Date: 20060515

Docket: IMM-739-98

Citation: 2006 FC 602

Ottawa, Ontario, May 15, 2006

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

ISTVAN JR. SZEBENYI

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT AND ORDER

I. Introduction

[1] By Statement of Claim issued on February 18, 1998, Mr. Istvan Szebenyi, Mrs. Gizella Szebenyi and Mr. Istvan Szebenyi, Jr. commenced an action against Her Majesty the Queen (the "Defendant"), seeking damages for the alleged negligent handling of a sponsorship application made to Citizenship and Immigration Canada ("CIC"), pursuant to the former *Immigration Act*,

R.S.C. 1985, c. I-2 (the "Immigration Act") and the former *Immigration Regulations*, SOR/78-172, as amended (the "Regulations").

[2] Mr. Istvan Szebenyi and Mrs. Gizella Szebenyi are the parents of Mr. Istvan Szebenyi, Jr. They are citizens of Hungary. Their son, Mr. Istvan Szebenyi, Jr. was landed in Canada in 1987, and became a Canadian citizen in 1990. In May 2000, Mr. Szebenyi sought leave of the Court to be removed as a plaintiff in this action. By Order dated October 4, 2000 issued by Prothonotary Lafrenière, Mr. Szebenyi was removed as a Plaintiff.

[3] By Order dated September 13, 2004, Prothonotary Lafrenière ordered that Mrs. Szebenyi be removed as a plaintiff pursuant to Rule 104(1)(a) of the *Federal Courts Rules*, SOR/98-106, as amended (the "Rules"). He cited non-compliance with earlier Directions of the Court concerning the conduct of this action, as the basis of the Order. Accordingly, Mr. Istvan Szebenyi, Jr. is now the sole plaintiff before this Court (the "Plaintiff").

[4] Following a lengthy procedural history, including an abortive attempt by the Defendant to strike out the original Statement of Claim, that is on behalf of the Plaintiff and his parents, as disclosing no cause of action, proceedings before the Federal Court of Appeal, and an unsuccessful application for leave to appeal to the Supreme Court of Canada, this matter proceeded to trial at Toronto on November 14, 2005. Pursuant to the Order of Prothonotary Milczynski, dated June 24, 2005, the parties submitted a three-volume trial record, upon the agreement that the documents

contained therein were admitted without the necessity of being proven and that all materials in the trial record would be part of the evidentiary record for the purposes of the trial.

[5] The trial record contains copies of the relevant pleadings, copies of certain Orders, the Plaintiff's written examination questions for the Defendant, the affidavits of Visa Officer Donald Cochrane and Dr. George Giovinazzo in reply to the written Discovery Examination. The trial record also contains the transcript of the Plaintiff's Discovery Examination and his responses to undertakings arising from that examination. As well, the trial record includes the Pre-Trial Memoranda of the parties, two pre-trial documentary exhibits submitted by the Plaintiff and an affidavit submitted on behalf of the Defendant, together with forty-eight exhibits.

[6] At the trial, the Plaintiff called Dr. Raymond Wu, a medical practitioner in Markham, Ontario who conducted a medical examination of Mrs. Szebenyi in January 1997. The Plaintiff sought to elicit opinion evidence from Dr. Wu. The Defendant objected to the tendering of opinion evidence from Dr. Wu in light of the absence of an expert report, in compliance with the Rules.

[7] The basis of the Plaintiff's claim is the alleged negligent manner in which CIC handled his mother's sponsored application for permanent residence in Canada.

II. Background

[8] The Plaintiff came to Canada as a landed immigrant in 1987. In 1990, he became a Canadian citizen. In 1992, he began thinking about sponsoring his parents to come to Canada so that

the family could be reunited and that the grandparents could be involved in the lives of their grandchildren, that is the children of the Plaintiff. The Plaintiff was interested in sponsoring his parents for immigration to Canada and reuniting the family because he is their only child and there are no close relatives living in Hungary.

[9] In January and February 1993, the Plaintiff contacted the office of CIC by telephone, to inquire about the process and spoke with a Mr. Milton Best. According to the Plaintiff, at the time of this initial inquiry, he specifically referred to the fact that his mother had been diagnosed in 1986 with Type-II Non-Insulin Dependant Diabetes, otherwise known as Diabetes Mellitus. He testified at his Discovery Examination that he was told by Mr. Best that the diabetic condition would not be of concern to Canadian immigration officials, as long as there were no complications. The Plaintiff said that he relied on his conversations with Mr. Best as constituting an assurance that there would be no problem with his mother's application.

[10] On February 15, 1993, the Plaintiff completed an "Undertaking of Assistance" for the sponsorship of his parents for immigration to Canada. By an Application for Permanent Residence dated April 28, 1993, Mr. Istvan Szebenyi and his wife Gizella Szebenyi applied for permanent residence in Canada.

[11] On May 7, 1993, a letter was sent to the Plaintiff's parents, requesting them to contact the Canadian Embassy in Budapest to arrange for medical examinations that were required as part of the processing of this application for permanent residence. The parents attended before a Designated Medical Practitioner ("DMP") in Budapest on May 19, 1993. A DMP is a local physician whose

qualifications are recognized by CIC in conducting medical examinations abroad for potential immigrants.

[12] The father received a clean bill of health. The medical report for the mother recorded that she had Diabetes Mellitus. The protein urinalysis and blood sugar tests yielded negative results.

[13] In June 1993, Mrs. Szebenyi was hospitalized in St. Stephen Hospital from June 14 until June 19, 1993. The hospital report in that regard noted that she had been “hospitalized for the adjustment of her diabetes”. The report also noted that she demonstrated “higher blood sugar values”.

