crown engage in deliberate and unlawful conduct as a public officer; and (2) was the public officer aware that the conduct was unlawful and likely to cause harm to the plaintiff? The Prothonotary held that, even if all allegations made were true, there were no material facts pleaded that suggest that the Officer acted outside the scope of her authority and that could give

rise to a cause of action. The Prothonotary pointed out that there is no entitlement to a positive H&C determination. It remains inherently discretionary. Therefore, the Claim's submissions respecting this tort were also struck.

[18] Finally, as regards the allegations of negligence, the Prothonotary found that there were no material facts to support a private law duty of care. The *Anns* test, as articulated by the Supreme Court of Canada, requires a relationship of sufficient proximity between the Crown and the Plaintiff that discloses reasonably foreseeable harm to establish a *prima facie* duty of care: *Imperial Tobacco*, above, at para 49; *Anns v Merton London Borough Council,* [1978] AC 728 [*Anns*]. The Prothonotary concluded that even if such a duty existed, the cause of action for negligence would fail for residual policy considerations. Prothonotary Aalto indicated that imposing a duty of care for the failure to make a positive H&C decision has the potential to create an indeterminate liability for all H&C applications which are denied. The Claim's submissions pertaining to negligence were also stuck.

[19] The Prothonotary then went on to find that if his analysis pertaining to misfeasance and negligence are incorrect, the Claim still fails on the basis of being a collateral attack on the decision of Justice Shore in IMM-883-14, and an abuse of process of the Court. The Claim is a disguised attempt to re-litigate the reasonableness of the H&C decision for the fourth time when the matter has already been decided at the immigration stage in the denial of the application for leave and judicial review, as well as in the denial of further reconsideration.

IV. STATUTORY PROVISIONS

[20] The following provisions of *Immigration and Refugee Protection Act,* SC 2001, c 27 [IRPA] are applicable in this proceeding:

Objectives – immigration	**Objet en matière d'immigration**
3 (1) The objectives of this Act with respect to immigration are	3 (1) En matière d'immigration, la présente loi a pour objet :
…	…
(d) to see that families are reunited in Canada;	(d) de veiller à la réunification des familles au Canada;
Humanitarian and compassionate considerations	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that	25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations

it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[21] The following provisions of the Rules are applicable in this proceeding:

Appeal	**Appel**
51 (1) An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.	51 (1) L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédérale.
Motion to strike	**Requête en radiation**
221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be,	(a) qu'il ne révèle aucune cause d'action ou de défense valable;
(b) is immaterial or redundant,	(b) qu'il n'est pas pertinent ou qu'il est redondant;
(c) is scandalous, frivolous or vexatious,	(c) qu'il est scandaleux, frivole ou vexatoire;
(d) may prejudice or delay the fair trial of the action,	(d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
(e) constitutes a departure from a previous pleading, or	(e) qu'il diverge d'un acte de procédure antérieur;
(f) is otherwise an abuse of the	(f) qu'il constitue autrement un

process of the Court,	abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

V. ISSUES

[22] The Appellant submits that the following are at issue in this proceeding:

1. Whether the Prothonotary misapplied the test on a motion to strike and usurped the function of the trial judge by rendering judgment on the merits without a trial; and
2. Whether the Prothonotary erred in law in striking his Claim.

VI. ARGUMENT

A. *Appellant*

(1) Motion to Strike

[23] The test on a motion to strike is high in that such an occurrence should only take place where the pleading is "bad beyond argument." The Appellant submits that the Prothonotary misapplied the test on a motion to strike: *Nelles v Ontario (1989)*, 60 DLR (4th) 609 (SCC); *Dumont v Canada (Attorney General)* [1990], 1 SCR 279; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959. The Appellant points to the jurisprudence for further guiding principles, emphasizing that a statement of claim should not be struck simply because it is novel (*Nash v Ontario* (1995), 27 OR (3d) (CA)), and that the Respondent must produce a case directly on point from the same jurisdiction (*Dalex Co v Schawartz Levitsky Feldman* (1994), 19 OR (3d) 463 (Gen Div)), and

that the Court should be generous and allow an amendment before striking (*Grant v Cormier* (2001), 56 OR (3d) 215 (Ont CA)).

