Federal Court  Cour fédérale

Date: 20170824

Docket: T-1774-15

Citation: 2017 FC 786

Ottawa, Ontario, August 24, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

EMAD IBRAHIM AL OMANI, LINA HOUSNE HAMZA NAHAS, AND SULTAN EMAD AL OMANI (A MINOR), LULWA EMAD IBRAHIM AL OMANI (A MINOR), HAYA EMAD IBRAHIM AL OMANI (A MINOR), BY THEIR LITIGATION GUARDIANS, EMAD IBRAHIM AL OMANI AND LINA HOUSNE HAMZA NAHAS

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] The Plaintiffs form a family from Saudi Arabia who applied for permanent residence in Canada under the Federal Skilled Worker Class. They submitted a statement of claim alleging a number of causes of action resulting in various heads of damages against the Defendant due to

their treatment in the immigration system. They also seek, or give notice of intent to seek, declarations that certain provisions in the *Federal Courts Act*, RSC, 1985, c F-7 [*Federal Courts Act*] and the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] are unconstitutional. The Defendant moved to strike the statement of claim in its entirety. The Court must determine whether the Defendant has established that the statement of claim fails to meet the pleadings requirements set out in the *Federal Courts Rules*, SOR 98-106 [the Rules]. At the Plaintiffs' request, the Court must also determine whether to grant leave to amend any claims that are struck.

I. Facts as set out in the statement of claim

[2] The principal Plaintiff, Emad Al Omani, first submitted an application for permanent residence in Canada under the Federal Skilled Worker Class pursuant to subsection 12(2) of the IRPA in September 2006. That application included his wife, Lina Housne Hamza Nahas, and their two children, Lulwa Ehmad Alomani and Sultan Emad Alomani, as accompanying dependents. Their third child, Haya Emad Ibrahim Al Omani, was later added to the application.

[3] The Canadian High Commission in London dealt with the application and refused it in December 2009 because it fell two points short of the score of 67 needed for a positive decision. The Plaintiffs mainly contest the visa officer's award of 4/10 points for "adaptability" and 10/16 points for English proficiency, both of which are made by applying subsection 76(1) and related provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. The principal Plaintiff maintains he should have received 5 adaptability points for his Canadian brother plus at least 3 adaptability points for his wife's university degree. On language

proficiency, he argues the visa officer should have considered other evidence of his English language abilities:

> A/ with respect to adaptability, the ***Regulations*** and CIC's own website, sets out that the Plaintiff, Emad Al Omani, should have obtained, under "adaptability", 5 points, because he has a "sibling" (brother) who is a Canadian citizen and another 3 points because his spouse has a University degree, for a ***minimum*** of 8 out of 10 points for "adaptability", and these 8 out of 10 points, which are statutorily predetermined, are ***before*** even considering the other factors of adaptability, such as the fact that both the Plaintiff and his wife have university degrees from English instruction universities, have a net worth of $2.3 ***million*** (CDN), of which half is in liquid assets, have family in Canada, have a job offer in Canada, from the company run and owned by the Plaintiff's brother;
>
> B/ with respect to language (English) proficiency, the Plaintiff, Emad Al Omani, only received 10 out of 16 points, notwithstanding that the ***Regulations***, and CIC's representations, indicate that the prescribed English exam is ***not*** the only means by which to access English proficiency, and notwithstanding that the Applicant raised the issue of the need to write the exam, when he in fact graduated from an English-speaking University, has worked for English-speaking companies, in the English language, and was in the third year of a four year MBA programme, in English, which he had not yet completed due to work demands, and that the officer was in possession of confirmation of all of the above, and refused to exercise jurisdiction to assess his English proficiency, in the circumstances, within the context of his "ability to become economically established in Canada"
>
> (at para 20(b)(ii) of the statement of claim).

[4] The decision was challenged in the Federal Court. In August 2010, the decision was set aside by the Federal Court and the matter was sent back for redetermination by a different visa officer.

[5] As part of the process of redetermination, the principal Plaintiff submitted further documentation requested by the Defendant and was called for an interview in January 2014. It is asserted that the interview lasted some 15 minutes. The officer asked the principal Plaintiff to explain a change in his job description. Towards the end of the interview, the officer would have asked the principal Plaintiff suddenly whether he "belonged to, or was in any way associated with "any group or organization like Al Qaeda in Iraq" ". The principal Plaintiff categorically replied, according to the statement of claim, that he did not belong to, nor associated with, such groups as Al Qaeda, nor Al Qaeda itself (statement of claim, para 26(b)). When the principal Plaintiff asked for more detail on the question, the officer refused due to "secrecy" concerns.

[6] In March 2014, the redetermination of the Plaintiffs' permanent residence application resulted in a second negative decision. The refusal explained that "there are reasonable grounds to believe [the principal Plaintiff is] a member of the inadmissible class of persons described in 34(1)(f)" of the IRPA.

[7] In September 2014, once again the Federal Court ordered that the second negative decision be set aside and the matter was sent back for redetermination. On the record as it stands, the Plaintiffs had not heard from the Crown with respect to this second redetermination. The Plaintiffs sued.

II. Arguments

[8] Fundamentally, the Plaintiffs argue that they have been mistreated in Canada's immigration system to a degree that warrants compensation. They allege the Defendant is liable

in tort for misfeasance in public office, abuse and excess of jurisdiction and authority, abuse of process, negligence and negligent investigation, conspiracy, and for breaches of the plaintiffs' section 7 and section 15 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] rights.

[9] The Plaintiffs are seeking:

i. general damages in the amount of $200,000 per Plaintiff;

ii. aggravated damages in the amount of $50,000 per Plaintiff;

iii. punitive damages in the amount of $50,000 per Plaintiff;

iv. any and all economic loss damages pleaded, to be calculated at trial;

v. a declaration and/or finding that section 49 of the *Federal Courts Act*, barring jury trials in the Federal Court, is unconstitutional, and of no force and effect;

vi. a declaration and/or finding that the requirement to seek leave from an administrative decision, under the IRPA, to commence judicial review under section 18 of the *Federal Courts Act*, pursuant to section 72(1) of the IRPA, violates the constitutional right to judicial review and a fair and independent judiciary and is of no force and effect; and

vii. solicitor-client costs of this action and any other relief the Court deems just.

[10] The Defendant contends in her motion to strike that the statement of claim fails to establish any of the alleged causes of action and does not properly plead damages. They further seek to strike the two named Ministers (Foreign Affairs and Citizenship and Immigration) from the action in favour of Her Majesty the Queen, as well as the Plaintiffs' constitutional arguments respecting the *Federal Courts Act* and the IRPA.

III. Law on a motion to strike

[11] Is before the Court the motion to strike brought on behalf of the Defendant. Rule 221(1) permits the Court to strike a claim on certain grounds:

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 process of the Court,	**f)** qu'il constitue autrement un 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.

The Defendant primarily relies on Rule 221(1)(a), which allows a claim to be struck if it "discloses no reasonable cause of action.". Rule 221(1)(c) is also in play.

[12] The test to strike a claim under Rule 221 sets a high bar. First, it is assumed that the facts stated in the statement of claim can be proven. The Court must be satisfied that it is plain and obvious that the pleading discloses no reasonable cause of action assuming the facts pleaded are true: *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 SCR 45 at para 17; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 [*Hunt*] at p 980. The Defendant bears the onus of meeting this test: *Sivak v Canada*, 2012 FC 272, 406 FTR 115 [*Sivak*] at para 25.

[13] In *Hunt*, the Supreme Court sided with the articulation of the rule in England to the effect that "if there is a chance that the plaintiff may succeed, then the plaintiff should not be "driven from the judgment seat"" (p. 980). A high bar indeed to succeed on a motion to strike. Some chance of success will suffice or, as Justice Estey said in *Att. Gen. of Can. v Inuit Tapirisat et al*, [1980] 2 SCR 735, "(o)n a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt"" (p.740).

[14] To show a plaintiff has a reasonable cause of action, the statement of claim must plead material facts satisfying every element of the alleged causes of action: *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227, 476 NR 219 [*Mancuso*] at para 19; *Benaissa v Canada (Attorney General)*, 2005 FC 1220 [*Benaissa*] at para 15. The plaintiff needs to explain the "who, when, where, how and what" giving rise to the Defendant's liability (*Mancuso*, para 19, *Baird v Canada*, 2006 FC 205 at paras 9-11, affirmed in 2007 FCA 48).

[15] Thus, there appears to be a balance. On one hand, a chance of success is enough for the matter to proceed. On the other, the material facts must be pleaded in sufficient detail such that the cause of action may exist. The purpose of pleadings is to give notice to the opposing party and define the issues in such a way that it can understand how the facts support the various causes of action. As the Court of Appeal put it in *Mancuso*, "(i)t is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and relief sought" (para 16). The Plaintiffs note that pleadings can still proceed despite being "far from models of legal clarity" (*Manuge v Canada*, 2010 SCC 67, [2010] 3 SCR 672 at para 23). But it remains that adequate material facts must be pleaded. Parties cannot make broad allegations in their statement of claim in the hope of later going on a "fishing expedition" to discover the facts: *Kastner v Painblanc* (1994), 176 NR 68, 51 ACWS (3d) 428 (FCA) at p.2.

[16] Rules 174 and 181 further define the minimum requirements for a statement of claim. Pursuant to Rule 174, every pleading must contain the material facts on which the party relies.

174 Every pleading shall contain a concise statement of the material facts on which the party relies, but shall not include evidence by which those facts are to be proved.	**174** Tout acte de procédure contient un exposé concis des faits substantiels sur lesquels la partie se fonde; il ne comprend pas les moyens de preuve à l'appui de ces faits.

Rule 181 requires that a pleading contain particulars of any alleged state of mind of a person, malice, or fraudulent intention.

181(1) A pleading shall contain particulars of every allegation contained therein, including	**181(1)** L'acte de procédure contient des précisions sur chaque allégation, notamment :

(a) particulars of any alleged misrepresentation, fraud, breach of trust, wilful default or undue influence; and	**a)** des précisions sur les fausses déclarations, fraudes, abus de confiance, manquements délibérés ou influences indues reprochés;
(b) particulars of any alleged state of mind of a person, including any alleged mental disorder or disability, malice or fraudulent intention.	**b)** des précisions sur toute allégation portant sur l'état mental d'une personne, tel un déséquilibre mental, une incapacité mentale ou une intention malicieuse ou frauduleuse.

[17] But what are "material facts"? They cannot be conclusions or bald allegations: *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at para 34; 321 DLR (4th) 301 [*Merchant*]; *Mancuso* at paras 17-18. You cannot plead bad faith as a material fact by merely stating phrases such as "deliberately or negligently" or "callous disregard:" *Zündel v Canada*, 2005 FC 1612 at para 16, affirmed in 2006 FCA 356. A modicum of story-telling is required. The statement of claim must contain enough facts for the Defendant to understand, for instance, what the bad faith allegation is based on.

[18] The jurisprudence suggests that a pleading can fall into one of three categories along a spectrum. The pleading either shows *no scintilla* of a cause of action, in which case the motion to strike would succeed, shows *a scintilla* of a cause of action, in which case there may be leave to amend, or it shows a *reasonable* cause of action. The Federal Court of Appeal similarly described in *Mancuso* material facts and bald allegations as lying on a continuum:

> [18] There is no bright line between material facts and bald allegations, nor between pleadings of material facts and the prohibition on pleading of evidence. They are points on a continuum, and it is the responsibility of a motions judge, looking

> at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.

IV. Issues

[19] Motions to strike can present short questions with lengthy answers. Based on the aforementioned law, we are concerned with two overarching issues in this case:

1. Is it plain and obvious that the statement of claim discloses no reasonable cause of action with respect to some or all of the claims?
2. Do some claims that could be struck nevertheless show a scintilla of a cause of action such that the Plaintiffs should be granted leave to amend those claims?