[14] According to the Plaintiff, the first time that his mother showed positive results for protein in urine was in June of 1993. A further test was conducted on September 8, 1993 by the DMP in Budapest; this also showed a positive result for protein. As a precaution, Mrs. Szebenyi saved a portion of the urine sample that had been tested on September 8. According to the Plaintiff, she brought this sample to a laboratory for an independent analysis on September 10, 1993 and the results of the independent analysis showed a negative result.

[15] On September 24, 1993, Dr. George Delios, Senior Medical Officer with the Canadian Embassy in Vienna, prepared a medical notification relative to Mrs. Szebenyi. This form recorded the following observations:

> This 61 year old applicant has inadequately controlled diabetes mellitus with renal and retinal complications, which are expected to

> deteriorate further resulting in a need for repeated specialist's attention and hospitalization for the management of complications and therefore will result in excessive demand on the health care system.
>
> She is inadmissible under Section 19(1) (a) (ii).

[16] By memorandum dated September 27, 1993, Dr. Delios forwarded the Medical Notification Form 1014 to Dr. Elliott, in London, England, requesting his countersignature on the document if he agreed with his opinion. Dr. Delios had assessed Mrs. Szebenyi as "medically inadmissible" with the rating of M-5. By a reply note dated October 2, 1993, Dr. Elliott indicated that he would assess Mrs. Szebenyi as M-7. He did not sign the Medical Notification.

[17] By letter dated December 17, 1993, Dr. Delios forwarded further test results to Dr. Bernstein, Assessment Control and Medico-Legal Support in Ottawa.

[18] The final medical notification by the medical officer was issued on January 12, 1994. In this notification, Dr. Delios repeated his earlier opinion concerning Mrs. Szebenyi's physical condition and determined that she was medically inadmissible, pursuant to subparagraph 19(1)(a)(ii) of the Immigration Act, on account of her diabetic condition. Dr. Bernstein in Ottawa concurred in this assessment, as appears from his signature on the document.

[19] In April 1994, the Plaintiff's parents were called for an interview at the Canadian Embassy in Budapest. On that day, Mr. Peter Duschinsky, an Immigration Counsellor and Consul at the Embassy, explained the meaning of medical inadmissibility to Mrs. Szebenyi. He told her that there were two options available, that is either to apply for a Minister's permit pursuant to the Act or

alternatively, to repeat the medical examination. Although the Plaintiff was not present at this interview, he was aware that it had taken place, as the result of a telephone conversation with his mother. He telephoned the Canadian Embassy in Budapest and according to his Discovery Examination, he was told that these two options had been presented to his mother.

[20] His mother decided to repeat the medical examinations and contacted a Dr. Halmy, a DMP for the purpose of conducting medical examinations for prospective immigrants to Canada. Dr. Halmy had not performed the initial medical examination that was conducted in May 1993.

[21] On May 18, 1994, Dr. Halmy completed his report and recorded that Mrs. Szebenyi has Diabetes Mellitus. He recorded that the tests for protein and blood sugar were normal.

[22] On May 25, 1994, by a letter sent from Dr. Delios in Vienna, Mrs. Szebenyi was advised that the assessment of her medical file could not be completed without further information. Additional tests were required, including blood urea nitrogen, serum creatinine and a twenty-four hour urine for protein.

[23] In the meantime, Mrs. Szebenyi was hospitalized in Budapest during the period May 12 to May 19, 1994. According to the Hospital Discharge Certificate that was produced by the Plaintiff in response to undertakings given during his Discovery Examination, she had recently experienced high blood sugar levels in the mornings. In the course of his Discovery Examination, the Plaintiff first described this hospitalization as “voluntary” on the part of his mother and he suggested that the second DMP, that is Dr. Halmy, had advised her to go to the hospital. Ultimately, the Plaintiff said

that it was “possible” that Dr. Halmy had offered this advice. There is no documentary evidence to suggest that the DMP had made such a recommendation.

[24] The Plaintiff, in his Discovery Examination, said that his mother had undergone a neurological test, that is a CAT scan, and a report was prepared, dated June 7, 1994. The Plaintiff also testified in his Discovery Examination that his mother underwent further protein and blood sugar tests in December 1994.

[25] On July 17, 1995, the Canadian Embassy in Vienna received a report from Dr. Halmy, dated July 14, 1995, concerning Mrs. Szebenyi. Dr. Halmy reported upon blood sugar, urinalysis, and a neurological assessment.

[26] This report generated an exchange of emails between Dr. Delios in Vienna and Mr. Duschinsky in Budapest. In an email dated July 17, 1995, Dr. Delios said the following:

> Subj applicant was assessed on January 12, 1994 as M-5.
>
> On May 18, 1994 she underwent new medicals (by Prof. Halmy). These were received in our office on May 24, 1994. On May 25, 1994 we sent a furtherance request to Prof. Halmy and a letter to the applicant to contact her physician. Only today, July 17, 1995 we received the requested information from the DMP (more than 13 months later!).
>
> In the meantime the medicals have expired. Grateful for your comments.

[27] In his reply of August 4, 1995, Mr. Duschinsky expressed concern about the meaning of the medical report submitted by Dr. Halmy. He questioned whether this report would show that Mrs.

Szebenyi was still medically inadmissible and if so, he was unsure if any purpose would be served by having her repeat the full medical examinations. On the other hand, if there were a "good possibility" that she would not be refused on medical grounds, then she should "probably" undergo the full medical examination again.

[28] Dr. Delios replied to the email of August 4, 1995 and said that the report of July 14, 1995 presented incomplete laboratory investigations. He said this factor would make it "very difficult if not impossible to predict whether this applicant will be refused or not".

