Federal Court Cour fédérale

Date: 20171204

Docket: T-1381-16

Citation: 2017 FC 1092

Ottawa, Ontario, December 4, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

MUBEEN FATIMA NAQVI

Plaintiff

and

HER MAJESTY THE QUEEN
THE ATTORNEY GENERAL OF CANADA

Defendants

JUDGMENT AND REASONS

I. Background

[1] This is an appeal brought under Rule 51(1) of the *Federal Courts Rules*, SOR/98-106, from a prothonotary's order dismissing the Defendants' motion to strike out Mubeen Fatima Naqvi's amended statement of claim.

[2] Ms. Naqvi pleads that, in 2013, an unnamed visa officer in Pakistan refused her sponsorship application on the basis that her marriage was not genuine. Ms. Naqvi's claim asserts that, in making the decision, the visa officer breached her rights under sections 2(a) and 15 of the *Canadian Charter of Rights and Freedoms*. She seeks over a million dollars in damages under section 24(1) of the *Charter*.

[3] This is the Defendants' second attempt to strike out Ms. Naqvi's claim under Rule 221(1) as disclosing no reasonable cause of action. A prothonotary of this Court allowed the first motion in part, granting Ms. Naqvi leave to clarify her statement of claim by amendment. The Defendants' second motion to strike the amended claim was dismissed by the prothonotary, who found that the amended claim was not bereft of any chance of success.

[4] On this appeal, the Defendants again argue that Ms. Naqvi has not pleaded the requisite material facts to ground her claim. For the reasons that follow, I agree that Ms. Naqvi's amended claim discloses no reasonable cause of action and cannot be cured by further amendment. Therefore, the order of the prothonotary dated June 9, 2017 shall be set aside and replaced with a judgment allowing the Defendants' motion to strike Ms. Naqvi's claim in its entirety, without leave to amend.

II. Summary of the Amended Statement of Claim

[5] In my view, the material facts pleaded in Ms. Naqvi's amended statement of claim, which, for the purposes of a motion to strike, must be read generously and assumed to be true (*Apotex Inc v Allergan, Inc*, 2011 FCA 134 at para 2), may be summarized as follows:

1. Ms. Naqvi is a Canadian citizen who is a visible minority, wears the hijab in public, and follows the Shia Ithna-Ashariyya Islamic faith. She married her husband, Ali Taqi Syed, on October 2, 2010 in Pakistan. The wedding reception and ceremonies were conducted in accordance with the religious beliefs of Ms. Naqvi and her family, meaning that (i) Ms. Naqvi wore a golden satin gown, specially made by her mother, and no visible makeup; (ii) Ms. Naqvi's bridal henna was only applied to the inside of her palms and intended only for her husband to see; and (iii) Ms. Naqvi and her husband remained modest and reserved in the presence of their family and friends.

2. Ms. Naqvi filed a sponsorship application for her husband in June 2011, which included colour photographs of the wedding reception and phone records intended as proof of contact. Some of Ms. Naqvi's bridal henna was visible in one of the pictures submitted. The phone records indicated calls from Ms. Naqvi's home phone number, which was registered under her mother's name.

3. In April 2013, the visa officer refused Ms. Naqvi's sponsorship application, determining that the marriage was not genuine because: (i) Ms. Naqvi was wearing a non-festive outfit with minimal jewelry and makeup, (ii) Ms. Naqvi did not have customary patterns of henna on her body, (iii) the photographs submitted showed limited comfort between Ms. Naqvi and her husband, and (iv) the phone records submitted were not registered in Ms. Naqvi's name. Ms. Naqvi was not put on notice of these concerns. The visa officer refused to contact Ms. Naqvi or her husband or request an interview.

4. A different visa officer, who conducted a preliminary review of the sponsorship file, determined that Ms. Naqvi's family was religious, and did not take issue with the greeting cards, envelopes, or phone bills furnished in support of Ms. Naqvi's application.

5. The Immigration Appeal Division of the Refugee Board reviewed the same photos that were before the visa officer and observed that Ms. Naqvi's wedding dress was "beautiful" and "colourful".