V. Analysis of each alleged cause of action

[20] The Court must take the statement of claim as it is. It must be read as generously as possible, thereby avoiding to put weight on what may be drafting deficiencies. However, would not be drafting deficiencies what would amount to speculations, hoping to find facts on discovery to support the allegations made. In effect, the motions judge is looking for the facts, taken as proven at this stage that will satisfy all of the necessary elements of the cause of action.

A. *Material facts*

[21] We find guidance in the binding decision of the Federal Court of Appeal in *Mancuso* on the requirements for a statement of claim to resist a motion to strike under rule 221.

[22] The main theme in *Mancuso* is the requirement that there be sufficient material facts pleaded. The material facts that are pleaded must be sufficient to support the claim and the relief sought. That means therefore that the facts must be advanced so that the cause of action may be established, leading to an appropriate remedy. The Court of Appeal agreed with the judge in *Mancuso* that "pleadings play an important role in providing notice and defining the issues to be tried and that the Court and opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action" (para 16). The plaintiff must commit to more than merely stating some facts, a sort of narrative taken as proven, and then posit a series of alleged causes of action in order to prevail on a motion to strike.

[23] A plaintiff will want to maximize her flexibility in a statement of claim. But she "must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant who, when, where, how and what gave rise to its liability" (*Mancuso*, para 19). As is often the case, the principle behind the rule helps understand the scope of the requirement. Hence, we read at paragraph 17 of *Mancuso*:

> [17] The latter part of this requirement – sufficient material facts – is the foundation of a proper pleading. If a court allowed parties to plead bald allegations of fact, or mere conclusory statements of law, the pleadings would fail to perform their role in identifying the issues. The proper pleading of a statement of claim is necessary for a defendant to prepare a statement of defence. Material facts frame the discovery process and allow counsel to advise their clients, to prepare their case and to map a trial strategy. Importantly, the pleadings establish the parameters of relevancy of evidence at discovery and trial.

[24] Thus, adequate pleadings are required up front; adequate material facts are mandatorily required. As put by the *Mancuso* Court at para 20, "(p)laintiffs cannot file inadequate pleadings

and rely on a defendant to request particulars, nor can they supplement insufficient pleadings to make them sufficient through particulars: *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112."

[25] That translates into the requirement that tort claims be identified and then the material facts are set out such that the elements of the tort claim are satisfied. In my view, that is largely missing in this statement of claim, which has made the examination of the motion to strike quite cumbersome.

B. *How the statement of claim is organized*

[26] The statement of claim is difficult to apprehend and somewhat unwieldy. It starts off with bald allegations of various infringements, be they abuse of process, excess of authority, public misfeasance, negligence, negligent investigation, contempt of two Federal Court Judgments, as well as violation of section 15 and 7 of the *Charter*. For good measure, there is also an allegation that section 49 of the *Federal Courts Act* (prohibition of jury trails) and 72 of the IRPA (requirement that leave be granted for judicial review) are unconstitutional and of no force and effect.

[27] It then continues with a series of paragraphs that allege facts, what constitutes in fact a narrative. Follow a number of paragraphs which provide a series of heads of damages that allegedly would result from the facts as presented. The chapeau of para 30 simply states that damages were suffered as a result of "officials' inexcusable delay, false and unfounded allegations, and breach of duty to process the main Plaintiffs' application."

[28] Paragraphs 32 to 35 of the statement of claim that the Plaintiffs list causes of action. Thus, para 32 declares that there was:

- abuse and excess of jurisdiction and authority;
- abuse of process at common law and section 7 of the *Charter*;
- public misfeasance.

The paragraph ends with a mere declaration, without any connection with the facts, that "tortious conduct has caused the damages". What particular facts constitute the alleged tortious conduct is nowhere to be found in the pleading.

[29] Para 34 of the statement of claim seeks to be somewhat more precise in suggesting that the delay between various proceedings constitutes in itself abuse and excess of authority as well as public misfeasance, alleging bad faith at para 35.

[30] The Plaintiffs chose to plead in the alternative that officials have been negligent and engaged in negligent investigation. As for these causes of action, the statement of claim does not state what facts are pled in support of its essential elements. Rather, it is simply stated that they are owed a duty of care "to competently and with due dispatch properly process an application …as well as competently and diligently investigate any allegations of inadmissibility" (para 36).

[31] In the further alternative, the Plaintiffs allege a conspiracy to deny their permanent residence. This time, the allegations are barely more precise in that the Plaintiffs allege "a contrived denial made in bad faith", delay and baseless association with Al Qaeda (para 37). I note that, again, the material facts that would give precision to the alleged conspiracy are not

stated. In fact, there is a general allegation of conspiracy, but bad faith, delay and baseless association do not make a conspiracy, i.e. where there is proof of agreement and execution. The Defendant does not know who, when, where, how and what which would give rise to its liability.

C. *Amending pleadings*

[32] It does not suffice for the Court to rule that a pleading is deficient. Rule 221 requires consideration of whether a pleading should be struck with or without leave to amend. The jurisprudence points to various considerations which come into play in making such determination.

[33] The Plaintiffs have raised the possibility that if the statement of claim is struck in part or in whole, leave to amend the pleadings should be granted. As long as a pleading shows a scintilla of a cause of action, it will not be struck out if it can be cured by amendment: *Hunt* at pp 976-978; *Simon v Canada*, 2011 FCA 6 [*Simon*] at para 8; *Collins v Canada*, 2011 FCA 140 at para 30 [*Collins*]; *Sivak* at para 94; *Sweet v Canada* (1999), 249 NR 17 at para 21 (FCA) [*Sweet*]; *Larden v Canada*, (1998) 145 FTR 140 at para 26; *Kiely v Her Majesty the Queen*, (1987) 10 FTR 10 (FCTD) at p 2; *Waterside Ocean Navigation Co Inc v International Navigation Ltd*, [1977] 2 FC 257 at para 4.

[34] The case law teaches that a pleading will not be struck out without leave to amend unless there is no scintilla of a cause of action (*McMillan v Canada*, (1996) 108 FTR 32 [*McMillan*] and *Sivak*). But there must be that scintilla. As Associate Chief Justice Jerome put it in *McMillan*, "(t)he burden on the applicant under R. 419 (1)(a) is heavy since portions of the

pleadings will only be struck out if it is clear that the claim cannot be amended to show a proper cause of action" (para 39).

[35] However, it is not for the Court to redraft the pleadings. In *Sweet*, the Court of Appeal commented that "(e)ach proceeding is to be assessed on its own merits, with consideration being given to, inter alia, the personal situation of the party, the issues and arguments raised, the manner and tone in which they are raised, the number and proportion of allegations that are defective and the readiness of the amendments needed" (my emphasis, para 21).

[36] In fact, if a scintilla of a cause of action has been pleaded, this Court may be more reticent to strike claims without leave to amend in case it is the first version of the pleading, as in this case. In *Simon* and *Collins*, the Court of Appeal warned that failure to comply with the rules once the pleadings have been allowed to be amended would expose the pleadings to the risk of being struck out (*Simon* at para 17 and *Collins* at para 31).

D. *Alleged causes of action*

[37] At the outset of the hearing, the parties agreed that the Defendant's list of claims was a satisfactory way to organize the discussion. I will proceed through each claim in this order and address the two issues identified above.

Claim 1: Misfeasance in public office

[38] The statement of claim alleges the tort of misfeasance in public office. Because it constitutes the cause of action on which the Plaintiffs have chosen to rely the most heavily, I have attempted to gather the various paragraphs of the statement of claim which refer to misfeasance:

> 1. The Plaintiffs claim […] all of which damages arise from: […]
>
> (ii) the Defendants' servants and officers' actions, and lack of action and omissions, in not issuing the permanent resident visas, and not complying with the Federal Court orders, constitutes an abuse of process, abuse and excess of authority and jurisdiction, public misfeasance, as well as negligence, and negligent investigation, all compensable at common-law, under the ***Immigration and Refugee Protection Act ("IRPA")***, as well as s. 24(1) of the ***Charter***.
>
> […]
>
> 32. The Plaintiffs state, and the fact is that:
>
> (a) the Defendants' officials have, with knowledge and intent, abused process, abused and exceeded authority and jurisdiction, and engaged in public misfeasance of their office, in their refusal to lawfully abide by the Federal Court order and terms of the ***IRPA*** and ***Regulations***, and issue permanent residence visas, and in the refusal(s) to give any cogent and/or sober answers to the plaintiffs and their counsel, except stone silence and stone-walling and that the Defendants' servants and officials have: […]
>
> (iii) engaged in public misfeasance as set out by the Supreme Court of Canada in ***Odhavji Estate v. Woodhouse [2003] 3 S.C.R. 263***, in that:
>
> A/ the officials engaged in deliberate, unlawful conduct in the exercise of their public functions;
>
> B/ the officials are aware that the conduct is unlawful and likely to injure the plaintiffs; and

> C/ the officials' tortious conduct is the legal cause of the plaintiffs' injuries pleaded herein;
>
> […]
>
> 33. The Plaintiffs state that the Defendants' officials have a common-law duty, as well as a statutory duty under s. 3(1)(f) of the ***IRPA***, as interpreted and confirmed by this Court, in ***Dragan v Canada QL [2003] F.C.J. No. 260*** and ***Liang v Canada (M.C.I.) 2012 FC 758*** decisions to process applications consistently and promptly, which sub-section reads:
>
> > 3. (1) The objectives of this Act with respect to immigration are
> >
> > …
> >
> > (f) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces […]
>
> 34. The Plaintiffs state that the Defendants' inexcusable, inordinate, and castigating delay, both between the time of the 1st judicial review and the 2nd negative decision, as well as the 2nd judicial review to the present, constitutes abuse and excess of authority, as well as public misfeasance, of public office, in that inexcusable delay has been determined to constitute public misfeasance in ***inter alia, McMaster v. Canada, [2009] F.C.J. No. 1071***, by this Court.
>
> 35. The Plaintiffs further state that the conduct of the officers, and nature and substance of both decisions to deny the Plaintiffs permanent residence, has been made in bad faith, and absence of good faith, and further constitutes public misfeasance as set out above in the within statement of claim.

[39] As indicated earlier, the Plaintiffs must plead with sufficient detail the constituent elements of each cause of action. But that is not enough. The Plaintiffs must also plead material facts in sufficient detail. As already indicated earlier, the trial judge in *Mancuso* commented, and it was specifically approved by the Court of Appeal, that "opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action"

(para 16). I am afraid this statement of fact suffers from that very deficiency. The elements of the tort of misfeasance are set out in *Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263 at paras 22-23 [*Woodhouse*]. The tort may take two different forms, but each requires the elements which are common to both. These elements are "(f)irst, the public officer must have engaged in deliberate and unlawful conduct in her or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff" (para 23). The tort may be approached in two ways. The two elements can be independently established, requiring unlawful conduct and knowledge that conduct was likely to cause harm. Or, both elements can be satisfied by proving the public officer specifically intends to injure a person because such officers do not have the authority to exercise their powers for an improper purpose (*Woodhouse* at para 23).

[40] The first element is focused on whether the alleged misconduct is deliberate and unlawful. This can arise from an act or omission that "arises[s] from a straightforward breach of the relevant statutory provisions or from acting in excess of the powers granted for an improper purpose": *Three Rivers District Council v Bank of England (No. 3)*, [2000] 2 WLR 1220 at p 1269, cited in *Woodhouse* at para 24.