[24] The Appellant submits that the Decision failed to apply the test or jurisprudence applicable on a motion to strike. Instead, it decided the case on the pleadings, without a trial, usurping the function of the trial judge. The Prothonotary ignored the facts pleaded and/or reconfigured other facts pleaded as bald statements in order to dismiss the facts, on their substance, rather than take them as proven, as is required by the jurisprudence: *Canada (Attorney General) v Inuit Tapirisat of Canada*, [1980] 2 SCR 735.

(2) Errors of Law

[25] The Appellant further argues that the Prothonotary blatantly erred when ruling that the Claim failed as a collateral attack. "Collateral attack" can only be used as a defence at trial and is not a basis to call into question jurisdiction or to strike a claim. The Appellant says that the Supreme Court has, on numerous occasions, made it clear that, whether or not judicial review has been brought, a plaintiff maintains a right to commence an action without bringing into question the jurisdictional issue of collateral attack: *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 [*TeleZone*]; *Canada (Attorney General) v McArthur*, 2010 SCC 63; *Parrish & Heimbecker Ltd v Canada (Agriculture and Agri-Food)*, 2010 SCC 64 [*Parrish*].

[26] As regards the torts of excess of authority and public misfeasance, the Appellant points to paragraphs 12, 13 and 15 of the Decision, and says that the Prothonotary erred in finding that the relevant material facts were not pleaded. Further, the Appellant alleges that jurisdiction was

exceeded when the Prothonotary made factual findings in a vacuum, and by holding that the determination of an H&C application is inherently discretionary: *Rudder v Canada*, 2009 FC 689 at para 37 [*Rudder*]; *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 at para 38 [*Lemus*].

[27] As regards negligence, the Appellant argues that, contrary to the findings of the Prothonotary, there is a duty owed by the Crown to an applicant to process applications: *Liang v Canada (Citizenship and Immigration)*, 2012 FC 758 at para 25; *Dragan v Canada*, [2003] FCJ No 260 at para 45.

[28] The Appellant also argues that the Prothonotary erred further by ruling that "imposing a duty of care for the failure to obtain a positive H&C decision has the potential to create an indeterminate liability for all H&C applications which are denied. H&C applications are discretionary and fact based."

[29] The Appellant submits that jurisdiction was further exceeded by the Prothonotary's over-generalizing his Claim by stating that he was pleading that all H&C applications had a right to a positive decision. The Appellant says that this is not the case, and that on the facts pleaded: he has a right to a positive decision; that jurisprudence exists that such a conclusion can be drawn with respect to temporary visas (*Rudder*, above); and that *mandamus* lies to compel a positive decision under s 25 of IRPA: *Lemus*, above.

[30] The Appellant says that the Prothonotary also overstepped his jurisdiction by acting as a "hybrid applications/trial judge" rather than deciding a motion to strike. He seeks an order setting aside the Decision, an order granting the relief that he alleges should have been granted by Prothonotary Aalto, costs of both the motion before Prothonotary Aalto and the within appeal, as well as any such further order or direction the Court deems just.

B. *Respondent*

[31] The Claim was struck by Prothonotary Aalto for two reasons: it was an attempt to re-litigate an issue already decided by the Court and it did not plead material facts to support the causes of action claimed. The Respondent submits that the Appellant has not shown that either of these reasons warrant an appeal.

[32] The Respondent says that the Appellant has failed to demonstrate that the decision-maker gave insufficient weight to relevant factors or proceeded on a wrong principle of law.

[33] The Appellant claims that the Respondent is liable for abuse of process, excess of jurisdiction and damages for breaches of the *Charter*. However, the Respondent submits that the Appellant has failed to raise any factual or legal argument to challenge Prothonotary Aalto's findings in regards to these claims. Therefore in this regard, the Decision should not be disturbed.