[29] In an email dated August 24, 1995, Dr. Delios described the history of Mrs. Szebenyi's medical file to Mr. Duschinsky, as follows:

> May 18, 1994
> a) Medical examination – completion of IMM 1017 and lab. report
> b) Received in our office May 24, 1994
> c) Furtherance instructions mailed to Prof. L. Halmy on May 25, 1994 requesting:
>
> 1. A report from a specialist in Diabetes concerning the following condition to include details of any investigations performed, the aetiology, diagnosis, treatment and prognosis of Diabetes Mellitus (translated)
> 2. Results of fasting and two hour post cibum blood sugars, of Blood urea nitrogen of Serum creatinine. (all these are blood tests)
> Results of 24 hour urine for protein.
> Details of fundoscopy and peripheral neuropathy if any are also required.
>
> On June 16, 1995 we received a request by fax from A. Bernstein, M.D., Deputy Director, Quality Assurance in Ottawa and replied as follows:

> On July 17, 1995 we received a 25 line report written in Hungarian signed by Dr. Toth Ceza and the accompanying five line translation by Prof. L. Halmy - both dated July 14, 1995.
>
> Please note that the validity of the medical examinations had already expired eight weeks before, and also the medical information received was incomplete as
> 1. No report from a Diabetologist (specialist) in Diabetes was forwarded
> 2. Blood and urine investigations results were also incomplete – only two out of the five tests were sent.
>
> We are faxing the correspondence received from Ottawa, our reply and the furtherance reports.

[30] On August 29, 1995, Mr. Duschinsky replied to Dr. Delios, setting out his understanding of the situation. He also sent Dr. Delios a copy of a memorandum that he had forwarded to Case Review in Ottawa. Mr. Duschinsky provided a summary of the sponsorship application to date, including the position adopted by the Plaintiff that the medical results were incorrect and the result of errors. He noted that following the second medical examination on May 18, 1994, a request for further information was sent out on May 25, 1994 and that nothing was received from the DMP until July 17, 1995. He also reported that the July 17,1995 report was incomplete and at that time, that is August 1995, the case was incomplete.

[31] Mr. Duschinsky asked the Ottawa office to “explain to sponsoring son that we have done everything that we could”, including advising about the process of obtaining a Minister’s permit. Finally, he said that a medical decision could not be made relative to Mrs. Szebenyi until all the requested medical information was provided.

[32] On August 30, 1995, Dr. Delios in Vienna sent a memorandum to Dr. Bernstein, Deputy Director, Quality Assurance, concerning Mrs. Szebenyi. The specific response on this note is to an "ATI Request re: Szebenyi Gizella Istvanne", that is an "Access to Information Request". Without commenting on that subject, Dr. Delios set out his view that he was unable to finalize Mrs. Szebenyi's application at that time since the validity of the prior medical examination, that is the medical examination of May 18, 1994, had expired some two months before the further medical information had been received and furthermore, that information was incomplete. Dr. Delios said that he thought a new medical report should be requested but Mr. Duschinsky "does not appear to agree with that". He sought advice from Dr. Bernstein.

[33] In a handwritten note upon the document found at pages 805 and 806 of the Trial Record, Dr. Bernstein said that the further information requested in May 1994 was appropriate and until all medical information is received, a new medical assessment could not be made. Dr. Bernstein acknowledged that Mrs. Szebenyi may once again be found medically inadmissible once the outstanding information, that is per the request of May 1994, is provided. He also noted that if this information should prove inconclusive, then a new medical examination would be required.

[34] On September 14, 1995, Dr. Delios communicated by email with Mr. Duschinsky and relayed the advice received from Dr. Bernstein. On the same day, Dr. Delios sent a letter to Dr. Halmy in Budapest, spelling out the outstanding medical information and stating that the following tests were still required:

a) A complete report from a medical specialist (diabetologist) concerning the following condition, to include details of any

> investigations performed, the aetiology/diagnosis, treatment & prognosis re. DIABETES MELLITUS (with English or French translation).
>
> b) Results of blood urea nitrogen, serum creatinine, fasting and two hour p.c. blood sugar, 24 hour urine for protein.
>
> c) A report from an ophthalmologist with details of fundoscopy (with English or French translation).
>
> Our headquarters in Ottawa have been informed and agree with the above, our Deputy Director is also requesting that every specialist's report must be fully translated in English or French.

[35] There was no reply to this letter. On February 9, 1996, according to an email from Dr. Delios to Dr. George Giovinazzo, a medical officer with CIC, a report dated January 24, 1996 and written by Dr. Winkler Gabor, was received at the Canadian Embassy in Vienna on February 9, 1996. In his email, Dr. Delios provided the substance of the report, as follows:

> We received this morning, 09 Feb. 1996, a consultation report signed by Dr. G. Winkler. On reviewing the file, it is noted that:
>
> a) the 24 hour urine for protein examination is now reported as being within normal limits
>
> b) fundoscopy: no diabetic angiopathy is found
>
> c) neurological examination is also reported within normal limits.

[36] He noted that Mrs. Szebenyi had been originally examined in May 1993 and was assessed as medically inadmissible in January 1994. He expressed his opinion that, on the basis of this most recent examination, that Mrs. Szebenyi may be upgraded to a M-3 profile. He asked for an opinion but also expressed his concern about the validity of the medical examination dated May 18, 1994.