[41] The second element establishes the nexus between the impugned public official and the plaintiff by requiring that defendants know that their conduct was unlawful and likely to harm. One can read at paragraph 29 of *Woodhouse*:

> The requirement that the defendant must have been aware that his or her unlawful conduct would harm the plaintiff further restricts the ambit of the tort. Liability does not attach to each officer who blatantly disregards his or her official duty, but only to

> a public officer who, in addition, demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question. This requirement establishes the required nexus between the parties. Unlawful conduct in the exercise of public functions is a public wrong, but absent some awareness of harm there is no basis on which to conclude that the defendant has breached an obligation that she or he owes to the plaintiff, as an individual. And absent the breach of an obligation that the defendant owes to the plaintiff, there can be no liability in tort.

The Court has further commented that this element requires the Defendant, at the very least, to have been "subjectively reckless or wilfully blind as to the possibility that harm was a likely consequence of the alleged misconduct" (*Woodhouse* at para 38).

[42] The requirement that the Defendant must have known that the conduct was unlawful is essential to the tort of misfeasance in public office. A public official's decision may well be adverse to certain people's interests, and yet still be lawful:

> The requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that misfeasance in public office requires an element of "bad faith" or "dishonesty". In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to the interest of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.
>
> (*Woodhouse*, para 28)

[43] With that understanding of the tort, I will assess whether the statement of claim sufficiently pleads both tort elements for each of the Plaintiffs' misfeasance pleadings. The statement of claim seems to allege misfeasance on four grounds: (i) refusal to abide by Federal Court orders; (ii) refusal to issue permanent resident visas; (iii) refusal to provide "cogent and/or sober" answers to questions posed by the Plaintiffs; and (iv) delay in processing the Plaintiffs' permanent residence applications. For the first three grounds, the Plaintiffs allege that the actions were done "with knowledge and intent", but no similar claim is made with respect to the alleged processing delay.

(1) *Misfeasance claim 1: Contempt*

[44] I see no potential for deliberate, unlawful conduct in the first allegation of contempt. The statement of claim says both Court orders sent the visa decision back for redetermination. There is no indication as to how the redetermination should proceed. No direction was given by the Court. The first redetermination resulted in a second negative decision, and the second redetermination is outstanding. The pleadings contain no facts, let alone material facts, showing that the orders were not followed. In fact, the exact opposite occurred. There was no refusal to abide by the court orders.

[45] As a result, I cannot see a scintilla of a cause of action in the Plaintiffs' claim that the Defendant failed to abide by the orders in bad faith. I am striking the misfeasance claim respecting the "refusal to abide by Federal Court orders" without leave to amend.

(2) *Misfeasance claim 2: Refusal to issue permanent visas*

[46] The second allegation is not, *prima facie*, unlawful. The act of refusing to issue permanent residence visas regularly occurs as a result of implementing IRPA. In this case, it is not completely clear on the record how the refusal to issue visas constitutes misfeasance.

[47] The statement of claim offers that the first visa officer awarded the principal Plaintiff the wrong number of points under the IRPR in the face of evidence to the contrary and that the visas were denied "with knowledge and intent". The relevant provisions set precise point allocations for the adaptability criterion, leaving the visa officer little discretion in how to award points for a Canadian relative or a spouse's education.

[48] It also states that the second visa officer deemed the principal Plaintiff inadmissible on the basis of wrong information. The relevant inadmissibility provisions of IRPA state that a foreign national is inadmissible for "being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to [in above subsections]" (para 34(1)(f) of IRPA). The determination of whether that organization engages in the enumerated acts requires that the officer must have "reasonable grounds" to believe in order to make that decision. That leaves a measure of appreciation to the officer. Certainty beyond a reasonable ground is not required. The test does not contemplate either that the officer be satisfied on a balance of probabilities, the legal standard in civil matters (*Canada (Attorney General) v Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 SCR 720). Reasonable grounds to

believe will suffice. The Plaintiffs, on the other hand, state that there is no basis for the inadmissibility finding.

[49] The phrase "with knowledge and intent" is a bald conclusion; however, there are sufficient material facts alleged early in the statement of claim to appreciate that there is a basis for the claim that both actions were deliberate conduct. It appears to me that there is a scintilla of a cause of action pleaded however imperfectly. But more precision is needed. The material facts must be plainly identified and they must be connected to the elements of the tort asserted, including of course the required state of mind (*Mancuso*, para 26).

[50] The second tort element is knowledge that the visa denials were unlawful and likely to harm the Plaintiffs. The statement of claim says that the visa officers denied the lawful visa issuance "with knowledge and intent" and "in bad faith". If the officers did award the wrong number of points and deem the principal Plaintiff inadmissible in the face of clearly contradictory evidence, this is sufficient to plead that the officers knew their conduct was unlawful. *Woodhouse* found that a similarly-worded pleading was sufficient to establish a reasonable cause of action in misfeasance:

> Insofar as the second requirement is concerned, the statement of claim alleges that the acts and omissions of the defendant officers "represented intentional breaches of their legal duties as police officers". This plainly satisfies the requirement that the officers were aware that the alleged failure to cooperate with the investigation was unlawful. The allegation is not simply that the officers failed to comply with s. 113(9) of the *Police Services Act*, but that the failure to comply was intentional and deliberate.
>
> (*Woodhouse*, para 36)

[51] The only reference to knowledge that the unlawful conduct would likely harm the Plaintiffs is at paragraph 35, which states "that the conduct of the officers, and nature and substance of both decisions to deny the Plaintiffs permanent residence, has been made in bad faith" and the general assertion that the alleged misfeasance was done "with knowledge". Bald conclusions such as "in bad faith" do not qualify as material facts (*Merchant* at para 34). Moreover, Rule 181 requires that Plaintiffs provide particulars on the material facts they are pleading to support a tort's mental element. Here, the Plaintiffs seem to be pointing to several circumstantial facts to argue that the Defendant intentionally misprocessed their permanent residence applications over a ten-year period to keep them out of Canada.

[52] If someone applies for a permanent residence visa, they expect to have it properly processed because they want to live in Canada. It is not a stretch to infer that improper denial of such a visa would likely harm applicants wanting to come to Canada. Of course, the statement of claim should actually plead specifically the material facts necessary to make out this second tort element. That was not done. *Mancuso* requires the who, when, where, how and what. The issue must be defined with more precision in order to make the proceedings manageable and fair. The amended pleadings will have to provide the material facts such that the Defendant will know what it is defending against. At this stage, one has to speculate somewhat as to what facts constitute the cause of action. More and better precision is called for.

[53] My role on a motion to strike is not to decide the Plaintiffs' chance of succeeding with this argument (*Minnes v Minnes* (1962), 39 WWR 112). Because I see a scintilla of a cause of action, barely, I am also granting leave to amend this particular misfeasance claim with respect

to the second tort element (i.e. material facts underpinning the allegation that the public official "knew" that their act or omission would likely harm the Plaintiff).

(3) *Misfeasance claim 3: Refusal to provide answers*

[54] The fact that the Defendant refused to answer the Plaintiffs' questions does not show unlawful conduct. This does not show a cause of action, let alone a reasonable one. Unlike the points calculation and the inadmissibility decision, the Plaintiffs failed to point to a statutory obligation that the visa officer(s) breached or show that the officer(s) acted unlawfully in the exercise of their public functions generally. As a result, I am striking the misfeasance allegation concerning the "refusal to provide "cogent and/or sober" answers to questions posed by the Plaintiffs" without leave to amend.

(4) *Misfeasance claim 4: Delay in processing visa applications*

[55] For the fourth misfeasance allegation regarding processing delays, the Plaintiffs relied on *McMaster v Canada*, 2009 FC 937, 352 FTR 255 [*McMaster*] for the authority that delay can constitute unlawful conduct in a misfeasance action. *McMaster* concerned an inmate who was repeatedly denied properly-sized running shoes in the face of a statutory obligation to provide adequate footwear. The statutory obligation that the Plaintiffs rely on for delay in the immigration context is subsection 3(1)(f) of IRPA, as interpreted in *Liang v Canada (Citizenship and Immigration)*, 2012 FC 758 at paragraph 25; 413 FTR 145 [*Liang*] and *Dragan v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 211 at paragraph 45, 227 FTR 272 [*Dragan*]. This subsection states:

> 3 (1) The objectives of this Act with respect to immigration are […]
>
> (f) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces;

Liang and *Dragan* found, on applications for *mandamus*, that unreasonable delay can amount to an implied refusal to perform the statutory duty to process visa applications under the IRPA. Justice Rennie, then of this Court, found in *Liang* that a *prima facie* case for delay was made out where applications requiring processing had been outstanding for 4.5 to 10 years.

[56] The Defendant seeks to distinguish *Liang* and *Dragan* on the basis that they dealt with applications for *mandamus*, not private law actions. They argue that "even where delays are found to be unreasonable or inordinate, this does not give rise to a free-standing cause of action", citing *Farzam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1659, 284 FTR 158 [*Farzam*] at para 105; and *Haj Khalil v Canada*, 2007 FC 923, 317 FTR 32 [*Khalil*] at para 8 (affirmed in *Haj Khalil v Canada*, 2009 FCA 66) (at para 28 of their written representations). Both *Farzam* and *Khalil* dealt with actions in negligence, not misfeasance in public office.

[57] The Plaintiffs' visa applications have been effectively outstanding for 10 years given they are still waiting for the outcome of their second redetermination. This falls at the outer end of Justice Rennie's suggested timelines for establishing *prima facie* unreasonable delay in the *mandamus* context. The Defendant has not presented an authority stating that unreasonable delay in processing visa applications cannot amount to unlawful conduct for the purposes of a misfeasance action. As a result, this appears to be an issue requiring discussion at trial and not on

a motion to strike. The Supreme Court in *Hunt* commented that "(p)rovided that the plaintiff can present a "substantive" case, that case should be heard" (p 975). It is premature on a motion to strike to rule on the matter.

[58] As noted above, unlike the first three misfeasance allegations, the Plaintiffs failed to specifically plead that the delay was "deliberate", but did plead that it was done "in bad faith", which implies a measure of deliberation. There are circumstantial facts that could support this tort element, namely the use of different grounds to refuse the visas in the first and second denial, but the statement of claim fails to plead clearly that the delays were deliberate. In *Woodhouse*, the Supreme Court struck allegations that lacked the words "deliberate" and "intentional", because inadvertence or negligence is insufficient to make out the intentional tort of misfeasance:

> 37 Although the allegation that the Chief deliberately failed to segregate the officers satisfies the requirement that the Chief intentionally breached his legal obligation to ensure compliance with the *Police Services Act*, the same cannot be said of his alleged failure to ensure that the defendant officers produced timely and complete notes, attended for interviews in a timely manner, and provided accurate and complete accounts of the incident. As above, inadvertence or negligence will not suffice; a mere failure to discharge the obligations of the office cannot constitute misfeasance in a public office. In light of the allegation that the Chief's failure to segregate the officers was deliberate, this is not a sufficient basis on which to strike the pleading. Suffice it to say, the failure to issue orders for the purpose of ensuring that the defendant officers cooperated with the investigation will only constitute misfeasance in a public office if the plaintiffs prove that the Chief deliberately failed to comply with the standard established by s. 41(1)(b) of the *Police Services Act*.
>
> [my emphasis]

Through the narrative offered as facts, I see however a scintilla of a cause of action on this first tort element, but the pleadings must properly set out the full cause of action. They will have to be significantly amended.

[59] As with the second misfeasance claim, the pleadings on the second tort element—knowledge of unlawful conduct and likelihood of harming the Plaintiffs—are not explicit and are close to being bald, which fails to meet the requirements of Rules 174 and 181. With respect to the Defendant's knowledge that their delays were unlawful, the statement of claim fails to plead the material facts showing which public officials had this knowledge. Was the first officer aware of an unlawful delay that would likely cause harm in 2009, or only the second officer in 2014? Or was it other individuals that knew the delay was unlawful?