6. The visa officer had certain expectations of a genuine marriage which were narrow minded. The visa officer expected Ms. Naqvi to bare her arms, contrary to her religious beliefs. The visa officer would have allowed Ms. Naqvi's application if she had not been adhering to her religious beliefs.

7. Ms. Naqvi was shocked and intimidated by the visa officer's decision and did not seek redress until her husband received his permanent residence card for fear of administrative retribution.

8. There was an unreasonable delay from the date of the visa officer's refusal in April 2013 to the date Ms. Naqvi's husband received his visa in January 2016. This delay disrupted Ms. Naqvi and her husband's plans for him to pursue his medical studies in Canada, and caused prejudice to Ms. Naqvi. There were further administrative incompetencies that exacerbated Ms. Naqvi's anxiety.

9. Ms. Naqvi experienced continuous anxiety over her separation from her husband, who remained in Pakistan where he was at risk of being targeted and killed.

> Ms. Naqvi suffered psychological trauma, along with attendant adverse impacts on her studies and financial well-being. It was reasonably foreseeable that Ms. Naqvi would incur financial costs and endure emotional distress and mental anguish as a result of the visa officer's refusal and subsequent administrative delay.

III. Analysis

A. *Standard of Review*

[6] A decision to strike a pleading is discretionary (*Elbit Systems Electro-Optics Elop Ltd v Selex ES Ltd*, 2016 FC 1129 at para 15). A prothonotary's discretionary order attracts the same standard of review on appeal as do similar orders by motions judges (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at para 69 [*Hospira*]). Therefore, a prothonotary's discretionary order should only be interfered with by this Court when it is incorrect in law, or when it is based on a palpable and overriding error in regard to the facts (*Hospira* at para 64).

[7] In my view, the prothonotary erred in law by not identifying and addressing all the required elements of Ms. Naqvi's pleaded cause of action (see *Tuccaro v Canada*, 2014 FCA 184 at para 22). The facts pleaded in Ms. Naqvi's amended statement of claim do not satisfy the requisite elements of an action for section 24(1) damages for breaches of the *Charter* by an administrative decision-maker, because Ms. Naqvi has not pleaded that the visa officer's

decision was motivated by intentional prejudice, nor could the facts that are pleaded, if proven, support such a finding.

B. *Legal Principles on a Motion to Strike*

[8] To survive the Defendants' motion to strike, Ms. Naqvi's amended claim must have set out all the necessary elements of a recognized cause of action, as well as sufficient material facts to support each of those elements (*Al Omani v Canada*, 2017 FC 786 at para 20).

[9] The requirement for sufficient facts is further reflected in Rule 174, pursuant to which every pleading must contain a concise statement of material facts relied upon. As the Federal Court of Appeal recently confirmed in *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 [*Mancuso*], sufficient material facts are the foundation of a proper pleading, which is, in turn, fundamental to the trial process:

> 17 [Sufficient material facts are] 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.
>
> 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.

> 19 What constitutes a material fact is determined in light of the cause of action and the damages sought to be recovered. The plaintiff 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.
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> 20 The requirement of material facts is embodied in the rules of practice of the Federal Courts and others: see *Federal Courts Rules*, Rule 174; Alta. Reg. 124/2010, s. 13.6; B.C. Reg. 168/2009, s. 3-1(2); N.S. Civ. Pro. Rules, s. 14.04; R.R.O. 1990, Reg. 194, s. 25.06. While the contours of what constitutes material facts are assessed by a motions judge in light of the causes of action pleaded and the damages sought, the requirement for adequate material facts to be pleaded is mandatory. Plaintiffs 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 Ltd.*, 2010 FCA 112.