[37] Dr. Giovinazzo replied to Dr. Delios on the same day. He provided reasons why an upgrade could not be made. The first one was the absence of a serum creatinine status that "is vital to the assessment of this applicant". He also pointed out that it was not to assess Mrs. Szebenyi as M-3 at this stage, since she did not have a medical examination that was valid for admissible assessments. He provided the following detailed explanation:

> As you know, Dr. Fortin, in the past has sent messages overseas to say that there should be NO extension of medical validities beyond the normal one year validity period for admissible cases. For INADMISSIBLE cases, there is no 'end date' for the medical validities (i.e. M4, M4/5, M5, M6, M6/7, M7 assessments have NO expiry date). All M1, M2, and M2/3 cases are only valid for a year from the time of the initial medical physical examination for the MS1017 (or one year from latest PA CXR if the CXR was taken before the medical physical examination for the MS1017). To upgrade a case to M1, M2, or M2/3 you must have a full medical examination no older than one year before the time of your admissible assessment.
>
> So, to answer your question: You cannot make this case M1/M3/M2,3 without a new medical examination.
>
> …
>
> … How do you resolve this problem? I suggest you notify the appropriate Visa Officer with the following type of comment: 'I have just received new medical information (dated 24Jan96) concerning this applicant. As you know, this applicant was previously assessed M5 in January 1994. This new information suggests that this applicant may now be upgradable to a medically admissible status for Canadian Immigration Purposes (i.e. M3). In view of this new information, you may wish to issue new medical documents for this applicant as the previous medical documents are no longer valid for admissible medical assessments.' The question of issuing new medical documents now rests with the Visa officer (he may actually have some other unrelated reasons why he does not want to reopen this particular applicant's file at this stage).

[38] Finally, Dr. Giovinazzo emphasized that medical officers, like Dr. Helios, are not authorized to issue new medical documents. That was the role of the visa officer who alone could decide to issue those documents.

[39] By letter dated February 21, 1996, the Vienna office wrote to Mrs. Szebenyi and asked her to contact the Canadian Embassy. She did not do so. No new medical information was provided until early 1997.

[40] An explanation for the delays in receiving the required medical information was provided by the Plaintiff in his Discovery Examination. He became suspicious of the results obtained on the medical examinations conducted for CIC. In November 1994, he made a request for disclosure of his mother's medical file, pursuant to the *Access to Information Act*, R.S.C. 1985, c. A-1, as amended. At his Discovery Examination, he said that in late 1994, he did not advise his mother to refuse further tests. He confirmed that, at that time, he was aware that the medical examination undertaken for immigration purposes was valid for one year only. He did not pursue the sponsorship application or ask for further information at this time because he felt that he and his parents were being pushed around.

[41] There was a delay of some five to six months before the Plaintiff received a response to his access request. In April 1995, he filed a formal complaint concerning the delay in the response. He

received a reply to his access request on May 23, 1995, together with copies of the documents that he had requested, with the exception of the neurological report of June 7, 1994.

[42] In the spring of 1994, the Plaintiff contacted his Member of Parliament, seeking assistance. Mr. Eggleton's office corresponded with the Canadian Embassy in Budapest and by letter dated August 15, 1994, Mr. Duschinsky sent a lengthy letter to Mr. Eggleton, outlining the history of the application and referring to the outstanding request for further medical test results.

[43] The Plaintiff wrote to the Canadian Human Rights Commission in 1995. By letter dated June 16, 1995, he was advised that the subject of his inquiry, that is the issuance of a visa to his mother, lay within the jurisdiction of CIC and there was no basis upon which the Human Rights Commission could accept his complaint.

[44] The Plaintiff also submitted a letter, together with documents, to the then Minister of Citizenship and Immigration in June 1995, seeking his assistance in finalizing the visa applications. His letter was acknowledged by the Minister's office by letter dated July 10, 1995.

[45] In March 1996, the Plaintiff signed a Notice of Appeal to the Immigration Appeal Division. The Notice was received by that body on May 2, 1996. He testified at his Discovery Examination that he took this step because he understood that his mother's visa application would be refused. The Plaintiff was represented by counsel in filing this appeal. He was advised by his lawyer that no decision had been made upon his mother's visa application and that the file remained open. His counsel apparently withdrew her services prior to a pre-hearing conference before the Immigration

Appeal Division on November 13, 1996. The Plaintiff, together with his mother, attended the pre-hearing before the Immigration Appeal Division. He was told that there were two options available: either his mother could apply for a Minister's permit or complete the full medical examination again.

[46] The Plaintiff testified that he instructed his lawyer to appeal to the Federal Court from the decision of the Immigration Appeal Division: however, he did not specifically instruct her to seek an order of mandamus. In any event, no application for leave and judicial review was filed.

[47] As noted above, Mrs. Szebenyi attended the pre-hearing conference in November 1996. According to the Plaintiff, his parents arrived in Canada on April 18, 1996 as visitors. It appears that Mrs. Szebenyi did not receive the letter dated February 21, 1996, sent to their address in Budapest, because she and her husband had moved in late 1994. The Plaintiff said that he only became aware of the February 21, 1996 letter in correspondence from his lawyer in August 1996. He said, in his Discovery Examination, that his parents had verbally advised the Canadian Embassy in Budapest of their change of address. However, he did not produce any documentation to show that the Embassy had been advised in this regard.

[48] The Plaintiff engaged a handwriting expert in Canada to examine his mother's signature upon the original medical examination form, that is the form dated May 19, 1993. He received a report, dated June 14, 1996, from the expert who expressed her opinion that the form did not bear his mother's signature. The comparison conducted by the expert was based upon a photocopy of the

May 19, 1993 form. The Plaintiff took this action because he was suspicious about the contents of this report.

[49] Ultimately, Mrs. Szebenyi is examined by a third DMP, in Canada, that is Dr. Raymond Wu. In his report dated January 31, 1997, he notes that Mrs. Szebenyi is generally healthy and that all blood and urine tests were negative.

[50] This report was submitted to the Embassy in Vienna but it was misfiled because it mistakenly stated that no prior medical examination for immigration purposes had been conducted. By letters dated March 13, 1997 and September 29, 1997, the Vienna office requested further medical information. The letter of September 29, 1997 specifically outlined five laboratory tests, including serum creatinine and hemaglobin A.