[60] With respect to the Defendant's alleged knowledge that the delays were unlawful and likely to harm the Plaintiffs, I see a scintilla of a cause of action. It is reasonable to infer that an alleged 10-year delay in processing does not fulfill the IRPA objective of "prompt processing" and would likely cause harm to the waiting family. However, again, the statement of claim must plead sufficient material facts to qualify as a reasonable cause of action. I would not strike the pleadings without allowing an opportunity to amend in order to satisfy the requirements.

[61] Accordingly, I am granting leave to amend this particular misfeasance claim with respect to the first tort element prerequisite that the unlawful conduct was deliberate, and with respect to the second tort element requirement that the public official "knew" that their act or omission was unlawful and likely to harm the Plaintiffs.

Claim 2: Abuse and excess of jurisdiction and authority

[62] The Plaintiffs refer to "abuse and excess of jurisdiction and authority" at multiple points in their pleadings, often in concert with their claims respecting misfeasance in public office:

> 1. The Plaintiffs claim […] all of which damages arise from: […]
>
> (ii) the Defendants' servants and officers' actions, and lack of action and omissions, in not issuing the permanent resident visas, and not complying with the Federal Court orders, constitutes an abuse of process, abuse and excess of authority and jurisdiction, public misfeasance, as well as negligence, and negligent investigation, all compensable at common-law, under the ***Immigration and Refugee Protection Act ("IRPA")***, as well as s. 24(1) of the ***Charter***.
>
> […]
>
> 32. The Plaintiffs state, and the fact is that:
>
> (a) the Defendants' officials have, with knowledge and intent, abused process, abused and exceeded authority and jurisdiction, and engaged in public misfeasance of their office, in their refusal to lawfully abide by the Federal Court order and terms of the ***IRPA*** and ***Regulations***, and issue permanent residence visas, and in the refusal(s) to give any cogent and/or sober answers to the plaintiffs and their counsel, except stone silence and stone-walling and that the Defendants' servants and officials have: […]
>
> (i) engaged in abuse and excess of jurisdiction and authority as historically contemplated by the Supreme Court of Canada in ***Roncarelli v. Duplessis, [1959] S.C.R. 121, et seq*** **[***Roncarelli*];
>
> […]
>
> 34. The Plaintiffs state that the Defendants' inexcusable, inordinate, and castigating delay, both between the time of the 1st judicial review and the 2nd negative decision, as well as the 2nd judicial review to the present, constitutes abuse and excess of authority, as well as public misfeasance, of public office, in that inexcusable delay has been determined to constitute public misfeasance in ***inter alia, McMaster v. Canada, [2009] F.C.J. No. 1071***, by this Court.

[63] The Defendant argues that abuse and excess of authority and jurisdiction alleged by the Plaintiffs is encapsulated in the tort of misfeasance. I agree. The following discussion of the tort of misfeasance in public office in *Woodhouse* confirms that it covers the claim of abuse and excess of authority and jurisdiction as contemplated in *Roncarelli v Duplessis*, [1959] SCR 121:

> 18 The origins of the tort of misfeasance in a public office can be traced to *Ashby v. White* (1703), 2 Ld. Raym. 938, 92 E.R. 126, in which Holt C.J. found that a cause of action lay against an elections officer who maliciously and fraudulently deprived Mr. White of the right to vote. Although the defendant possessed the power to deprive certain persons from participating in the election, he did not have the power to do so for an improper purpose. Although the original judgment suggests that he was simply applying the principle *ubi jus ibi remedium*, Holt C.J. produced a revised form of the judgment in which he stated that it was because fraud and malice were proven that the action lay: J. W. Smith, *A Selection of Leading Cases on Various Branches of the Law* (13th ed. 1929), at p. 282. Thus, in its earliest form it is arguable that misfeasance in a public office was limited to circumstances in which a public officer abused a power actually possessed.
>
> 19 Subsequent cases, however, have made clear that the ambit of the tort is not restricted in this manner. In *Roncarelli v. Duplessis*, [1959] S.C.R. 121, this Court found the defendant Premier of Quebec liable for directing the manager of the Quebec Liquor Commission to revoke the plaintiff's liquor licence. Although *Roncarelli* was decided at least in part on the basis of the Quebec civil law of delictual responsibility, it is widely regarded as having established that misfeasance in a public office is a recognized tort in Canada. See for example *Powder Mountain Resorts Ltd. v. British Columbia* (2001), 94 B.C.L.R. (3d) 14, 2001 BCCA 619; and *Alberta (Minister of Public Works, Supply and Services) v. Nilsson* (2002), 220 D.L.R. (4th) 474, 2002 ABCA 283. In *Roncarelli*, the Premier was authorized to give advice to the Commission in respect of any legal questions that might arise, but had no authority to involve himself in a decision to revoke a particular licence. As Abbott J. observed, at p. 184, Mr. Duplessis "was given no statutory power to interfere in the administration or direction of the Quebec Liquor Commission". Martland J. made a similar observation, at p. 158, stating that Mr. Duplessis' conduct involved "the exercise of powers which, in law, he did not possess at all". From this, it is clear that the tort is not restricted to the abuse of a statutory or prerogative power actually held. If that were

> the case, there would have been no grounds on which to find Mr. Duplessis liable.

[64] As a result, I am striking the reference to abuse and excess of jurisdiction and authority as a stand-alone cause of action. The matter ought to be dealt with under the misfeasance claims once properly amended.

Claim 3: Abuse of process

[65] The statement of claim pleads the tort of abuse of process in the same paragraphs already referred to above for misfeasance in public office and quoted at length at paragraph 38 of these reasons.

[66] The Defendant contends that abuse of process "involves the misuse of the process of the courts to coerce someone in a way that is outside the ambit of the legal claim upon which the court is asked adjudicate": para 33 of the Defendant's written representations citing *Levi Strauss & Co v Roadrunner Apparel Inc*, (1997), 76 CPR (3d) 129 (FCA) at p 3.

[67] The Supreme Court of Canada authority provided by the Plaintiffs, *United States of America v Cobb*, 2001 SCC 19, [2001] 1 SCR 587 [*Cobb*], also defines abuse of process in terms of abusing the court process:

> 37 Canadian courts have an inherent and residual discretion at common law to control their own process and prevent its abuse. The remedy fashioned by the courts in the case of an abuse of process, and the circumstances when recourse to it is appropriate were described by this Court in *R. v. Keyowski*, [1988] 1 S.C.R. 657, at pp. 658-59:

> The availability of a stay of proceedings to remedy an abuse of process was confirmed by this Court in *R. v. Jewitt*, [1985] 2 S.C.R. 128. On that occasion the Court stated that the test for abuse of process was that initially formulated by the Ontario Court of Appeal in *R. v. Young* (1984), 40 C.R. (3d) 289. A stay should be granted where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency", or where the proceedings are "oppressive or vexatious" ([1985] 2 S.C.R. [128], at pp. 136-37). The Court in *Jewitt* also adopted "the caveat added by the Court in *Young* that this is a power which can be exercised only in the 'clearest of cases'" (p. 137).

[68] In a similar decision on a motion to strike, Prothonotary Aalto also concluded that *Cobb* relates to abuse of the court process and that the plaintiff failed to plead facts making out this tort:

> [64] On the tort of abuse of process, I agree with the Crown's submissions that *Cobb* does not support the Plaintiff's submission that this tort exists on these facts. In *Cobb*, the Supreme Court explicitly defined abuse of process as abuse of the Court's own process and that definition did not include a public official's abuse of any process in a vacuum. The Plaintiff neither pleads facts relating to an abuse of a Court process nor did he provide any case-law that expands the tort of abuse of process beyond the abuse of the Court's process as conceptualized in *Cobb*.
>
> (*Almacén v Her Majesty the Queen*, 2015 FC 957, upheld at 2016 FC 300 and subsequently upheld at 2016 FCA 296)

[69] Moreover, the Plaintiffs pleaded no material facts going to the elements of this tort in their statement of claim (i.e. how or when a court process was abused). Actually, when

discussions of immigration officials came before this Court, twice they were returned for a new determination. It is difficult to see how seizing the Court on judicial review by the Plaintiffs can be an abuse of process of the Court by the Defendant. Therefore, I am striking this claim without leave to amend.

Claim 4: Negligence and negligent investigation

[70] The statement of claim pleaded negligence and negligent investigation as follows:

> 36. In the alternative the Plaintiffs state that, the Defendants' officials have been negligent, and engaged in negligent investigation, in the exercise of their common-law, statutory, and constitutional duties owed to the Plaintiffs in that:
>
> (i) the Defendants' officials owe a common-law, statutory, and constitutional, duty of care to competently and with due dispatch properly process an application sent back by judicial order pursuant to an application for judicial review under the statutory scheme pursuant to the ***IRPA*** as well as competently and diligently investigate any allegations of inadmissibility;
>
> (ii) the Defendants' officials breached this duty of care; and
>
> (iii) as a result of this breach the Plaintiffs have suffered loss and damages which includes, ***inter alia***;
>
> A/ the mental suffering and distress of separation between the plaintiffs and their family in Canada, also protected by s.7 of the ***Charter***;
>
> B/ irreparable loss of companionship, of the Plaintiffs, particularly that involving the children;
>
> C/ economic loss, to be quantified at trial, in being deprived of, inter alia;
>
> > (i) the benefit of the Plaintiff, Emad Al Omani, to exercise his proper place and activity in the joint business interests of his brother in Canada;
> >
> > (ii) the incursion of legal costs incurred to date, to be determined at trial;

> D/ the mental stress and anguish of falsely being branded as associated with Al Qaeda, or such groups, which further endangers their very lives;
>
> E/ their right to equal treatment and protection under the law, as required by s. 3(3)(d) of the ***IRPA***, the structural imperatives of the Constitution, as well as s. 15 of the *Charter*, and loss of their dignity to the extent of unequal treatment under the law.

[71] The Defendant argues that the Plaintiffs have failed to plead material facts pertaining to each element of a negligence action, particularly duty of care and breach of the standard of care. I agree. The pleadings are declaratory, without any connection of material facts with the elements of the tort.

[72] When a duty of care is not clearly established in the case law, the *Anns* test is used to determine if a duty exists, as per *Cooper v Hobart*, 2001 SCC 79, [2001] 3 SCR 537 at paragraph 30. The Defendant summarized the test at paragraph 36 of her written representations:

> (a) Does the relationship between the parties in the circumstances disclose the reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care; and
>
> (b) Notwithstanding the existence of a *prima facie* duty of care, are there residual policy considerations that should negative the imposition of a duty of care?

[73] The only allegations that the Plaintiffs pleaded with respect to duty of care is to allege that the Defendant owes a duty of care to (i) “competently and with due dispatch properly process an application sent back by judicial order pursuant to an application for judicial review under the statutory scheme pursuant to the IRPA” and to (ii) “competently and diligently investigate any allegations of inadmissibility” (at para 36 of the statement of claim). They

pleaded no facts whatsoever going to either element of the *Anns* test (*Anns v Merton London Borough Council*, [1978] AC 728 (HL)).

[74] The Plaintiffs also pleaded scarce facts as to the breach of this alleged duty of care. Repeating the points above, they allege the Defendant did not properly process an application sent back by judicial review and did not properly investigate allegations of inadmissibility. In my view, this is less than thin.