[34] The Respondent further argues that the Appellant has confused the Court's reasonable finding that the Claim was an attempt to re-litigate an issue already decided (the reasonableness

of the H&C decision), and therefore an abuse of process, with the concept of a "collateral attack" as explained by the Supreme Court in *TeleZone*, above. However, this was not the basis for striking the Claim. Prothonotary Aalto found that the Claim was an impermissible attack on the Court's upholding of the reasonableness of the decision on judicial review. The Respondent says that while both the decision that was under appeal and *TeleZone* use the language of "collateral attack," the term has a different meaning in the two contexts, as an attack on the decision of the Court is distinct from an attack on an administrative decision by way of action. While the latter is permissible, the former may be an abuse of process.

[35] The Respondent also says that the Appellant has not shown that the Court's alternative finding, that the Claim disclosed no reasonable cause of action, was in error.

[36] As regards the claim of misfeasance, the Respondent says no material facts were pleaded to establish that the Officer acted outside the scope of her authority, and even if she did, nothing was submitted to establish a causal connection to damages by way of entitlement to a positive H&C decision. The Appellant's reliance on the decisions in *Rudder* and *Lemus*, both above, do not help him. In *Rudder*, the Court exercised its discretion to grant *mandamus* on the judicial review of a temporary resident visa. This does not establish that the Appellant is somehow entitled to a positive H&C decision or that a negative decision somehow gives rise to a cause of action. Similarly, the decision in *Lemus* does not change the fact that a discretionary decision is not stripped of its discretionary nature by judicial review.

[37] In terms of the claim of negligence, the Respondent submits that Prothonotary Aalto reasonably found that there was no duty of care between the Respondent and the Appellant based on the facts pleaded and a correct application of the law. The jurisprudence has established that the relationship between the government and the governed is not one of individual proximity and nothing claimed by the Appellant supports a departure from this principle: *Premakumaran v Canada*, 2006 FCA 213 at para 22 [*Premakumaran*]; *Benaissa v Canada (Attorney General)*, 2005 FC 1220 at para 35 [*Benaissa*]. The Respondent says that unlike the circumstances in the jurisprudence upon which the Appellant relies, here there has been no refusal to process his application nor any undue delay in processing his application.

[38] The Appellant has misunderstood the second branch of the *Anns* test. The question is not whether the decision to reject the H&C application was a policy decision, but whether there are policy reasons that weigh against the finding of a duty of care. Prothonotary Aalto cited such policy reasons as weighing against the finding of a duty of care, including a concern over indeterminate liability for all H&C applications that are denied. The Respondent argues that the finding of no duty of care was correct in law and the striking of the claim in negligence ought not to be disturbed as a result.

VII. ANALYSIS

[39] In accordance with *Merck & Co v Apotex Inc*, [2004] 2 FCR 459, a discretionary order of a prothonotary should only be reviewed *de novo* if the questions raised in the motion are vital to the final issue in the case, or the order is clearly wrong in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misrepresentation of the facts.

[40] In the present motion, the questions raised are vital to the final issue in this case. Hence, I will review the Decision of Prothonotary Aalto on a *de novo* basis.

[41] As Prothonotary Aalto pointed out in his reasons, I summarized the jurisprudence for striking a pleading for disclosing no reasonable cause of action and for being scandalous and vexatious in *Sivak*, above:

> [15] The test in Canada to strike out a pleading under Rule 221 of the Rules is whether it is plain and obvious on the facts pleaded that the action cannot succeed. In this regard, the Supreme Court of Canada has noted that the power to strike out a statement of claim is a "valuable housekeeping measure essential to effective and a fair litigation." See *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 and *R v Imperial Tobacco Canada Ltd.* 2011 SCC 42, at paragraphs 17 and 19.
>
> [16] In determining whether a cause of action exists, the following principles are to be considered:
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> a. The material facts pled are to be taken as proven, unless the alleged facts are based on assumptive or speculative conclusions which are incapable of proof;
>
> b. If the facts, taken as proven, disclose a reasonable cause of action, that is, one with some chance of success, then the action may proceed; and
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> c. The statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies.
>
> See *Operation Dismantle Inc. v Canada*, [1985] 1 SCR 441.
>
> …
>
> [25] *Edell v Canada (Revenue Agency)*, [2010] GSTC 9, 2010 FCA 26, reaffirms the fundamental rule that in a motion to strike the Court is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved. The defendant who seeks

summary dismissal bears the evidentiary burden of showing the lack of a genuine issue.

[26] The fundamental rule, however, must take into account that no cause of action can exist where no material facts are alleged against the defendant. See *Chavali v Canada* 2002 FCA 209.

…

[31] There are many cases that hold that an action cannot be brought on speculation in the hope that sufficient facts may be gleaned on discovery to support the allegations made in the pleadings. See, for example, *AstraZeneca Canada Inc. v Novopharm Ltd.* 2009 FC 1209; appeal dismissed 2010 FCA 112.

[32] In fact, it is an abuse of process for a plaintiff to start proceedings in the hope that something will turn up. A plaintiff should not be permitted to discover the defendant to pursue such an action. See *Kastner*, above.

[33] I think it is also well-established that the rule that material facts in a statement of claim must be taken as true in determining whether a reasonable cause of action is disclosed does not require that allegations based upon assumptions and speculation be taken as true. See *Operation Dismantle*, above.

…

[89] In *George v Harris*, [2000] OJ No 1762, at paragraph 20, Justice Epstein, then of the Ontario Superior Court of Justice, provided examples of what constitutes a "scandalous," "frivolous" or "vexatious" document:

i. A document that demonstrates a complete absence of material facts;

ii. Portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations;

iii. A document that contains only argument and includes unfounded and inflammatory attacks on the integrity of a party, and speculative, unsupported allegations of defamation;

iv. Documents that are replete with conclusions, expressions of opinion, provide no indication whether information is based on personal knowledge or information and belief, and contain many irrelevant matters.

> [90] A statement of claim containing bare assertions but no facts on which to base those assertions discloses no reasonable cause of action and may also be struck as an abuse of process. Furthermore, as indicated above, a claimant is not entitled to rely on the possibility that new facts may arise as the case progresses. On the contrary, the facts must be pled in the initial claim. The question of whether those facts can be proven is a separate issue, but they must be pled nonetheless.
>
> [91] The authorities cited above also show that when a particular cause of action is pled, the claim must contain pleadings of fact that satisfy all of the necessary elements of that cause of action. Otherwise, it will be plain and obvious that the claim discloses no reasonable cause of action.
>
> [92] A statement of claim will also be struck on the grounds that it is so unruly that the scope of the proceedings is unclear. As stated by this Court in *Ceminchuk v Canada*, [1995] FCJ No 914, at paragraph 10
>
>> A scandalous, vexatious or frivolous action may not only be one in which the claimant can present no rational argument, based upon the evidence or law, in support of the claim, but also may be an action in which the pleadings are so deficient in factual material that the defendant cannot know how to answer, and a court will be unable to regulate the proceedings. It is an action without reasonable cause, which will not lead to a practical result.

A. *Abuse of Process*

[42] Prothonotary Aalto struck the Claim as being an abuse of process because it was simply a disguised attempt to re-litigate the issues that had already been litigated and decided in the immigrations context:

> [74] Even if I am wrong on both misfeasance in public office and negligence, in my view the Claim fails on the basis of being a collateral attack on the decisions of Justice Shore in IMM-883-14. No serious or arguable issue was raised on the application for leave and judicial review. Justice Shore's discretion was exercised in accordance with the jurisprudence [see, for example, *Krishnapillai*,

> *supra* at para. 10]. The Claim, on a plain reading, is simply a disguised attempt to re-litigate the reasonableness of the H&C decision, an already decided issue both at the immigration stage and the application for leave and judicial review to this Court and the further re-consideration. The Plaintiff has had three chances, each of which were denied. This [is] a fourth attempt to re-litigate the same issue. This action constitutes a collateral attack on those decisions and amounts to an abuse of process. To again litigate his matter is a waste of judicial resources on a claim that is bound to fail or is bereft of any chance of success [see, for example, *Hunt v Carey*, [1990] 2 SCR 959].