[51] Mrs. Szebenyi did not attend for these tests. By this time, the Plaintiff was advising his mother not to undergo further testing. In his opinion, the tests were not required and were not reasonably requested. The Plaintiff, in December 1997, decided to commence an action against the Canadian government for damages relative to the alleged negligent handling of his sponsorship application.

[52] The Statement of Claim was filed on February 16, 1998. Up to that date, no refusal had been made by the CIC. In the original Statement of Claim, the Plaintiff and his parents sought damages in the amount of $9,000,000.00. This amount was later changed to $6,000,000.00.

[53] By a letter dated August 16, 2000, Visa Officer Donald Cochrane refused the visa application made by Mr. and Mrs. Szebenyi. The letter was addressed to Mr. Szebenyi and advised that the application was being refused because his dependent wife, Mrs. Gizella Szebenyi, had been found to be medically inadmissible to Canada, pursuant to subparagraph 19(1)(a)(ii) of the Immigration Act.

[54] Mr. Cochrane recounted the history of their medical examinations that were undertaken by Mrs. Szebenyi. He explained that the only completed medical assessment on the file was the one from 1994. He advised that an appeal could be taken to the Immigration Appeal Division.

[55] Following receipt of the refusal letter of August 16, 2000, the Plaintiff filed an appeal to the Immigration Appeal Division. In written reasons dated November 6, 2001, the appeal was dismissed. The Immigration Appeal Division concluded that the refusal of the visa officer was valid in law. It commented upon the Plaintiff's actions in "second guessing" the medical officers and noted that the visa officer's decision to rely on the medical notification of 1994 was reasonable and legally valid.

[56] The Plaintiff did not seek judicial review of this decision of the Immigration Appeal Division. He chose to pursue this action for damages instead.

[57] The Plaintiff claims that he suffered emotional distress and nervous shock, as the result of the way in which his parents' application for landing was handled. He also claimed that he had

suffered pecuniary damages, under the headings of loss of opportunity and economic loss, as a result of the actions of the Defendant's servants, agents and employees.

III. Evidence

[58] The foregoing details have been culled from the documentary materials submitted in particular the Pre-trial Exhibit of the Plaintiff and the affidavit of Ms. Rehal, submitted on behalf of the Defendant. According to the transcript of the hearing, the Plaintiff and the Defendant had an agreement as to the use at trial of the documents contained in the trial record. The following appears at pages 1, 2, 3 and 4 of the transcript:

> **MR. McCLENAGHAN:** Basically, my Lady, I just had a discussion with the plaintiff. What the parties are agreed on is that any document that is in the trial record is basically admitted, and can be reviewed and taken into evidence and reviewed by your Ladyship. So any of the documents from Citizenship and Immigration, they don't have to be proven through - - we discussed about it.
>
> …
>
> **MR. McCLENAGHAN:** Correct. Also, as you've indicated, there are two affidavits in the trial record: One, affidavit of Donald Cochrane, which is a product of the plaintiff's written examination questions, which the plaintiff has indicated he wishes to put before the Court, and that is, of course, admissible pursuant to Rule 268; and also, the affidavit of George Giovinazzo, which is the defendant's response to the plaintiff's written examination questions which called for a medical opinion.
>
> So those are in the trial record, and the plaintiff wishes to have those adduced into evidence.
>
> With respect to - -

> **THE COURT:** Just a minute now. They're in the trial record; then the defendant is not objecting that they be introduced into evidence.
>
> **MR. McCLENAGHAN:** Yes.
>
> **THE COURT:** Okay.
>
> **MR. McCLENAGHAN:** Again, it was my understanding at the last case management conference, however, that the plaintiff wanted them in evidence, but that's certainly correct that he's not objected to their admission.
>
> With respect to the transcript of the examination for discovery of the defendant, or rather the plaintiff, it is a part of the trial record. I'm content to have it all reviewed by your Ladyship. I would say, however, that there are large portions of the transcript that concerns hearsay, or rather there's hearsay evidence in there. Therefore, I may decide - - I guess I'm in your Ladyship's hands - - there are portions of his examination for discovery that I wish to read in as part of my case.
>
> **THE COURT:** Okay.
>
> **MR. McCLENAGHAN:** I may limit it to that rather than have you consider the whole 200-page transcript. Again, it's peppered with hearsay evidence, so it may be better just for me to read in the relevant portions.
>
> **THE COURT:** Well, by reading in the relevant portions, or by reading in what you want to read in, you are then adopting that evidence as evidence for the defendant.

[59] The Plaintiff made an opening statement in which he referred to various documents. Pursuant to Rule 287, he had provided a copy of a video to counsel for the Defendant, under cover of a letter dated November 18, 2003 and gave notice of his intention to introduce this video as demonstrative evidence at trial. The video records urine testing undertaken by Mrs. Szebenyi in the summer of 2003.

[60] The Plaintiff called one witness at the trial, that is Dr. Wu, a DMP who performed the third medical examination of Mrs. Szebenyi in Canada on January 31, 1997. At trial, the Plaintiff sought to introduce opinion evidence from Dr. Wu about the tests that were requested of Mrs. Szebenyi. He also wanted to question Dr. Wu about the video tape. Counsel for the Defendant objected to the introduction of opinion evidence from Dr. Wu since no expert report had been filed in compliance with the Rules. Counsel also objected to the introduction of the video as evidence on the grounds of relevance.

[61] The Defendant's objections were upheld and Dr. Wu was not permitted to give expert evidence. As for the video, it was marked as an Exhibit and viewed, subject to a ruling on its ultimate relevance. I conclude that the video is not relevant to the issues raised and it will not be considered.