[75] The Plaintiffs stated that there exists a duty of care without even alleging how that can be. What is the duty of care that was owed by immigration officers? The English Court of Appeal in *W. v Home Office*, [1997] EWJ No 3289 (QL) [*W. v Home Office*] found twenty years ago that there is no proximity such that a duty of care exists between a plaintiff and immigration officers. One can read at para 28:

> The process whereby the decision making body gathers information and comes to its decision cannot be the subject of an action in negligence. It suffices to rely on the absence of the required proximity. In gathering information, and taking it into account, the Defendants are acting pursuant to their statutory powers and within that area of their discretion where only deliberate abuse would provide a private remedy. For them to owe a duty of care to immigrants would be inconsistent with the proper performance of their responsibilities as immigration officers. In conducting their inquiries, and making decisions in relation to immigrants, including whether they should be detained pending those inquiries, and making decisions in relation to immigrants, including whether they should be detained pending those inquiries, they are acting in that capacity of public servant to which the considerations outlined above apply.

That is the view taken by this Court in *Premakumaran v Canada*, 2005 FC 1131 [*Premakumaran*].

[76] In that case, finding support in *A. O. Farms Inc v Canada*, [2000] FCJ no 1771, 28 Admin LR (3d) 315 (FCA), the Court found that the immigration officers as agents of the government owe "a duty of care to the public as a whole and not to the individual Plaintiffs. The Plaintiffs cannot be considered a "neighbour" for these purposes and no such relationship should be created between the Defendant and individual members of the public" (*Premakumaran*, at para 25). The Federal Court of Appeal agreed. It found that "(i)n this case, however, no duty of care arises. As the Motions Judge correctly found, no special relationship of proximity and reliance is present on the facts of this case" (*Premakumaran v Canada*, 2006 FCA 213, [2007] 2 FCR 191, at para 24). It is one thing to allege that the performance in office constitutes a misfeasance. It is quite another to base one's claim on a duty of care leading to a claim in negligence. Misfeasance and negligence are completely different and target different states of mind.

[77] The *W. v Home Office* case found an echo in this Court in *Benaissa*. There, the Court found that the process of the gathering of information by the decision-making body leading to a decision cannot be the subject of an action in negligence. There may be, in my view, circumstances in which a degree of proximity will be sufficient. However, the bare assertion that unidentified immigration officers deliberately failed to process the application for permanent residence in a timely fashion does not plead the duty of care that would distinguish this case and the facts that could disclose the factual basis for the allegation of negligence. This does not

disclose a reasonable cause of action. I cannot see a scintilla of a cause of action. There is not even the beginning of something that could be amended.

[78] Justice Russell faced a similar statement of claim in *Sivak*. He struck the negligence claim for failing to plead material facts going to the essential elements of the tort of negligence:

> [45] I also agree with the Defendants that the Plaintiffs have not pled, or factually substantiated, the essential elements of the tort of negligence.
>
> [46] As the Defendants point out, to support a cause of action in negligence, a statement of claim must include sufficient facts to support the essential elements of the tort. These include establishing a duty of care, providing details of the breach of that duty, explaining the causal connection between the breach of duty and the injury, and setting out the actual loss. Such a claim requires a factual basis that identifies each wrongful act as well as negligence, such as the "when, what, by whom and to whom of the relevant circumstances." See *Benaissa v Canada (Attorney General)*, 2005 FC 1220, at paragraph 24.
>
> [47] The Plaintiffs make a bald allegation at paragraph 28(b) of the Claim that the "Defendants' officials have been negligent in the exercise of their common-law, statutory, and constitutional duties owed to the Plaintiffs" and that these duties arose in the context of the processing of their refugee claims pursuant to the *Immigration and Refugee Protection Act*. This is followed by unsubstantiated statements that the "Defendants' officials breached this duty of care" and that this caused the Plaintiffs' losses.
>
> [48] I agree with the Defendants that such allegations are nothing more than conclusions and are not sufficient to support a cause of action in negligence. No details have been provided to identify the "Defendants' officials," to explain their roles and responsibilities in relation to the Plaintiffs, or to establish their connection to any of the parties. Similarly, the Claim is silent as to the "Defendants' officials" particular acts or omissions that the Plaintiffs' claim were negligent and no facts are included to support the specific "common-law, statutory and constitutional duties" that were allegedly breached. It seems to me that the general requirements for establishing liability in tort have not been met and it would be impossible to conduct the necessary analysis

> to determine whether liability could be established. As the Defendants point out, this is particularly difficult where the defendant is a government actor. Issues arise as to whether public law discretionary powers establish private law duties owed to particular individuals or whether the decisions in question were policy decisions or operational decisions. These questions are very complex and detailed factual pleadings are required in order to properly determine whether a cause of action exists.
>
> [my emphasis]

[79] In my view, the claim as pled does not disclose a reasonable cause of action; indeed, there is not even a scintilla of a cause of action. The pleadings are nothing other than general allegations and conclusions without providing the material facts required or even what the duty of care may be. Bare assertions of conclusions are not allegations of material facts. The Plaintiffs only declare that there exists some duty of care. The Court in *Sivak*, relying on *Kisikawpimootewin v Canada*, 2004 FC 1426 [*Kisikawpimootewin*] and *Murray v Canada* (1978), 21 NR 230 (FCA) found that "a claim that does not sufficiently reveal the facts upon which a cause of action is based, such that it is not possible for the defendant to answer or the Court to regulate the action, is a vexatious action" (para 30). The Plaintiffs have asserted the claim as an alternative. In so doing, they have failed to provide any material fact relevant to a negligence claim that could support what is at any rate a vague claim based on bald assertions and conclusions.

[80] The tort of negligent investigation requires the Plaintiffs to plead facts pertaining to the conduct of the investigation into the inadmissibility finding to make out a reasonable cause of action (*Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para 68). The Defendant argues that "[i]n the few cases where the standard of care has been held to have

been breached, the conduct of investigators has involved egregious and overzealous behaviour" (at para 45 of the Defendant's written representations). Examples of such conduct include "ignoring exculpatory or other material evidence" and "making decisions based primarily on assumptions or stereotypes" (*Safa Almalki v Canada*, 2012 ONSC 3023 at para 17). There is nothing of the sort that is even alleged by the Plaintiffs in this lawsuit.

[81] The Supreme Court also noted in *Woodhouse* that citizens are not entitled to a certain level of thoroughness in an investigation, nor are they entitled to a certain outcome:

> 40 … Individual citizens might desire a thorough investigation, or even that the investigation result in a certain outcome, but they are not entitled to compensation in the absence of a thorough investigation or if the desired outcome fails to materialize…

[82] The statement of claim recounts only the principal Plaintiff's 15-minute interview where he was asked about Al Qaeda and states that the officer refused to explain the reason for the question; it pleads that these allegations have no basis:

> 24. On January 13th, 2014 the Plaintiff, Emad Al Omani was called in for a ***very brief*** interview with respect to his application re-determination.
>
> 25. On March 17th, 2014 the Plaintiff was, Emad Al Omani was sent a second negative decision, which stated and concluded, without any reasons whatsoever, that;
>
> > "In particular, there are reasonable grounds to believe that you are a member of the inadmissible class of persons described in 34(1)(f) of the Immigration and Refugee Protection Act." […]
>
> 26. The Plaintiff, Emad Al Omani, advises that at ***no time*** was he either:

> (a) given notice of these outrageous and untrue conclusions and allegations; nor
>
> (b) shown any evidence nor any information, to address these false allegations and conclusions.
>
> During the interview, the Plaintiff was asked an unfocused, nebulous, and non-contextual question about Al Qaeda. In fact, during the fifteen (15) minute interview, the Plaintiff, Emad Al Omani, was only asked two questions, namely:
>
> (a) to explain the change in his job description […]
>
> (b) the officer asked the Plaintiff if the Plaintiff belonged to, or was in any way associated with "any group or organization like Al Qaeda in Iraq", to which the Plaintiff categorically replied that he did ***not*** belong to, ***nor*** associated with such groups as Al Qaeda, nor Al Qaeda itself.
>
> The Plaintiff then asked the officer to be more specific with respect to why he would even ask such a question, but the immigration officer refused, citing "secrecy" barring him from divulging any Canadian government information.
>
> 27. The earlier application, which had been denied, had no such allegations nor conclusions for denial. It was denied based on the fact that some documents relating to Emad Al Omani, were missing, and a miscalculation and blatant error(s) in applying the selection criteria, for which it was sent back for reconsideration by Federal Court order.

[83] Apart from these statements, no material facts are given. There is nothing on the conduct of the investigation that led to the inadmissibility finding. I agree with the Defendant that the statement of claim fails to plead facts, let alone sufficient material facts to establish the tort of negligent investigation other than suggesting that the Plaintiffs are unhappy with the conclusion reached that they are inadmissible. The pleadings do not even begin to give any indication to support a general allegation that the investigation may have been negligent. I see no scintilla of an argument and am striking this claim without leave to amend. There is not even the faintest

allegation of the who, when, where, how and what giving rise to liability. It is plain and obvious that the claim cannot succeed. The Plaintiffs throw up in the air an accusation with nothing to support it. There is nothing to amend. Actually, the Plaintiffs did not even attempt to specify how the claim could be amended (*Ward v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 568, para 30). The fact of the matter is that there is no cause of action given the material facts pleaded. It is not so much that there are deficiencies which may be cured by amendment. There is no cause of action pleaded.

Claim 5: Conspiracy

[84] In what appears to be the further alternative, the Plaintiffs allege that the Defendant is engaged in a conspiracy at paragraph 37 of their statement of claim:

> 37. The Plaintiffs further state that the Defendant's officials have:
>
> (a) (i) engaged, and are engaging in a conspiracy, through their conduct and communications, to deny the Plaintiff's statutory, constitutional, as well as international treaty rights, to deny their permanent residence under Canadian law, as well as a fair and impartial assessment of their application, a conspiracy as outlined, ***inter alia***, by the Supreme Court of Canada in the test set out in ***Hunt v. Carey*** and jurisprudence cited therein, namely to;
>
> > A/ engage in an agreement for the use of lawful and unlawful means, and conduct, the predominant purpose of which is to cause injury to the Plaintiff; and/or
> >
> > B/ to engage, in an agreement, to use unlawful means and conduct, whose predominant purpose and conduct directed at the Plaintiff, is to cause injury to the Plaintiff, or the Defendants' officials should know, in the circumstances, that injury to the Plaintiff, is likely to, and does result;
>
> The details and particulars of which conspiracy(ies) are as follows:

> (b) that the first denial was a contrived denial made in bad faith, and absence of good faith, entirely designed and engineered to deny, contrary to law, the Plaintiffs' application;
>
> (c) that the inordinate, inexcusable, and castigating delay between the 1st judicial review determination, and second denial, as well as the inordinate, inexcusable and castigating delay since the 2nd judicial review, to the present, are all designed to stone-wall and deny the Plaintiffs' procedural and substantive rights to have their applications possessed [*sic*];
>
> (d) that the baseless, false, and wholly contrived allegations of inadmissibility for association with Al Qaeda, or such groups, have been designed and engineered to simply deny the Plaintiffs their procedural and substantive right to have their application(s) processed under the ***IRPA***.
>
> The Plaintiffs state that all known (and unknown) officers to the Plaintiffs involved in the investigation, processing, and denial of the Plaintiffs' application have conspired with the goal of denying the Plaintiffs, by any and all means necessary, and therefore liable in conspiracy as set out by the Supreme Court of Canada, in ***Hunt v. Carey*** as follows [repeats test as set out above].
>
> 38. The Plaintiff states, and the fact is, that as a direct result of the Defendant's officials illegal actions, and tortious conduct, the Plaintiffs have, and will, suffer damages which he claims as set out the within statement of claim.