[10] *Mancuso*'s statement of these principles is well-established in the case law. For instance, over a decade earlier, *Benaissa v Canada (Attorney General)*, 2005 FC 1220 underlined the crucial importance of clearly pleading all material facts as follows:

> [14] Rule 174 of the Federal Courts Rules ("Rules") sets out the fundamental principle that a pleading must contain a concise statement of the material facts on which a party relies. It follows that all of the facts which a party must prove to establish a cause of action must be legally complete.
>
> [15] When a particular cause of action is pleaded, the claim must contain material facts satisfying all the necessary elements of the cause of action. Otherwise, the inevitable conclusion would be that such a claim discloses no reasonable cause of action: *Howell v. Ontario* (1998), 159 D.L.R. (4th) 566 (Ont. Div. Ct.).

[11] Ms. Naqvi seeks damages under section 24(1) of the *Charter*, which provides that anyone whose *Charter* rights or freedoms have been infringed may apply to the Court for a "just and appropriate" remedy.

[12] An action for damages under section 24(1) is not in the nature of a tort, but rather a "distinct public law action directly against the state" (*Dunlea v Attorney General*, [2000] NZCA 84 at para 81, cited in *Vancouver (City) v Ward*, 2010 SCC 27 at para 22 [*Ward*]).

[13] Justice Rennie held in *Mancuso* that *Charter* actions do not trigger special rules on motions to strike and the requirement of pleading material facts still applies:

> 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.

[14] Indeed, *Mancuso* was followed on this point last year in *Shebib v Canada*, 2016 FC 539, which further underscored that *Charter* cases must be "carefully prepared and presented on a solid factual basis" (at para 23). More recently, Justice McSweeney of the Ontario Superior Court of Justice held that "*Charter* claims must be supported by material facts, and cannot be made on a factual vacuum" (*Ogiamien v R*, 2017 ONSC 2312 at para 35, citing *MacKay v Manitoba*, [1989] 2 SCR 357 (SCC)).

[15] In this proceeding, the Defendants moved under Rule 221(1)(a), requesting that the prothonotary strike out Ms. Naqvi's amended claim as disclosing "no reasonable cause of action". The test on such a motion is whether it is "plain and obvious" that the claim cannot succeed, as set out by the Supreme Court of Canada in *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42:

> [17] The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. Supreme Court Rules. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.
>
> […]
>
> [22] A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the *Supreme Court Rules* (now r. 9-5(2) of the *Supreme Court Civil Rules*). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[16] In summary, the applicable legal framework on the Defendants' motion to strike required the prothonotary to: (i) define the constituent elements of Ms. Naqvi's claim for *Charter* damages, and (ii) assuming the facts pleaded to be true, determine whether it was "plain and obvious" that the action could not succeed (see *McIlvenna v Greater Subdbury (City)*, 2014 ONSC 2716 at para 24 [*McIlvenna*]).

C. *Elements of Ms. Naqvi's Claim for Charter Damages*

[17] The *Charter* applies not only to legislation, but also to actions taken under statutory authority; a party may therefore seek a remedy under the *Charter* for the unconstitutional actions of a delegated decision-maker (see *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at 644, 1997 CarswellBC 1939 (WL Can) at paras 20-21). Ms. Naqvi pleads that her *Charter* rights were breached by the actions of the visa officer, a decision-maker with delegated authority under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[18] Ms. Naqvi does not challenge the validity of any of IRPA's provisions, nor does she seek judicial review of the visa officer's decision (which Ms. Naqvi has since successfully appealed to the Immigration Appeal Division). Rather, she seeks damages under section 24(1) of the *Charter*, which authorizes courts to grant "appropriate and just" remedies to individuals whose *Charter* rights have been breached.

[19] A claimant who seeks damages under section 24(1) of the *Charter* must first show that a *Charter* right has been breached. Section 24(1) is remedial; the underlying *Charter* breach is the wrong upon which the claim for damages is based (*Ward* at para 23). Then, the claimant must show that damages are a just and appropriate remedy (*Ward* at para 4; see also *McIlvenna* at para 54).

[20] Therefore, Ms. Naqvi's amended claim must contain sufficient material facts that, if true, would establish the following necessary elements of her cause of action: (i) that the visa officer's

actions breached Ms. Naqvi's rights under section 2(a) of the *Charter*, and/or section 15 of the *Charter*, and (ii) that damages under section 24(1) of the *Charter* are a just and appropriate remedy.