[62] As for the Defendant, she relied on the materials filed in the trial record, although counsel for the Defendant expressed concern about the Court's consideration of all of the transcript of the Plaintiff's Discovery Examination, saying that it was "peppered" with hearsay. The Defendant chose to read in to the record, pursuant to Rule 288, the following questions from the Plaintiff's Discovery Examination:

> Questions 157, 158, 277-286, 338, 365-379, 406-421, 504, 505, 551-565, 705-711, 745-777, 786-788, 846, 847, 865-867, 977-986, 1014-1025, 1133-1138, 1157 and 1158.

Pursuant to Rule 288, a party may read in to the record extracts from the Discovery Examination of an adverse party, and adopt that evidence as its own.

[63] The Defendant purported to rely on Rule 288 with respect to the affidavits provided by Mr. Cochrane and Dr. Giovinazzo. However, in my opinion, she cannot do so since these affidavits were provided as Discovery Examination to the Plaintiff. The Plaintiff was entitled to use this evidence in accordance with Rule 288, if he wished, but it is not clear to me that he intended to do so. The only references made by the Plaintiff to these affidavits were in the course of his opening submissions.

[64] In *Newfoundland Processing Ltd. v. "South Angela" (The)* (1995), 96 F.T.R. 157 (T.D.), the Court refused to allow a party to use the discovery evidence of one of its own potential witnesses, as evidence at trial. In the present case, the trial record is unclear that the Defendant could use the affidavits of Mr. Cochrane and Dr. Giovinazzo as her own evidence. I will accord these affidavits little weight. In any event, I am satisfied that they are not relevant to the dispositive issue, that is whether the Plaintiff has a cause of action.

IV. Issues

[65] By Order dated June 24, 2005 of Prothonotary Milczynski, the trial of this action was to proceed only on the issue of liability. If liability is found against the Defendant, damages will then be assessed.

[66] The Order of June 24, 2005 defined the trial issues as follows:

> 2. The issues to be determined at trial are:
>
> (a) whether the Plaintiff has any reasonable cause of action or standing to bring this proceeding; and
>
> (b) if so, whether the Defendant was negligent or otherwise liable for any damages to the Plaintiff as a result of the Plaintiff's mother's application for landing in Canada being denied on medical grounds.

V. Discussion and Disposition

[67] The claim of the Plaintiff is the only matter now before the Court. Upon the withdrawal of his father as a plaintiff pursuant to the Order of Prothonotary Lafrenière on October 4, 2000, the action on the part of that person was effectively discontinued.

[68] The effect of the further Order of Prothonotary Lafrenière, made on September 13, 2004, pursuant to Rule 104(1)(a) of the Rules, was to remove Mrs. Gizella Szebenyi as a party. It follows that, as a consequence, the action on her behalf was discontinued. This means that the only matter before the Court is the claim advanced by the Plaintiff.

[69] The Plaintiff bases his claim upon the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, as amended ("the Act"), and the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended. Pursuant to the *Crown Liability Act*, section 3, a claim may be advanced against Her Majesty the Queen in tort. The following provisions of section 3 are relevant here:

3. The Crown is liable for the damages for which, if it were a person, it would be liable … (b) in any other province, in respect of (i) a tort committed by a servant of the Crown, or (ii) a breach of duty attaching to the ownership, occupation, possession or control of property.	3. En matière de responsabilité, l'État est assimilé à une personne pour : … b) dans les autres provinces : (i) les délits civils commis par ses préposés, (ii) les manquements aux obligations liées à la propriété, à l'occupation, à la possession ou à la garde de biens.

[70] The broad scope of section 3 is limited by section 10 of that Act which provides as follows:

10. No proceedings lie against the Crown by virtue of subparagraph 3(a)(i) or (b)(i) in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant or the servant's personal representative or succession.	10. L'État ne peut être poursuivi, sur le fondement des sous-alinéas 3a)(i) ou b)(i), pour les actes ou omissions de ses préposés que lorsqu'il y a lieu en l'occurrence, compte non tenu de la présente loi, à une action en responsabilité contre leur auteur, ses représentants personnels ou sa succession.

[71] The critical facts concerning the Plaintiff are the following: as a Canadian citizen, he submitted an application to sponsor his parents, who are Hungarian citizens, as permanent residents. That application was governed by the Immigration Act and the Immigration Regulations. The authority and responsibility to decide whether Mr. and Mrs. Szebenyi satisfied the admissibility

requirements including medical admissibility, created by the relevant statutory and regulatory regimes lay with the visa officer, not with the Plaintiff.

[72] The Plaintiff exercised his rights to challenge the process by which the visa was denied, by appealing to the Immigration Appeal Division. He chose not to seek judicial review when his appeal was dismissed.

[73] Do these facts give rise to an action in tort against the Defendant?

[74] The concept of Crown liability, pursuant to the Act, is vicarious and not direct, as was recently discussed by Justice Martineau in *Farzam v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1659. This means that, having regard to section 10 of the Act, the Plaintiff must show that the alleged act or omission of a servant of the Crown, in this case one or more of the employees who was engaged in assessing the visa application, would have given rise to a cause of action in tort against that employee or his personal representative. In short, the Plaintiff must show that an action in tort would lie against an employee or employees of the Defendant Crown, in their personal capacity.

[75] The question is whether the Plaintiff has shown, on the balance of probabilities, that he suffered an actionable wrong. This question necessarily focuses on the basic principles of tort, as a cause of action.