[85] As the Plaintiffs outlined, *Hunt* explains that the tort of conspiracy can be established on two grounds: (i) the plaintiff can claim a conspiracy to injure in that two or more people work together in agreement using lawful or unlawful means for the predominant purpose of injuring the plaintiff, who is in fact injured; or (ii) the plaintiff can claim a conspiracy of unlawful acts where two or more people work together in agreement to engage in unlawful conduct directed toward the plaintiff that they ought to know is likely to cause injury to said plaintiff, who is in fact injured.

[86] The Defendant referred to *Normart Management Ltd v West Hill Redevelopment Co Ltd*, (1998), 37 OR (3d) 97 (ONCA), for a list of the elements that need to be pleaded to establish a cause of action in conspiracy. The Ontario Court of Appeal writes at paragraph 21:

> [21] In *H.A. Imports of Canada Ltd. v. General Mills Inc.* (1983), 42 O.R. (2d) 645, 150 D.L.R. (3d) 574 (H.C.J.), O'Brien J., dealing with the civil action of conspiracy as pleaded, quoted from Bullen, Leake and Jacob's *Precedents of Pleadings*, 12th ed. (London: Sweet & Maxwell, 1975), as follows at pp. 646-47:
>
> > The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby.

[87] The statement of claim under review speaks of denials to grant permanent residence based on flimsy reasons followed by long periods without any action on the part of the government; however it identifies those involved in the alleged grand conspiracy as “all known (and unknown) officers to the Plaintiffs involved in the investigation, processing, and denial of the Plaintiffs’ application” (at para 37). This obviously does not constitute an identification by name. It is not either by group or job positions. The Plaintiffs identify officers based on their allegation that those who dealt with the matter, given that permanent residence was denied, have conspired together. The statement of claim does not describe the alleged conspirators’ relationship with each other apart from implying that they are those who worked on the

Plaintiffs' application at some point. It is as if the Plaintiffs seek to derive some conspiracy against them based on two denials and the periods of time between events.

[88] The statement of claim fails to describe the agreement(s) between the alleged conspirators. It pleads their alleged overall approach—denying the processing of the Plaintiffs' permanent residence application "by any and all means necessary"—but does not plead material facts precisely describing the purpose of the agreement between the known and unknown officers. It is fine to have a conspiracy theory, but it must be spelled out. Crying "conspiracy" is not enough to disclose a reasonable cause of action.

[89] Reading the pleadings as generously as can be, there is no way to decipher what the agreement may be, who the conspirators are, whether the alleged conspiracy has the predominant purpose to injure the Plaintiffs, as opposed to pursuing some other purpose, whether the alleged conspiracy is to use lawful or unlawful means. In other words, we are left with a bald and bold allegation without even attempting to define the essential elements of the tort alleged, and obviously, offering any fact, material or not, to substantiate an allegation.

[90] Instead of identifying the branch of the tort of conspiracy the Plaintiffs wish to rely on in order to state material facts on which they actually rely, they make a completely generic assertion, without more. There is not even anything about how there can be a conspiracy, as opposed to, for instance mere knowledge or approval of a cause of conduct. Proof of agreement and execution is required. Nothing of the sort is alleged with material facts in support.

[91] All that is known is that the Plaintiffs were denied permanent residence twice. The pleadings, in my view, amount to a complete absence of definition of the tort and its elements. It is plain and obvious that there is no reasonable cause of action. It is as if the Plaintiffs were suggesting that, given they were denied twice and there were delays, there must be somehow a conspiracy. It is not pleading conspiracy to merely allege these facts and, without more, suggest an agreement the purpose of which is unknown. Put a different way, the Plaintiffs seem to allege their experience with immigration authorities is such that there must be some conspiracy hatched somewhere.

[92] The pleadings are also so deficient in factual material that the Defendant would be incapable to know how to answer. They are bare assertions that are unfounded; not only they do not disclose a reasonable cause of action they could be struck as frivolous or vexatious (*Senechal v Muskoka (District Municipality)*, [2003] OJ No 885; *Kisikawpimootewin supra*).

[93] In terms of overt acts, which would tend to show that some agreement to work together exists and could be opposed to the co-conspirators, the statement of claim simply references the first visa denial, the delay between the first judicial review and the second visa denial, the delay since the second judicial review, and the inadmissibility allegations. There is no trace of any agreement, just some discrete events. The Plaintiffs pleaded a series of independent events, and did not present anything tending to show that the conspirators agreed to undertake these acts to further the conspiracy; rather, they rely on their overarching statement that the Defendant aimed to deny the Plaintiffs' application processing, without more.

[94] The nature of a conspiracy requires that there be participants, some known and others unknown, who agree to do something that will cause injury (*Cement LaFarge v B.C. Lightweight Aggregate*, [1983] 1 SCR 452). Here, the material facts allowing to conclude to some agreement are absent. The date, the object and the purpose of an agreement between unknown participants is not even pled. No overt act by the participants in furtherance of the conspiracy is offered in the pleadings. These are bald allegations involving undefined persons without even a hint of the agreement which is central to a claim of conspiracy. As found in *Sivak* at para 55, this constitutes a pleading that is vexatious (see also *Kisikawpimootewin*). It is not possible, on the basis of these pleadings, for the Defendant to know how to answer. The pleading is "so defective that it cannot be cured by simple amendment" (*Krause v Canada*, [1999] 2 FCR 476 (FCA)). The Plaintiffs never indicated how they could amend their pleadings on this front such that there could be some assessment of "the readiness of the amendments needed", in the words of the Federal Court of Appeal in *Sweet*.

[95] I agree with the Defendant that the Plaintiffs have failed to plead all the elements of the tort of conspiracy. It may be argued that none were pleaded. It is entirely deficient with respect to pleading the essential elements of the tort. Given the complete lack of detail on the alleged agreement, I see no scintilla of an argument. As a result, I am striking this claim without leave to amend.

Claim 6: Breach of Plaintiffs' section 7 and 15 Charter rights

[96] The Plaintiffs allege both section 7 and section 15 *Charter* breaches at various points in their statement of claim. They note that decisions under the IRPA must be applied in a manner that is consistent with the *Charter*:

> 33. The Plaintiffs state that the Defendants' officials have a common-law duty, as well as a statutory duty under s. 3(1)(f) of the ***IRPA***, as interpreted and confirmed by this Court, in ***Dragan v Canada QL [2003] F.C.J. No. 260*** and ***Liang v Canada (M.C.I.) 2012 FC 758*** decisions to process applications consistently and promptly […] and that such decisions must be ***Charter***-compliant, as dictated by s. 3(3)(d) of the ***IRPA*** which states:
>
> **(3)** This Act is to be construed and applied in a manner that…
>
> (d) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada

[97] The section 7 allegations appear at paragraphs 30, 32, and 36:

> 30. As a result of the Defendants' officials' inexcusable delay, false and unfounded allegations, and breach of duty to process the main Plaintiffs' application, the Plaintiffs have suffered the following damages:
>
> (a) with respect to Emad Al-Omani his wife and children, the dire danger, indelible stigma, and mental distress and suffering knowing that the High Commission is making false and unfounded allegations that he is associated with Al Qaeda, or such groups, as well as the mental suffering of not being able to join his brothers and families in Canada and the financial damages in not being able to engage with his brothers in their business in Canada, of which he has a financial interest;
>
> (b) the mental stress and anxiety, and endangerment of their lives, knowing that false allegations of association with Al Qaeda, or

> such groups, have been made which places their lives at risk in Saudi Arabia
>
> […]
>
> 32. The Plaintiffs state, and the fact is that:
>
> (a) the Defendants' officials have […]
>
> > (iv) breached the plaintiffs constitutional right(s) to the Rule of Law and Constitutionalism, as well as their s. 7 and 15 ***Charter*** Rights;
>
> which tortious conduct has caused the damages set out in paragraph 30 in the statement of claim herein.
>
> […]
>
> 36. In the alternative the Plaintiffs state that, the Defendants' officials have been negligent, and engaged in negligent investigation, in the exercise of their common-law, statutory, and constitutional duties owed to the Plaintiffs in that […]
>
> (iii) as a result of this breach the Plaintiffs have suffered loss and damages which includes, ***inter alia***;
>
> > A/ the mental suffering and distress of separation between the Plaintiffs and their family in Canada, also protected by s.7 […]
> >
> > D/ the mental stress and anguish of falsely being branded as associated with Al Qaeda, or such groups, which further endangers their very lives;

[98] The section 15 allegations at paragraphs 1, 30, 32, 36 centre on the allegation that the Plaintiffs were treated unequally on the grounds of race and national origin because they are Saudi Arabs:

> 1. The Plaintiffs claim: […]
>
> iii) the actions and omissions of the visa office at the Canadian High Commission in London, England, constitutes a […] breach of the Plaintiffs' right to the Rule of Law, Constitutionalism, as well

> as equal treatment, both under the underlying imperatives to the constitution as well as s. 15 of the ***Charter***;
>
> 30. As a result of the Defendants' officials' inexcusable delay, false and unfounded allegations, and breach of duty to process the main Plaintiffs' application, the Plaintiffs have suffered the following damages: […]
>
> (c) loss of dignity in being treated unequally contrary to s. 3(3)(d) of the ***IRPA***, the unwritten principles of the constitution, and s. 15 of the ***Charter***, based on race and national origin, to wit: as Saudi Arabs.
>
> 32. The Plaintiffs state, and the fact is that:
>
> (a) the Defendants' officials have […]
>
> > (iv) breached the plaintiffs constitutional right(s) to the Rule of Law and Constitutionalism, as well as their s. 7 and 15 ***Charter*** Rights;
>
> which tortious conduct has caused the damages set out in paragraph 30 in the statement of claim herein. […]
>
> 36. In the alternative the Plaintiffs state that, the Defendants' officials have been negligent, and engaged in negligent investigation, in the exercise of their common-law, statutory, and constitutional duties owed to the Plaintiffs in that […]
>
> (iii) as a result of this breach the Plaintiffs have suffered loss and damages which includes, ***inter alia***; […]
>
> > E/ their right to equal treatment and protection under the law, as required by s. 3(3)(d) of the ***IRPA***, the structural imperatives of the Constitution, as well as s. 15 of the *Charter*, and loss of their dignity to the extent of unequal treatment under the law.

[99] A preliminary issue with the Plaintiffs' claim is whether the Plaintiffs hold sections 7 and 15 *Charter* rights that can be breached. The Plaintiffs are referred to as "Saudi nationals" in the statement of claim and it appears that the principal Plaintiff only interacted with immigration officers at the Canadian High Commission in London, United Kingdom. The Plaintiffs pleaded

damages on the basis that they have not been able to join their family in Canada. They are not Canadian, nor is it clear they were in Canada when the alleged *Charter* violations occurred.

[100] The Defendant did not raise this as a ground to strike the statement of claim, so I will not consider it in my decision on this motion. However, given the fundamental nature of this threshold issue I think it is worth summarizing recent law on the topic.

[101] In *Tabingo v Canada (Citizenship and Immigration)*, 2013 FC 377; [2014] 4 FCR 150, Justice Rennie questioned whether foreign nationals hold *Charter* rights and summarized the jurisprudence applicable to this issue at paragraphs 61-79. He found that the case law generally does not extend *Charter* rights to non-Canadians or those outside of Canada, but since the parties did not contest the issue, he did not draw his own conclusion:

> [75] Other recent decisions of this Court have found that non-citizens outside of Canada generally do not hold *Charter* rights: *Zeng v Camada (Attorney General)*, 2013 FC 104, paras 70-72; *Kinsel v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1515, paras 45-47; *Toronto Coalition to Stop the War v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 957, paras 81-82. These three decisions followed Justice Blanchard's determination that a *Charter* claim may only be advanced by an individual who is present in Canada, subject to criminal proceedings in Canada, or possessing Canadian citizenship.
>
> [76] This limitation on the application of the *Charter* is not a recent development. Even prior to *Slahi*, the Federal Court and the Federal Court of Appeal had interpreted *Singh* as barring *Charter* claims from non-citizens outside Canada: *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1990] 2 FC 534 (CA) (aff'd on other grounds [1992] 1 SCR 236); *Ruparel v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 615; *Lee v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 242; *Deol v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 1034 (aff'd on other grounds 2002 FCA 271).