D. *Breaches of Sections 2(a) and 15 of the Charter*

[21] As Justice Rennie of the Federal Court of Appeal explained in *Mancuso*, a motion to strike a *Charter* claim must be determined with reference to the substantive content of each *Charter* right alleged to have been breached (*Mancuso* at para 21).

(1) Section 2(a)

[22] The elements of a breach of section 2(a) of the *Charter* were recently confirmed by the Supreme Court of Canada in *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 [*Ktunaxa*] as follows:

> [68] To establish an infringement of the right to freedom of religion, the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned state conduct interferes, in a manner that is non‑ trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief: see *Multani*, at para. 34.

[23] I have no difficulty concluding that Ms. Naqvi's amended claim contains sufficient material facts to support a finding that her religious practices and beliefs are sincere (see *Ktunaxa* at para 69).

[24] However, Ms. Naqvi has not pleaded any material facts which, if proven, would show that her religious beliefs or practices were in any way threatened, inhibited, or constrained by the visa officer's actions (see *Veffer v Canada (Foreign Affairs and International Trade Canada)*, 2007 FCA 247 at para 33). In other words, the facts pleaded do not show that Ms. Naqvi's freedom to believe in the Shia Ithna-Ashariyya Islamic faith, or her freedom to practice her religion, were interfered with (*Ktunaxa* at para 70).

[25] It is thus plain and obvious that those parts of Ms. Naqvi's amended claim seeking damages for a breach of section 2(a) of the *Charter* disclose no reasonable cause of action and should be struck.

(2) Section 15

[26] The test for a breach of section 15 of the *Charter* consists of two questions: (i) whether the law creates a distinction based on an enumerated or analogous ground; and (ii) whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping (*R v Kapp*, 2008 SCC 41 at para 17). In *Mancuso*, in the context of a motion to strike *Charter* claims, Justice Rennie of the Federal Court of Appeal also commented that a claimant under section 15 must "establish that the basis on which he or she claims to have been discriminated against is either an enumerated or an analogous ground within the scope of section 15" (at para 24).

[27] Ms. Naqvi pleads that, had she not displayed indicia of her religious practices, her sponsorship application would have been approved. Bearing in mind that discrimination need not be intentional to constitute a breach of section 15 (*Withler v Canada (Attorney General)*, 2011

SCC 12 at paras 29 and 31), I conclude that Ms. Naqvi's pleaded facts could support a finding that her section 15 rights were breached.

[28] However, that by itself does not provide a complete answer to the legal issue before this Court. As set out below, the facts pleaded in Ms. Naqvi's amended claim must also support a finding that *Charter* damages would be a just and appropriate remedy.

[29] I note that Ms. Naqvi has also pleaded that the visa officer's actions violated a duty of procedural fairness owed to her under section 15. Ms. Naqvi has not provided the Court with any authorities supporting this interpretation of section 15. It is ordinarily section 7 of the *Charter* that protects against violations of procedural fairness (see *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 19), and only in circumstances where "a decision-maker has a power of decision over life, liberty or security of the person" (Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Canada: Thomson Reuters, 2007) (loose-leaf 2016 supplement) ch 47.22). Ms. Naqvi has not pleaded section 7, and nor would the facts pleaded establish a deprivation of her life, liberty or security in these circumstances (see *Maghraoui v Canada (Citizenship and Immigration)*, 2013 FC 883 at para 20). In any event, even if Ms. Naqvi had properly pleaded a breach of section 7, her amended claim would still fail to support an entitlement to *Charter* damages, as I will now explain.

E. *Damages a Just and Appropriate Remedy*

[30] The thrust of the Defendants' argument on this appeal is that the facts pleaded in Ms. Naqvi's amended claim would, if proven, not support a finding that the visa officer intentionally refused Ms. Naqvi's sponsorship application based on prejudice.

[31] Justice Rennie wrote in *Mancuso* that "[a]s a general rule, damages are not available from harm arising from the application of a law which is subsequently found to be unconstitutional, without more" (*Mancuso* at para 29, emphasis added). The "without more" is typically some element of bad faith (*Mancuso* at para 29; followed in *Canada (Royal Mounted Police) v Canada (Attorney General)*, 2015 FC 1372 at para 37 [*Royal Mounted Police*]; *Whaling v Canada (Attorney General)*, 2017 FC 121 at para 14).

[32] Here, Ms. Naqvi impugns the actions of a visa officer, not the application of a law found to be unconstitutional. With respect to the unconstitutional conduct of state actors, it is not sufficient to prove mere negligence: there must be some "additional" element of bad faith or malice to justify an award of damages (see *Tremblay v Ottawa Police Services Board*, 2016 ONSC 4185, at para 167; *Hawley v Bapoo*, 2007 ONCA 503 at paras 8-9; *Royal Mounted Police* at paras 36-37 and 40). This is analogous to the "without more" identified in *Mancuso*.

[33] Recently, in *MacRae v Feeney*, 2016 ABCA 343 [*MacRae*], the Alberta Court of Appeal upheld a trial judge's decision to strike a claim for *Charter* damages, relying on *Henry v British Columbia (Attorney General)*, 2015 SCC 24 for the proposition that, where a plaintiff seeks

Charter damages based on a "highly discretionary decision", an element of improper purpose, *mala fides*, or wilfulness must be inferable from the facts pleaded:

> 12 Moldaver, J writing for five members of the seven judges who heard the Henry appeal explained that "the malice standard translates awkwardly into cases where the alleged misconduct is wrongful non-disclosure." (at para. 59) In contrast, he wrote that the wrongdoing targeted by the tort of malicious prosecution "...is the decision to initiate or continue an improperly motivated prosecution" and that because malice requires a showing of improper purpose, the "improper purpose" inquiry "is apt when the impugned conduct is a highly discretionary decision such as the decision to initiate or continue a prosecution, because discretionary decision-making can best be evaluated by reference to the decision-maker's motives." (at para. 59)
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> 13 In the case at bar the decision to investigate and prosecute was a "highly discretionary decision." Neither mala fides nor wilfulness is made out on this record. We see no basis for appellate intervention.

[34] Here, as in *MacRae*, Ms. Naqvi seeks *Charter* damages based on a "highly discretionary decision" — that of a visa officer. Ms. Naqvi must prove that the visa officer's decision was actually motivated by an improper purpose (i.e., intentional prejudice). As she has not pleaded any facts that would directly prove *mala fides*, she must plead circumstances from which a trier of fact could infer this requisite intentional element (see *Fragomeni v Greater Sudbury Police Service*, 2015 ONSC 3889 at para 32).

[35] Rule 181(1)(b) also directs that a pleading must contain particulars of any alleged state of mind of a person, including of malice or fraudulent intention. Although Ms. Naqvi does not expressly plead that the visa officer was motivated by malice, it is clear to me from Ms. Naqvi's amended claim and her submissions on this appeal that she sincerely believes that the visa officer's "narrow" state of mind may be inferred from the circumstances pleaded.

[36] I do not agree that the facts pleaded could support the requisite wilful element required for Ms. Naqvi's claim for *Charter* damages. Ms. Naqvi's amended claim does not plead, nor would the pleaded facts support a finding, for example, that the visa officer's decision was utterly devoid of foundation or made for an extraneous purpose, or that the visa officer made deliberately false statements or concealed information (see *OJ v Alberta*, 2013 ABQB 693 at para 79), or that the visa officer deliberately or recklessly disregarded information (see *Oniel v Metropolitcan Toronto (Municipality) Police Force* (2001), 195 DLR (4th) 59 (ONCA) at para 54-59).

[37] On this point, I refer to the reasoning in *Wilson v Toronto Police Service*, [2001] OJ No 2434 (OSCJ) [*Wilson*], aff'd [2002] OJ No 383 (ONCA). Although *Wilson* considered a difference cause of action (malicious prosecution), the principles enunciated by the trial judge, and confirmed by the Ontario Court of Appeal, are instructive by analogy:

> 72 […] [The plaintiff] is unable to plead facts that could lead to the conclusion that Barry continued the prosecution in the complete absence of any information pointing to guilt or upon evidence that was ludicrously and obviously insufficient. He is unable to point to circumstances that could result in a conclusion that the prosecution can only be accounted for by implying some wrong or indirect motive to the prosecutor, although it may be impossible to say what it was […]
>
> (Emphasis added)

[38] The Ontario Court of Appeal upheld *Wilson*, writing:

> 2 In some cases, depending on the entirety of the evidence, the trier of fact may infer malice from the absence of any reasonable prospect of conviction. The potential availability of that inference at the end of a trial cannot, however, relieve a plaintiff of his or her obligation to properly plead the "full particulars" of an allegation of malice: Rule 25.06(8).
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> ([2002] OJ No 383)

[39] I am cognizant that allegations of prejudice and intentional discrimination are rarely proven by direct evidence, and that there is also always the possibility that more information could arise through the trial process. In this regard, the Defendants direct me to the transcript of the motion, and the prothonotary's comment that: "what if it turns out that [the visa officer] holds some grudge against a particular sect that Ms. Naqvi belongs to?"

[40] However, Ms. Naqvi has not pleaded or argued that further material facts, outside of her knowledge, exist to support her claim. She argues instead that the visa officer's motives can be inferred from the facts she has pleaded. More importantly, on a motion to strike, the Court must be wary of allowing a claim to proceed on the basis that better evidence may arise down the road. As held by Justice Stratas: "[t]he price of admission to documentary and oral discoveries is the service and filing of an adequately particularized pleading that asserts all of the essential elements of a viable cause of action" (St John's Port Authority v Adventure Tours Inc, 2011 FCA 198 at para 63).

[41] Canada's immigration system depends upon a large number of visa officers with delegated authority to make highly discretionary decisions. Unfortunately, some of those

decisions are poorly made, as occurred in Ms. Naqvi's case. Those poor decisions can be set aside on appeal or judicial review. However, absent an additional, wilful element of wrongdoing, such as bad faith or prejudice, a poorly-made decision does not open the door to *Charter* damages.

[42] In sum, a judge of this Court could not conclude, taking the facts pleaded to be true, that the visa officer's conduct was intentionally motivated by prejudice or another improper purpose. Therefore, it is plain and obvious that Ms. Naqvi's claim cannot succeed and should be struck in its entirety.

F. *Whether Leave to Amend should be Granted*

[43] Ms. Naqvi has already had one opportunity to amend her claim. In considering whether Ms. Naqvi should be granted leave to amend again, the test is whether the defects in her pleading are potentially curable (*Simon v Canada*, 2011 FCA 6 at para 8). I am satisfied that Ms. Naqvi has pleaded all the circumstances known to her, and thus no amendments to her statement of claim could cure the deficiencies identified.

IV. Conclusion

[44] I conclude that the prothonotary erred in dismissing the Defendants' motion to strike Ms. Naqvi's claim. The prothonotary's order dated June 9, 2017 is hereby set aside, and replaced with a judgment striking Ms. Naqvi's amended claim without leave to amend.

[45] I have considered the costs submissions on both sides. Taking into account all the circumstances, including the immigration history of these proceedings, which led to personal challenges for Ms. Naqvi and her husband, I decline to make any costs order in this particular matter.

[46] I wish to thank and congratulate Ms. Naqvi for her able and professional presentation of her case, which, as mentioned during the hearing of this appeal, rivalled the advocacy skills of many counsel who appear before me.

JUDGMENT in T-1381-16

THIS COURT'S JUDGMENT is that

1. The appeal is allowed.
2. The Order of the Prothonotary dated June 9, 2017 is set aside, and replaced with a judgment striking the plaintiff's amended claim without leave to amend.
3. No costs are awarded.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1381-16
STYLE OF CAUSE:	MUBEEN FATIMA NAQVI v HER MAJESTY THE QUEEN, THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 24, 2017
JUDGMENT AND REASONS:	DINER J.
DATED:	DECEMBER 4, 2017

APPEARANCES:

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