[76] In *Farzam*, the Court reviewed the fundamental requirements of a negligence action, at paragraph 83, as follows:

> 83. ... According to this rule, a plaintiff in a negligence action is entitled to succeed by establishing three things to the satisfaction of the court: (A) a duty of care exists; (B) there has been a breach to that duty; and (C) damage has resulted from that breach. This is the traditional English approach to negligence liability (Allen M. Linden, *Canadian Tort Law*, 7th ed. (Markham, On.: Butterworths, 2001) at 102 and cases referred to by the author). That being said, the following framework of analysis may be very useful: (1) the plaintiff must suffer some damage; (2) the damage suffered must be caused by the conduct of the defendant; (3) the defendant's conduct must be negligent, that is, in breach of the standard of care set by the law; (4) there must be a duty recognized by law to avoid this damage; (5) the conduct of the defendant must be a proximate cause of the loss or, stated in another way, the damage should not be too remote a result of the defendant's conduct; (6) the conduct of the plaintiff should not be such as to bar or reduce recovery, that is the plaintiff must not be guilty or [sic] contributory negligence and must not voluntary assume the risk (*Canadian Tort Law*, *supra*, at page 103). In the present case, whatever methodology is employed, the result is the same: the present action must fail as the requisite elements are not all met.

[77] In determining whether there is a duty of care, I must first address the issue of harm. The Plaintiff claims that he suffered emotional distress and depression as a result of the denial of permanent residence to his parents. He also claims that he suffered loss of enjoyment of life, economic loss and pain and suffering.

[78] On the basis of the documentary evidence submitted by the Plaintiff, including medical records, lab reports and copies of prescriptions, I am satisfied that he has suffered from depression. However, I do not have sufficient evidence to show that this condition was caused by the servants or employees of the Defendant. I am not satisfied that he has shown that the personal health problems

experienced by the Plaintiff, including depression and emotional stress, can be attributed to the servants and agents of the Defendant. I note that according to the medical records submitted, covering the period 1994 to 2004, the Plaintiff was suffering from depression in 1994.

[79] It is true that some eight years elapsed between the submission of the sponsorship application in February 1993 and the dismissal of the Plaintiff's appeal by the Immigration Appeal Division in November 2001. However, during that time, other options were available to the Plaintiff, for example pursuit of a Minister's permit. That alternative was first suggested in April 1994 and repeated by the Immigration Appeal Division in 1996. While providing less security than permanent residence status, the Minister's permit would have allowed the Plaintiff to live in Canada with his parents, in family reunification.

[80] The Plaintiff chose not to seek a Minister's permit. To the extent that he suffered stress during the period in question, I am satisfied he has failed to show that it is a direct consequence of the action of any of the Defendant's employees who were engaged in processing his mother's visa application.

[81] Next, is there a duty of care? The accepted approach in dealing with this issue is the "two-step" approach set out by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.). That test was adopted by the Supreme Court of Canada in *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2, and has since been consistently applied by Canadian courts.

[82] In *Cooper v. Hobart*, [2001] 3 S.C.R. 537 at para. 30, the Supreme Court described the two-step approach as follows:

> 30. In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At [page551] the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. … [Emphasis in the original]

[83] In *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, involving a quasi-governmental regulatory case, the Court commented on *Cooper*, at paras. 9 and 10 as follows:

> … Mere foreseeability is not enough to establish a *prima facie* duty of care. The plaintiff must also show proximity – that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances. Factors giving rise to proximity must be grounded in the governing statute when there is one, as in the present case.
>
> If the plaintiff is successful at the first stage of *Anns* such that a *prima facie* duty of care has been established (despite the fact that the proposed duty does not fall within an already recognized category of recovery), the second stage of the *Anns* test must be addressed. That question is whether there exist residual policy considerations which justify denying liability. Residual policy considerations include, among other things, the effect of recognizing that duty of care on other legal obligations, its impact on the legal system and, in a less

> precise but important consideration, the effect of imposing liability on society in general.

[84] It is clear that in applying the "*Anns* test", the Court must consider the question of proximity between the Plaintiff and the Defendant and assess the relationship. Is the relationship sufficiently "close and direct" that justice requires the imposition of a duty of care, in the circumstances? A critical factor to be considered in this regard is the governing statute where there is one.

[85] In this case, as in *Farzam*, there is a governing statute, that is the Immigration Act. The broad purpose of that Act is to regulate the admission of persons into Canada who otherwise have no right of entry. In this regard, I refer to *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711.

[86] In *Farzam*, the Court at para. 94 said the following:

> 94. In the case at bar, any relationship between the Plaintiff and the Defendant exclusively comes from the implementation of the Canadian immigration policy recognized by statute, namely, the Immigration Act, R.S.C. 1985, c. I-2. The Plaintiff came in 1988 as Government-assisted refugee (CR1) under a Ministerial Permit. The commitment taken by the Government to financially assist the Plaintiff came to an end one year after he was admitted. In November 1991, the Plaintiff became a landed immigrant. In this regard, the allegedly negligent actions by Immigration officials outside Canada occurred in the processing of a request made in 1990 for the issuance of a Minister's Permit to the Plaintiff's wife, and later, of an application made by her in 1992 for the issuance of a permanent resident visa. Despite the fact that a Minister's Permit was issued in 1994, Ms. Mohiti refused to come to Canada. In 1994, the relationship between the Plaintiff and the Defendant was one of a permanent resident who sponsored his wife to come to Canada. In the circumstances of this case, is this evidence enough to establish

> the requisite proximity of relationship between the Plaintiff and the Defendant?

[87] In that case, Mr. Farzam had sued the Defendant for damages allegedly flowing from the negligence of officials of CIC in processing both his application for permanent residence and the management of his wife's immigration file. There is some similarity with the present case insofar as both actions involve visa applications for family members. In each case, the plaintiffs, at the time of commencing their litigation, had status in Canada, Mr. Farzam as a permanent resident and the Plaintiff here, as a citizen.

[88] In *Cooper*, the Supreme Court of Canada, at para. 43, said that the policy of the governing statute must be examined, in order to determine whether the required proximity of relationship exists, as follows:

> 43. In this case, the factors giving rise to proximity, if they exist, must arise from the statute under which the Registrar is appointed. That statute is the only source of his duties, private or public. Apart from [page557] that statute, he is in no different position than the ordinary man or woman on the street. If a duty to investors with regulated mortgage brokers is to be found, it must be in the statute.

[89] The Immigration Act states that one of its statutory purposes is the reunification of families, as set out in section 3**.**

[90] In *Farzam*, the Court said the following about the importance of immigration policy as set out in the governing legislation, at para. 97:

> 97. In the present case, as in Cooper, the statute is the only source of the Crown's decision-making duties. It is trite law that admission of an alien to this country is a "privilege" determined by the Immigration Act and its applicable regulations. Ms. Mohiti was an "immigrant" and had to satisfy the statutory criteria for admissibility and all relevant regulatory requirements. While Ms. Mohiti did not satisfy those requirements, a Minister's Permit was issued to her in January 1994. There was certainly no obligation to issue a Minister's Permit to Ms. Mohiti beforehand. This decision was entirely discretionary under section 37 of the Immigration Act. In issuing a Minister's Permit, the delays in the processing of Ms. Mohiti's application for the issuance of permanent resident visa were taken into account by the Minister or his delegate. I cannot find that there has been a breach of any statutory duty in the processing of Ms. Mohiti's application for a permanent residence visa. Mrs. Mohiti returned it in October 1992. There was no particular statutory or regulatory delay imposed by the visa officer responsible for the processing of such application. Normally, it would take between six months to one year. If a decision whether to grant a permanent resident visa to Ms. Mohiti was improperly delayed, the remedy was to make an application for judicial review seeking the issuance of a writ of mandamus with leave of a judge of the Federal Court under section 82.1 of the Immigration Act (see *Dragan v. Canada (Minister of Citizenship and Immigration)*), 2003 FCT 211, [2003] 4 F.C. 189 (F.C.T.D.); *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 315 (F.C.T.D.)).

[91] I refer, as well, to para. 98 as follows:

> 98. … Indeed, there are a number of cases of this Court which support the point of view that the relationship between the government and the governed is not one of individual proximity, including in an immigration context: *A.O. Farms Inc. v. Canada*, [2000] F.C.J. No. 1771 at paras. 10-12 (F.C.T.D.) (QL); *Benaissa v. Canada (Attorney General)*, 2005 FC 1220, [2005] F.C.J. No. 1487 at para. 35 (QL); *Premakumaran v. Canada*, 2005 FC 1131, [2005] F.C.J. No. 1388 at para. 25 (QL). The approach taken by the Court in these cases is compatible with the one taken in other jurisdictions, particularly in England.

[92] I adopt this reasoning in the present case. The Plaintiff had no right to the issuance of a visa to his mother. He had no right to impose his opinion as to the necessity or significance of the medical tests that were requested, in order to allow the CIC officials to assess his mother's application. He had no right to anything except to make the sponsorship application. Insofar as the ultimate decision was subject to an appeal, he exercised that right. He elected not to exercise his right to seek judicial review of that decision. As noted by the English Court of Appeal in *W. v. Home Office*, [1997] E.W.J. No. 3289 (QL), Imm. A.R. 302 (UK Ct. App. Cir. Div.) at para. 21, the appropriate avenue to review decisions made by immigration officers is to seek judicial review. Decisions of the Immigration Appeal Division can also be reviewed by judicial review.

[93] In the circumstances, I conclude that no *prima facie* duty of care has been shown by the Plaintiff. For the sake of completeness, I will briefly consider whether even if such a threshold level was met, are there residual policy considerations that would justify the Court in denying liability. I concur with the conclusion reached, in this regard, by Justice Martineau in *Farzam* at para. 102 where he said the following:

> 102. … In my view, it would not be just, fair and reasonable for the law of this land to impose a duty of care on those responsible for the administrative implementation of immigration policies of the kind which have been made in the case of the Plaintiff, absent evidence of bad faith, misfeasance, or abuse of process.

[94] Now, in the present case, the Plaintiff has alleged bad faith on the part of various Immigration officials. He refers to unreasonable rejection of medical reports, unreasonable requests

for further medical tests, carelessness in the manner in which his mother's file was handled in the matter of filing documents and forwarding documents.

[95] I am satisfied that the evidence submitted does not support his allegations. First, the requests for medical tests and information were made by medical officers in the performance of their duties to assess medical admissibility under the Immigration Act. Ultimately, the medical professionals made an assessment, in effect, a recommendation. Any decision to issue a visa lay with a visa officer.

[96] There is evidence of occasional misfiling but, as in *Farzam*, this does not amount to bad faith or misfeasance.

[97] In any event, these complaints do not directly relate to the Plaintiff. He makes these complaints on behalf of his mother who is no longer a party to this litigation.

[98] There is no duty of care owed to the Plaintiff that can support his claim against the Defendant. It is not necessary for me to address the other elements of a claim in negligence. The Plaintiff has no cause of action and this action will be dismissed. If the parties cannot agree on costs, then brief submissions may be made within 10 days of this Order.

ORDER

The action is dismissed. If the parties cannot agree on costs, submissions may be made within 10 days of this Order.

"E. Heneghan"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-739-98
STYLE OF CAUSE:	ISTVAN SZEBENYI JR. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 14 - 15, 2005
REASONS FOR ORDER AND ORDER :	HENEGHAN J.
DATED:	May 15, 2006

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