> [77] The only exception counsel identified involved an applicant claiming the right to citizenship, rather than the privilege of immigration: *Crease v Canada*, [1994] 3 FC 480. In that case the applicant had applied for citizenship from within Canada and had a Canadian mother.
>
> [78] The respondent does not dispute either the applicants' standing or the application of the *Charter*. The parties appear to coalesce around the proposition that the FSW applications establish a sufficient nexus with Canada to extend the reach of sections 7 and 15. The jurisprudence does not support this concession. What is in issue involves the repercussions abroad of domestic legislation. In this case, there is no question of the extra-territorial application of the *Charter* as an adjunct of the actions of Canadian officials abroad, nor is there, as I conclude on the evidence, non-compliant administration of the legislation. The issue framed by this case is whether the protections provided by sections 7 and 15 reach foreign nationals, when residing outside of or beyond Canadian territory.
>
> [79] Despite my reservations as to the correctness of the concession, given that there is no *lis* between the parties on the issue, I will not determine the point. *Charter* jurisprudence should develop incrementally through the interface of opposing positions and interests. In any event, it is unnecessary to determine the point, as I find that the claims of infringement fail on their merits.

[102] On appeal to the Federal Court of Appeal (*Tabingo v Canada*, 2014 FCA 191; [2015] 3 FCR 346 [*Tabingo*]), Justice Sharlow acknowledged Justice Rennie's remarks in *Tabingo*, but also found that she did not need to draw a conclusion on the issue:

> [53] In this Court, the Minister argues that the applicants do not have rights under section 7 or subsection 15(1) of the Charter. However, for reasons that will become apparent from the discussion below, I do not consider it necessary to express an opinion on that point.

[103] Putting aside this preliminary issue and turning to the causes of action as pleaded, statements of claim must plead material facts pertaining to each element of an alleged *Charter* violation. Once again, *Mancuso* provides useful guidance, at paragraph 21:

> [21] There are no separate rules of pleadings for Charter cases. The requirement of material facts applies to pleadings of Charter infringement as it does to causes of action rooted in the common law. The Supreme Court of Canada has defined in the case law the substantive content of each Charter right, and a plaintiff must plead sufficient material facts to satisfy the criteria applicable to the provision in question. This is no mere technicality, "rather, it is essential to the proper presentation of Charter issues": *Mackay v Manitoba*, [1989] 2 S.C.R. 357 at p. 361.

[104] The section 7 of constitutional right requires that it be established that the right to life, liberty or security has been violated. The pleadings are silent as to what right would have been violated. As it has been established, more than 30 years ago, the three interests protected by section 7 are distinct (*Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177; *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486). There is no indication to be found in the pleadings of what interest is involved where a permanent resident visa has been denied to a foreigner.

[105] Not only the interests are not identified such that could be identified the elements that need to be proven given the ambit of each interest, but the pleadings don't give any indication as to how the interest might be engaged. To put it another way, there are no material facts pleaded. What are the facts to support an allegation of interference with the life, the liberty or the security of a person that is not allowed to immigrate to Canada, a privilege that has not been elevated to the level of a right (*Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 SCR 539). At best, the pleadings speak in terms of mental stress and anxiety

generated by governor action. It may be worth noting that the Supreme Court discussed that matter in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 [*Blencoe*] and found that stress, stigma and anxiety did not deprive of the right to life, liberty and security of the person:

> 97 To summarize, the stress, stigma and anxiety suffered by the respondent did not deprive him of his right to liberty or security of the person. The framers of the *Charter* chose to employ the words, "life, liberty and security of the person", thus limiting s. 7 rights to these three interests. While notions of dignity and reputation underlie many *Charter* rights, they are not stand-alone rights that trigger s. 7 in and of themselves. Freedom from the type of anxiety, stress and stigma suffered by the respondent in this case should not be elevated to the stature of a constitutionally protected s. 7 right.

If the Plaintiffs wish to make the case, especially in spite of *Blencoe*, they have to plead the material facts, which they have not done. They are essential (*Mackay v Manitoba*, [1989] 2 SCR. 357 [*Mackay*]) even more so perhaps where the Supreme Court has already found that stress, stigma and anxiety for someone living in this country did not rise to a constitutionally protected right. I do not wish to suggest that it cannot be done in an appropriate case; it is just that it is especially important that facts be pled such that there can be a reasonable cause of action. Otherwise, "the defendant would be left guessing as to the scope of the case it has to meet to respond to the section 7 infringement" (*Mancuso*, para 23).

[106] I am comforted in my conclusion by the similar finding made in *Sivak* where the Court stated that the Plaintiffs "have failed to indicate how one or more of their protected interests have been infringed, and they have also failed to identify the circumstances or context in which the breaches allegedly occurred. I have to agree with the Defendants that the allegations in this

regard are stated in the form of conclusions without factual basis." (para 73). To quote from *Mackay* at p 362, "*Charter* decisions cannot be based upon unsupported hypothesis of enthusiastic counsel."

[107] The statement of claim also references mental suffering and financial damages resulting from the visa denials, neither of which are sufficient to ground a *Charter* claim in the absence of additional material facts as set out by the Federal Court of Appeal in *Tabingo*:

> [97] The appellants are foreign nationals who reside outside Canada. Their only connection to Canada is that they have applied under a Canadian statute for the right to become permanent residents. They have no legal right to that status, and no right to enter or remain in Canada unless they attain that status. They had the right to seek permanent resident status under the IRPA, and when they did so they had the right to have their applications considered under the IRPA. However, neither of those rights is a right to life, liberty or security of the person. When their applications were terminated by subsection 87.4(1), they were not deprived of any right that is protected by section 7 of the Charter.
>
> [98] The appellants argue that if their applications had been accepted they would have acquired the right to enter and remain in Canada, which means necessarily that they would also have acquired all Charter rights except those given only to citizens of Canada. They argue that, because of the importance of their objective of becoming permanent residents of Canada, the loss of their right to have their permanent resident visa applications considered is such a blow to their psychological and physical integrity that it should be construed as the loss of a right that is within the scope of section 7 of the Charter.
>
> [99] I do not accept this argument. I have no doubt that the termination of the appellants' permanent resident visa applications caused them financial loss, but financial loss alone does not implicate the rights to life, liberty and security of the person. The termination of their applications could have been profoundly disappointing to the appellants and perhaps for some psychologically damaging, but the evidence does not establish the high threshold of psychological harm necessary to establish a

> deprivation of the right to security of the person: *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307.

[108] The Plaintiffs also failed to plead facts pertaining to the section 7 internal analysis regarding the principles of fundamental justice. Being deprived of the right to life, liberty or security of the person in accordance with the principles of fundamental justice is not violation of section 7. It simply does not suffice to make a general allegation that section 7 *Charter* rights have been violated

[109] With respect to the section 15 claims, they suffer from the same deficiencies. The Defendant argues that the Plaintiffs must show that there has been a distinction on an enumerated or analogous ground and that this distinction creates a disadvantage by perpetuating prejudice or stereotyping to properly plead a section 15 claim: *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*] at para 17; *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 at paras 30-31. They argue that even if there are enough facts to show adverse impact on an enumerated ground, the statement of claim does not plead facts showing how the treatment amounts to discrimination. Such analysis includes various factors such as:

> […] (1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected.
>
> *Kapp* at para 19

[110] I agree with the Defendant that the Plaintiffs have not provided any material facts establishing how they were discriminated against.

[111] The statement of claim fails to plead the basic elements of either *Charter* claim. These pleadings are once again so defective that they cannot be cured by simple amendment. There is not a reasonable cause of action disclosed. Since I see no scintilla of a cause of action to be cured, I have to strike both, without leave to amend.

Claim 7: Damages

[112] The Defendant argues that the Plaintiffs' damages should be struck for lacking particularity. Damages are primarily pleaded at paragraphs 1, 30 and 36 of the statement of claim:

> 1. The Plaintiffs claim:
>
> (a) general damages in the amount of $200,000 per Plaintiff;
>
> (b) aggravated damages in the amount of $50,000 per Plaintiff;
>
> (c) punitive damages in the amount of $50,000 per Plaintiff;
>
> (d) any and all economic loss damages pleaded, to be calculated at trial;
>
> […]
>
> 30. As a result of the Defendants' officials' inexcusable delay, false and unfounded allegations, and breach of duty to process the main Plaintiffs' application, the Plaintiffs have suffered the following damages: […]
>
> (a) with respect to Emad Al-Omani his wife and children, the dire danger, indelible stigma, and mental distress and suffering knowing that the High Commission is making false and unfounded allegations that he is associated with Al Qaeda, or such groups, as well as the mental suffering of not being able to join his brothers and families in Canada and the financial damages in not being able to engage with his brothers in their business in Canada, of which he has a financial interest;
>
> (b) the mental stress and anxiety, and endangerment of their lives, knowing that false allegations of association with Al Qaeda, or

> such groups, have been made which places their lives at risk in Saudi Arabia […]
>
> (c) loss of dignity in being treated unequally contrary to s. 3(3)(d) of the ***IRPA***, the unwritten principles of the constitution, and s. 15 of the ***Charter***, based on race and national origin, to wit: as Saudi Arabs.
>
> […]
>
> 36. In the alternative the Plaintiffs state that, the Defendants' officials have been negligent […]
>
> (iii) as a result of this breach the Plaintiffs have suffered loss and damages which includes, ***inter alia***;
>
> A/ the mental suffering and distress of separation between the plaintiffs and their family in Canada, also protected by s.7 of the ***Charter***;
>
> B/ irreparable loss of companionship, of the Plaintiffs, particularly that involving the children;
>
> C/ economic loss, to be quantified at trial, in being deprived of, inter alia;
>
> (i) the benefit of the Plaintiff, Emad Al Omani, to exercise his proper place and activity in the joint business interests of his brother in Canada;
>
> (ii) the incursion of legal costs incurred to date, to be determined at trial;
>
> D/ the mental stress and anguish of falsely being branded as associated with Al Qaeda, or such groups, which further endangers their very lives;
>
> E/ their right to equal treatment and protection under the law, as required by s. 3(3)(d) of the ***IRPA***, the structural imperatives of the Constitution, as well as s. 15 of the Charter, and loss of their dignity to the extent of unequal treatment under the law.

[113] The Plaintiffs argue that damages do not need to be precisely calculated at this stage.