[43] Before me, the Appellant argues, based upon the *TeleZone*, above, line of cases that whether or not judicial review has been brought, or whether or not judicial review has been successful or unsuccessful, the Appellant still has a right to bring an action "without bringing into question the jurisdictional issue of collateral attack, *albeit* the Crown is free to raise collateral attack, *as a defence*, *at trial*" [emphasis in original].

[44] The Appellant also says the Prothonotary erred because "we are not dealing with judicial review proper, on its merits, but a leave application, without reasons." The Appellant cites no authority to support this assertion.

[45] Justice Shore's decisions refusing leave are final decisions of the Court based upon a review of the merits put forward by the Appellant in his application for leave and judicial review. Those decisions indicate, in accordance with established jurisprudence, that the application for leave evinced no arguable case. See *Bains v Canada (Employment and Immigration)*, [1990] FCJ No 457; *Sivagurunathan v Canada (Citizenship and Immigration)*, 2013 FC 233 at para 9. In order to reach that conclusion, Justice Shore, like any leave judge, was obliged to review the merits on both sides of the application and decide whether the Appellant had raised any issues

that could reasonably be argued. Justice Shore decided that the Appellant had raised no such issue so that there was no case to go to a judicial review hearing. Hence, the Court has already decided that no argument can be made that the H&C decision contains a reviewable error, and the Federal Court of Appeal in *Krishnapillai v R*, 2001 FCA 378 [*Krishnapillai*], has ruled that commencing an action where leave is denied can be an abuse of the process of the Court:

> [18] The constitutional issue was raised, as is mandated by section 82.1 of the Act, through the only process contemplated by Parliament to challenge the Minister's decision: an application for leave to seek judicial review. The issue was raised, one must assume, with the other issues that could be raised in order to challenge the decision of the Minister. Section 82.1 of the Act provides that there is no appeal from a judgment denying leave. The intent of Parliament was clearly to put an end to the challenge of a decision made under the *Immigration Act* at an early stage, i.e. as soon as leave was denied. Where leave is denied, the commencement of an action raising an issue that was or could have been raised in the leave application is an indirect attempt to circumvent the intent of Parliament and a collateral attack on the judgment denying leave. This is an abuse of the process of the Court.
>
> [19] This conclusion disposes of the issue raised with respect to the constitutional validity of subsection 53(1). It could dispose, also, of the better part of the issues raised with respect to the constitutional validity of the leave requirement because, apart from the issue relating to the absence of reasons in denying leave which obviously could not have been raised prior to the decision denying leave, these issues could and should have been raised at the first opportunity, i.e. in the leave application. However, the argument was not made on that basis, and I shall treat the whole issue of the validity of the leave requirement under the following heading, as was done by the parties.
>
> …
>
> [36] The attack on the constitutionality of the leave requirement prescribed by section 82.1 of the *Immigration Act* has no chance of success.
>
> [37] The statement of claim was properly struck out in its entirety as it was on the one hand an abuse of the process of the

> Court and as it did not, on the other hand, raise any reasonable cause of action.

[46] As Prothonotary Aalto found, the Claim in the present case is simply an attempt to re-litigate the reasonableness of the H&C decision, and the Court has already dealt with the reasonableness of that decision. *TeleZone*, above, and other cases cited by the Appellant do not assist him. In *Parrish*, above, for example, the Supreme Court of Canada ruled that there is nothing in ss 17 and 18 of the *Federal Courts Act*, RSC, 1985, c F-7 that requires a plaintiff to be successful on judicial review before bringing a claim for damages against the Crown. That is not the issue here. In the present case, the Appellant's judicial review application had been dealt with by Justice Shore who, in order to refuse leave, had to conclude that there was nothing unreasonable or otherwise legally objectionable about the H&C decision that could be fairly argued on judicial review. The test for leave is fairly low; in order to dismiss leave Justice Shore had to decide that there was just no reasonable argument that could be made. The allegations in the claims – knowingly misapplying the law; knowingly mistaking facts; knowingly failing to articulate reasons; discrimination; ignoring s 3(1)(a) of the IRPA – were either raised or could have been raised in the leave application. The Federal Court of Appeal has said that this can be an abuse of the process of the Court, and it seems to me on the facts of this case that it is. Asking for damages as opposed to asking for the H&C decision to be quashed does not mean that the merits have not already been dealt with by the Court. This is not a collateral attack strictly speaking, or *res judicata*; it is an abuse of process.

[47] The Court has a discretionary right to strike where it determines that its own processes are being abused. The Appellant invites the Court to read the jurisprudence as saying that he has

a right to commence an action irrespective of whether the result on judicial review is positive or negative. Even if I accept this interpretation, I do not read the cases as saying that following a negative decision on judicial review the Court cannot decide whether any action commenced is an abuse of process. This is an entirely different issue and is governed by its own jurisprudence. The Appellant has pursued judicial review and has obtained a final decision of the Court that there is no fairly arguable case for reviewable error. He is now attempting to litigate the H&C decision by way of action. I see no way around the conclusion that this is an indirect attempt to circumvent the intent of Parliament and a collateral attack on Justice Shore's judgment denying leave and therefore is an abuse of the process of the Court. On these grounds alone, the Claim has to be struck, and the Appellant has made no suggestion as to how it could be amended to make it otherwise.

[48] The Appellant has also drawn the Court's attention to the Supreme Court of Canada jurisprudence to the effect that a failure to grant leave does not necessarily mean that a judgment is confirmed. In *Des Champs v Conseil des écoles*, [1999] 3 SCR 281 at para 31, the Supreme Court said that "refusal of leave is not to be taken to indicate any view by members of this Court of the merits of the decision." The jurisprudence cited by the Appellant deals with leave to appeal to the Supreme Court which is not the issue here. "Leave" does not mean the same thing in every context. In the context of immigration review, a denial of leave means that there is no fairly arguable case on the merits.

B. *No Reasonable Cause of Action*

[49] In the alternative, Prothonotary Aalto struck the Claim for disclosing no reasonable cause of action. Following my own *de novo* review, I see no way to avoid the same conclusion.

[50] The *mandamus* cases cited by the Appellant to support his misfeasance claims do not assist. In the present case, there are no facts pleaded in the Claim that would establish any kind of right to a positive H&C decision. Even if reviewable errors occurred in reaching a negative decision, this does not mean that the Appellant would be entitled to a positive H&C, and Justice Shore has already decided that there is no arguable case for reviewable error. No facts are pleaded to establish that the Officer acted outside her authority or that the Appellant is entitled to H&C relief. The Appellant's claim to misfeasance in public office is not supported by any material facts and he simply asks the Court to assume that he is entitled to a positive H&C decision. In addition, there are no facts pleaded to support that any damages suffered were caused by the Officer's alleged wrongdoing.

[51] The Appellant refers the Court to Justice Zinn's decision in *Cabral et al v MCI et al* (Docket no. T-2425-14) at para 17. In that case, Justice Zinn decided, on the pleadings before him, that there were sufficient facts to support allegations that the Minister had acted dishonestly. In the present case, paragraph 12 of the Claim remains a series of assertions without facts to support them.

[52] For much the same reason as given by Prothonotary Aalto, my own review of the pleadings leads me to conclude that the negligence claims must be struck as revealing no possible cause of action. The Appellant has not satisfied either branch of the *Anns* test. He has not pleaded facts to support a duty of care. He seeks to rely upon judicial review cases that say there is a statutory duty to process an application. In this case, the Appellant's H&C application has been processed but, in any event, the statutory duty to process a claim does not establish a duty of care under *Anns*.

[53] The Appellant does not fully address the second *Anns* issue. He appears to think that the question is whether the decision to reject the H&C application was a policy decision. The issue is whether there are policy reasons in this case that weigh against finding that there is a duty of care. Prothonotary Aalto identified and addressed those policy considerations in his own reasons:

> [72] Even if such a *prima facie* duty existed, the cause of action fails on the second part of the *Anns* test in any event: the existence of residual policy considerations that justify denying liability. The jurisprudence teaches that policy considerations "are not concerned with the relationships between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally" (*Benaissa v Canada (Attorney General)*, 2005 FC 1220 at para. 33). In my view, imposing a duty of care for the failure to obtain a positive H&C decision has the potential to create an indeterminate liability for all H&C applications which are denied. H&C applications are discretionary and fact based. This H&C was also subjected to an application for leave and judicial review and re-consideration both of which were denied.

[54] The Appellant argues that the Court should not be making a decision at this stage and that whether a duty of care exists is a matter for the trial judge. But the Appellant pleads no material facts that could support a duty of care. The Courts have found that no duty of care arises in some

immigration contexts. See *Premakumaran*, above, at para 22; *Szebenyi v Canada*, 2006 FC 602 at para 91; *Khalil v Canada,* [2007] FC 928 at para 155. I also note that in *Benaissa*, above, Prothonotary Lafrenière struck a claim for the very reasons that arise in this case:

> [35] Even if foreseeability has been adequately pleaded by the Plaintiff, some further ingredient would be needed to establish the requisite proximity of relationship between the Plaintiff and the Crown: Hill v. Chief Constable of West Yorkshire, [1989] A.C. 53 (H.L.). In Cooper, the Supreme Court of Canada directed that an examination of the policy of the statute under which the officers of the Crown are appointed must be conducted to decide whether there exists the required proximity of relationship to create a statutory duty of care. If such a duty of care to the Plaintiff exists, it must be found in the statute, namely the Immigration and Refugee Protection Act.
>
> …
>
> [38] Even if the Plaintiff could establish a *prima facie* duty of care, it is plain and obvious that he cannot succeed at the second stage of the analysis set out in *Cooper* based on the facts pleaded. The question at the second stage is whether there exist residual policy considerations which justify denying liability. These policy considerations are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally.
>
> [39] In my view, it would not be just, fair and reasonable for the law to impose a duty of care on those responsible for the administrative implementation of immigration decisions of the kind which have been made in the case of the Plaintiff, absent evidence of bad faith, gross negligence, or undue delay.

[55] These considerations against finding a duty of care seem entirely appropriate to me. I would only add that finding a duty of care in this case would, to quote the Federal Court of Appeal in *Krishnapillai*, above, at para 18, allow "an indirect attempt to circumvent the intent of Parliament" to clearly "put an end to the challenge of a decision made under the *Immigration Act* at an early stage, i.e. as soon as leave was denied."

[56] These seem to me to be the only issues of substance that the Appellant has raised in this appeal.

[57] As the Prothonotary points out, the Claim is the Appellant's second attempt to define meritorious causes of action. In addition, there is no way to cure what is simply a collateral attack and an abuse of process on the decision of Justice Shore denying leave. It would, therefore, be inappropriate to grant leave to amend in a situation where the claim cannot possibly succeed and there is no scintilla of a cause of action. See *Spatling v Canada (Solicitor General)*, 2003 CarswellNat 1013. The problems with this Claim are not curable by amendment.

ORDER

THIS COURT ORDERS that

1. The Plaintiff's (Appellant's) motion is dismissed and the decision of Prothonotary Aalto is upheld;
2. The Defendant (Respondent) is awarded costs of this motion to appeal and costs of the motion heard by Prothonotary Aalto.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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