There is some support for this position in *Woodhouse*:

> 41 Although courts have been cautious in protecting an individual's right to psychiatric well-being, compensation for damages of this kind is not foreign to tort law. As the law currently stands, that the appellant has suffered grief or emotional distress is insufficient. Nevertheless, it is well established that compensation for psychiatric damages is available in instances in which the plaintiff suffers from a "visible and provable illness" or "recognizable physical or psychopathological harm": see for example *Guay v. Sun Publishing Co.*, [1953] 2 S.C.R. 216, and *Frame v. Smith*, [1987] 2 S.C.R. 99. Consequently, even if the plaintiffs could prove that they had suffered psychiatric damage, in the form of anxiety or depression, they still would have to prove both that it was caused by the alleged misconduct and that it was of sufficient magnitude to warrant compensation. <u>But the causation and magnitude of psychiatric damage are matters to be determined at trial. At the pleadings stage, it is sufficient that the statement of claim alleges that the plaintiffs have suffered mental distress, anger, depression and anxiety as a consequence of the alleged misconduct.</u>
>
> […]
>
> 74 As discussed in the context of the actions for misfeasance in a public office, courts have been cautious in protecting an individual's right to psychiatric well-being, but it is well established that compensation for psychiatric damages is available in instances in which the plaintiff suffers a "visible and provable illness" or "recognizable physical or psychopathological harm". At the pleadings stage, it is sufficient that the statement of claim alleges mental distress, anger, depression and anxiety as a consequence of the defendant's negligence. <u>Causation and the magnitude of psychiatric damage are matters to be determined at trial.</u>
>
> [my emphasis]

[114] The same rule applies to other categories of damages. Other than damages alleged to result from the *Charter* violations that have been struck out, I agree with the Plaintiffs that the Defendant has not discharged her burden to show why the alleged damages should be struck. Whether they will be able to show that they have suffered damages, including that their psychiatric well-being has been affected beyond grief or emotional disturbance or distress,

remains to be shown. However the test is not likelihood of success, but rather reasonable cause of action. I am allowing the damages to proceed as pleaded.

Claim 8: Whether Ministers should be named in the statement of claim

[115] The statement of claim provides the following description of the named Defendants:

> 3. (a) the Defendant, Her Majesty the Queen is statutorily and vicariously liable for the acts and omissions of her servants pursuant to s. 17(1)(5) of the ***Federal Courts Act*** as well as ss. 24(1) and 52 of the ***Constitution Act***, 1867, and in particular, any purported Crown prerogative, if any exists post the Patriation of the ***Constitution Act, 1982***, and ***Canada Act, 1982***, by the Defendants', the Minister of Foreign Affairs, and/or Citizenship and Immigration, employees of the Canadian High Commission in London, England;
>
> (b) The Defendant, the Minister of Foreign Affairs is statutorily and constitutionally responsible for maintaining and staffing Canada's visa posts abroad; and
>
> (c) The Defendant, the Minister of Citizenship and Immigration is statutorily and constitutionally responsible for administering the ***IRPA*** and its ***Regulations***.

[116] The defendants seek to strike the two named Ministers (Foreign Affairs and Citizenship and Immigration) in favour of a single defendant, Her Majesty the Queen who then becomes the Defendant. The defendants note that the named Ministers are not themselves liable for the damages claimed in this case (*Federation of Newfoundland Indians v Canada*, 2003 FCT 383 at para 30). In *Cairns v Farm Credit Corp.*, [1992] 2 FC 115; 49 FTR 308, Justice Denault wrote:

> [6] The plaintiffs have named the Honourable William McKnight as a defendant in this action. A Minister of the Crown cannot be sued in his representative capacity, nor can he be sued in his personal capacity unless the allegations against him relate to

> acts done in his personal capacity (*Re Air India* (1987), 62 O.R. (2d) 130, (sub nom. *Air India Flight 182 Disaster Claimants v. Air India*) 44 D.L.R. (4th) 317 (H.C.)). As the plaintiffs have made no claims against the Minister relating to actions done in his personal capacity, the Honourable William McKnight must be struck as a party to the action.

Similar comments are found in *Mancuso v Canada (National Health and Welfare),* at para 180. At the hearing of the case, counsel for the Plaintiffs all but conceded the point. At any rate, that appears to be the state of the law (*Sibomana v Canada,* 2016 FC 943 at paras 32-33).

[117] I see no reason to name these two Ministers in the present case; therefore I am striking them from the statement of claim in favour of Her Majesty the Queen as the sole Defendant.

Claim 9: Constitutionality arguments regarding jury trials under the Federal Courts Act and leave for judicial review under the IRPA

[118] The Plaintiffs indicated that they plan to constitutionally challenge section 49 of the *Federal Courts Act*, which bars jury trials, on the basis that it violates "the constitutional imperatives of Rule and Law and Constitutionalism, as well as the right to a jury trial, grounded in the *Magna Carta*, and continued in s. 11(f) of the *Charter* in the criminal context, as well as the residual clause of s. 7 of the *Charter* in the civil context […]" (statement of claim, para 39).

[119] The Plaintiffs also seek a declaration that subsection 72(1) of the IRPA is unconstitutional on the basis that the Defendant's officials "can perpetually deny a meritorious application whereby, sooner or later, a leave application will be denied" and a leave application is not, in itself, judicial review (at paras 40(a) and (c) of the statement of claim).

[120] The Defendant argues that both arguments should be struck because they are wholly immaterial to the present action.

[121] In *Mancuso*, the Federal Court of Appeal encountered a similar issue on a motion to strike seeking declarations on the constitutionality of other legislation. It concluded that while free-standing declarations of constitutionality are available, they require a factual grounding:

> [32] […] Free-standing declarations of constitutionality can be granted: *Canadian Transit Company v. Windsor (Corporation of the City)*, 2015 FCA 88. But the right to the remedy does not translate into licence to circumvent the rules of pleading. Even pure declarations of constitutional validity require sufficient material facts to be pleaded in support of the claim. Charter questions cannot be decided in a factual vacuum: *Mackay v. Manitoba*, above, nor can questions as to legislative competence under the Constitution Act, 1867 be decided without an adequate factual grounding, which must be set out in the statement of claim. This is particularly so when the effects of the impugned legislation are the subject of the attack: *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099.
>
> [33] The Supreme Court of Canada in Canada *(Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, para. 46 articulated the pre-conditions to the grant of a declaratory remedy: jurisdiction over the claim and a real as opposed to a theoretical question in respect of which the person raising it has an interest.
>
> [34] Following *Khadr*, this Court in *Canada (Indian Affairs) v. Daniels*, 2014 FCA 101, 2014 FCA 101 (leave to appeal granted) at paras. 77-79 highlighted the danger posed by a generic, fact-free challenge to legislation – in other words, a failure to meet the second Khadr requirement. Dawson JA noted that legislation may be valid in some instances, and unconstitutional when applied to other situations. A court must have a sense of a law's reach in order to assess whether and by how much that reach exceeds the legislature's *vires*. It cannot evaluate whether Parliament has exceeded the ambit of its legislative competence and had more than an incidental effect on matters reserved to the provinces without examining what its legislation actually does. Facts are necessary to define the contours of legislative and constitutional competence. In the present case, this danger is particularly acute;

> as the judge noted, the legislation at issue pertains to literally thousands of natural health supplements.
>
> [35] This is not new law. While the plaintiffs point to *Solosky v. The Queen*, [1980] 1 S.C.R. 821 for the proposition that there is a broad right to seek declaratory relief, *Solosky* also notes that there must be "a 'real issue' concerning the relative interests of each [party]." The Court cannot be satisfied that this requirement is met absent facts being pleaded which indicate what that real issue is and its nexus to the plaintiffs and their claim for relief.
>
> [my emphasis]

[122] With respect to the section 49 claim, I note that the Plaintiffs, in their memorandum of fact and law at paragraph 18, explain that this is not an argument, but rather a notice of relief to be sought. There is nothing else. Justice Zinn struck the same section 49 argument in *Cabral v Canada (Citizenship and Immigration)*, 2016 FC 1040 as immaterial to the present action. I agree. If it is no more than a notice that something will follow, it is useless; furthermore, the said notice does not even contemplate section 26 of the *Crown Liability and Proceedings Act*, RSC, 1985, c C-50. It is a different matter of a procedural nature which does not accord with a statement of claim. It shall be struck from the statement of claim. In so doing I do not wish to suggest that the constitutionality of section 49 cannot be attacked in these proceedings.

[123] With respect to the Plaintiffs' claim respecting subsection 72(1) of the IRPA, I agree with the Defendant that this pleading is immaterial at this point. The Plaintiffs have had two visa decisions quashed and sent back for judicial review. Each time leave was evidently granted. The statement of claim references a hypothetical future refusal to grant leave. That cannot be the basis of a challenge to the legislation in this case. This is no more than a theoretically question,

certainly not a real question on the facts of this case. As a result, the Plaintiffs' complete lack of factual basis on which to bring this claim, I am striking this claim without leave to amend.

VI. Conclusion

[124] If there is compensation to be awarded, it is not through the law of conspiracy or negligence, but rather through the law of misfeasance in public office, once properly pleaded. There is simply nothing to suggest in the statement of claim that the essential elements of the tort have even been considered. It is simply not enough to say "negligence" or "conspiracy". More is needed to have a scintilla of a cause of action. The essential elements of one cause of action are not the same as another cause of action. Misfeasance is not negligence, and negligence is not conspiracy. The material facts for each will vary. The approach taken was in effect to tell the story generally without connecting the facts to the causes of action alleged later in the document. At the end of the day, we are left with a narrative that supports a cause of action in misfeasance, which requires to be pled with more precision, but is dearly missing with respect to the alternative causes of action in negligence and conspiracy. In my view, there is a scintilla of cause of action in misfeasance pleaded such that with appropriate amendments in order to allege the material facts required, the matter could proceed further.

[125] Some of the claims are therefore struck out, without leave to amend:

1. misfeasance in public office – refusal to abide by court order
2. misfeasance in public office – refusal to answer questions
3. abuse and excess of jurisdiction and authority

4. abuse of process

5. negligence and negligent investigation

6. conspiracy

7. sections 7 and 15 of the *Charter* violations

8. constitutional arguments concerning section 49 of the *Federal Courts Act* and section 72 of the *Immigration and Refugee Protection Act*.

[126] Some claims are struck with leave to amend:

1. misfeasance in public office – refusal to issue visas and delay in issuing visas

2. misfeasance in public office – delay in issuing visas

3. damages – *Charter* violations.

[127] Finally, the named ministers are struck in favour of Her Majesty the Queen.

[128] Given the split success on the motion, there will not be an award of costs.

ORDER in T-1774-15

THIS COURT ORDERS that for the reasons given, the following causes of action are struck out from the statement of claim, without leave to amend, pursuant to Rule 221(1) of the *Federal Courts Rules*:

1. misfeasance in public office – refusal to abide by court order
2. misfeasance in public office – refusal to answer questions
3. abuse and excess of jurisdiction and authority
4. abuse of process
5. negligence and negligent investigation
6. conspiracy
7. sections 7 and 15 of the *Charter* violations
8. constitutional arguments concerning section 49 of the *Federal Courts Act* and section 72 of the *Immigration and Refugee Protection Act*.

For the reasons given, the following sections are struck from the statement of claim, with leave to amend, pursuant to Rule 221(1) of the *Federal Courts Rules*:

1. misfeasance in public office – refusal to issue visas and delay in issuing visas
2. misfeasance in public office – delay in issuing visas
3. damages – *Charter* violations.

In view of the fact that the success is split on this motion to strike, no costs will be awarded.

On the consent of both parties, the Plaintiffs will have 60 days from the date of this Order to file an amended statement of claim and the Defendant will have 30 days to file a Statement of Defence from the date of service of the amended statement of claim.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1774-15
STYLE OF CAUSE:	EMAD IBRAHIM AL OMANI, LINA HOUSNE HAMZA NAHAS, AND SULTAN EMAD AL OMANI (A MINOR), LULWA EMAD IBRAHIM AL OMANI (A MINOR), HAYA EMAD IBRAHIM AL OMANI (A MINOR), BY THEIR LITIGATION GUARDIANS, EMAD IBRAHIM AL OMANI AND LINA HOUSNE HAMZA NAHAS V HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 26, 2016
ORDER AND REASONS:	ROY J.
DATED:	AUGUST 24, 2017

APPEARANCES:

Rocco Galati	FOR THE PLAINTIFFS
Susan Gans	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Rocco Galati Law Firm Professional Corporation Toronto, Ontario	FOR THE PLAINTIFFS
Deputy Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANT