Federal Court Cour fédérale

Date: 20120228

Docket: T-1700-11

Citation: 2012 FC 272

Ottawa, Ontario, February 28, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

DAVID SIVAK, LUCI BAJZOVA, MONIKA SIVAK, LUCIE BAJZOVA, MIROSLAV SARKOZI, ANDREJ BALOG, ZANETA BALOGOVA, GALINA BALOGOVA, VIKTOR SARKOZI, ANDREJ BALOG, ANDREJ BALOG, MARIE BALOGOVA, LUKAS BALOG, MILAN LASAB, MILADA LASABOYA, and ELVIS KULASIC

Plaintiffs

and

HER MAJESTY THE QUEEN and THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Defendants

<u>REASONS FOR ORDER AND ORDER</u>

THE MOTION

[1] I have before me a motion by the Defendants to strike portions of the Plaintiffs' Amended Statement of Claim. I heard this motion in conjunction with a motion by the Plaintiffs seeking certification as a class action and, to some extent, both motions need to be considered together.

[2] By way of judgment, dated March 31, 2011, I converted the Plaintiffs' previous judicial review application into an action pursuant to subsection 18.4(2) of the *Federal Courts Act*, directing that henceforth the judicial review would be treated and proceeded with as an action.

[3] Since actions are commenced by way of Statement of Claim, the Plaintiffs filed their most recent Amended Statement of Claim (Claim) on October 19, 2011, and it is this document against which the Defendants' strike motion is directed.

[4] The Defendants do not seek to strike the Claim in its entirety. They acknowledge the importance of resolving as quickly as possible the dispute between the parties concerning procedural fairness, natural justice, and the validity of the Fact-Finding Mission Report on State Protection Czech Republic, dated June 2009 (2009 Report) in so far as the 2009 Report relates to the Refugee Protection Division's (RPD) decision-making process. What the Defendants object to are those portions of the Claim that deal with tort allegations, as well as a few more peripheral matters which they say do not comply with the rules and jurisprudence that govern pleadings in this Court.

OVERVIEW

[5] After reviewing the Claim, my general conclusion is that the impugned portions are, as the Defendants allege, often little more than bald accusations which the Plaintiffs have attempted to bolster with colourful rhetoric and irrelevant asides instead of providing a real basis of fact. For example, a passage such as

> there is no doubt, in the minds of anyone involved with refugees, particularly the members of the immigration bar, as well as notable NGOs, that this "June, 2009 Report" was manufactured by the IRB, as a means of appeasing the Minister, in order to base negative findings and refugee determinations, which would reduce the acceptance rates of Czech Roma

is a statement of what the Plaintiffs hope to prove, but it also reveals that the Plaintiffs are short of facts to support their case, and so have to fall back upon the alleged omniscience of the "immigration bar" and "anyone involved with refugees." I do not see anywhere in the rules that govern pleadings that facts can be dispensed with provided plaintiff or defendant invokes the oracular powers of their own counsel and his or her cohorts at the bar.

[6] This matter was converted to an action because it raised important matters of possible institutional bias that I felt could not be assessed on judicial review given the limited record available to the Court. Since conversion, the Plaintiffs have broadened the scope of their objectives and now wish to accuse the Canadian government of conspiring to deprive them, and other Czech Roma, of their rights under our immigration system. If the Plaintiffs wish to launch such an attack they must proceed efficiently and effectively.

[7] To proceed efficiently and effectively both sides must abide by and follow the *Federal Courts Rules* (Rules) which were promulgated precisely for this purpose. At this stage in the proceedings the Plaintiffs must comply with the rules that govern the form and content of pleadings. In my view, the Plaintiffs have not done this with their Claim, and the result is that this action has already taken much longer than it should have taken to reach this stage. The issues raised by the Plaintiffs have a significance for many other extant and future refugee claims, and the system could easily become trammelled as other claims are held in abeyance to await the outcome of this action.

This situation gives rise to an even greater need for efficiency and effectiveness than might otherwise be the case. Hence, from this point on, the Court will look to counsel on both sides to do everything in their power to ensure the just, most expeditious and least expensive determination of this dispute on its merits.

[8] Deficient pleadings do not promote the just, most expeditious and least expensive determination on the merits. In fact, they promote the opposite, which is why it is important that the objections to the Claim be dealt with quickly and that timelines be set to achieve the remaining steps needed to carry this dispute to a resolution.

THE MOTION TO STRIKE

[9] Rather than request particulars, the Defendants have brought a motion to strike some portions of the Claim. After hearing the differences between counsel on these matters, I do not think the Defendants are being premature or heavy-handed. The wide disparity of views between the parties over what is required of pleadings means that the Court's early involvement is to be preferred.

The Applicable Rules

[10] I see no dispute between the parties concerning the applicable rules and principles that govern pleadings. The Plaintiffs simply allege that they have complied with the law and that their Claim as presently drafted is sufficient.

[11] The two principal functions of pleadings are to clearly define the issues between litigants and to give fair notice of the case which has to be met by the other side. See *Cerqueira v Ontario*, 2010 ONSC 3954.

[12] Rule 174 requires that 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 proven.

[13] Rule 181 requires that a pleading "shall contain particulars of every allegation contained therein."

[14] Pursuant to subsection 221(1) of the Rules, a defendant may bring a motion to strike out all or some of a statement of claim on the following grounds:

a. It discloses no reasonable cause of action;

b. It is immaterial, or redundant; or

c. It is scandalous, frivolous or vexatious.

[15] The test in Canada to strike out a pleading under Rule 221 of the Rules is whether it is plain and obvious on the facts pleaded that the action cannot succeed. In this regard, the Supreme Court of Canada has noted that the power to strike out a statement of claim is a "valuable housekeeping measure essential to effective and a fair litigation." See *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 and *R v Imperial Tobacco Canada Ltd.* 2011 SCC 42, at paragraphs 17 and 19.

[16] In determining whether a cause of action exists, the following principles are to be considered:

a. The material facts pled are to be taken as proven, unless the alleged facts are based on assumptive or speculative conclusions which are incapable of proof;

b. If the facts, taken as proven, disclose a reasonable cause of action, that is, one with some chance of success, then the action may proceed; and

c. The statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies.

See *Operation Dismantle Inc. v Canada*, [1985] 1 SCR 441.

[17] These basic principles have acquired a fairly heavy gloss of case law over the years as the Court has applied them to particular sets of pleadings. I think it might be helpful at this stage to set out some of the more basic guidelines that have emerged from the cases that I believe have relevance for this motion.

Rule 174

[18] In *Baird v Canada* 2006 FC 205; affirmed 2007 FCA 48, a statement of claim was held to be fatally flawed where it did not specify a time when the offending activities giving rise to the causes of action took place. Nor did it specify which Crown servant did something wrong. The pleadings were allegations and conclusions, and did not provide the essential facts grounding the cause of action.

[19] In *Sunsolar Energy Technologies (S.E.T.) Inc. v Flexible Solutions International Inc.* 2004 FC 1205, this Court concluded that in order to implead corporate officers and directors, actual actions of personal conduct must be pleaded. A bare assertion of conclusion is not an allegation of material fact, nor can it support a cause of action against an individual defendant. Nor can it be pled that it is a "reasonable conclusion" that an individual was implicated to a sufficient extent to support a finding of deliberate acts. To hold otherwise is to turn an action into a fishing expedition.

[20] *Conohan v The Cooperators*, [2002] 3 FC 421, 2002 FCA 60 makes the often repeated point that it is sufficient for a party to plead the material facts. Counsel is then at liberty to present in argument any legal consequences which the facts support.

[21] The importance of pleading facts is asserted again in *Johnson v Canada (Royal Canadian Mounted Police)* 2002 FCT 917, where the Court reiterated that it is not sufficient for a claim to contain assertions without facts upon which to base those assertions. In *Johnson*, this meant that a plea of breach of agreement must allege the relevant terms that have been breached, and a plea of breach of fiduciary duty must identify the material facts alleged to give rise to the existence of the duty and the breach.

[22] *Kastner v Painblanc* (1994), 58 CPR (3d) 502, 176 NR 68 (Fed. CA) emphasizes the important general point that an action is not a fishing expedition and that a plaintiff who starts proceedings in the hope that something will turn up abuses the Court's process.

Rule 181

[23] *Chen v Canada (Minister of Citizenship and Immigration)* 2006 FC 389, makes it clear that the purpose of pleadings is to define the matters at issue between the parties, but the purpose of particulars is different. Particulars are meant to provide the opposing party with sufficient information of the allegations being advanced so that it might know the case to be met at trial and to prepare a full and meaningful response. If a pleading is not good as a matter of law, particulars cannot save it. If it is not good as a matter of pleading, particulars will not improve it. These distinctions are of significance in the present case because Plaintiffs' counsel often took the position before me that this motion to strike is not appropriate because the Defendants have not asked for particulars and, if the Claim as pled is in any way defective, such defects can be remedied by the Court simply ordering particulars.

[24] *Paul v Kingsclear Indian Band* (1997), 137 FTR 275 (TD), however, establishes clearly that there is no obligation on a defendant to demand particulars and a plaintiff cannot cure an otherwise deficient statement of claim by arguing that defendant has not sought particulars.

Rule 221

[25] *Edell v Canada (Revenue Agency)*, [2010] GSTC 9, 2010 FCA 26, reaffirms the fundamental rule that in a motion to strike the Court is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. All allegations of fact,

unless patently ridiculous or incapable of proof, must be accepted as proved. The defendant who seeks summary dismissal bears the evidentiary burden of showing the lack of a genuine issue.

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

[27] *Apotex Inc. v Glaxo Group Ltd*, 2001 FCT 1351 teaches that the Court should generally refuse to strike out "surplus statements" that are not prejudicial. Doubt is to be resolved in favour of permitting the pleading so that relevant evidence in support of the pleading may be brought before the trial judge.

[28] Also, while the Court is not required to re-draft pleadings, it must examine defective pleadings to determine if they could be saved through proper amendments. See *Sweet v Canada* (1999), 249 NR 17 (Fed. CA).

[29] Even though, if there is any doubt, paragraphs in the pleadings should be left in so that evidence may be brought before the trial judge, this does not mean that redundant or immaterial paragraphs outlining the evidence should remain in the pleadings. See *Mathias v The Queen*, [1980] 2 FC 813 (TD).

[30] *Kisikawpimootewin v Canada*, 2004 FC 1426 reiterates the well-recognized premise that a scandalous, vexatious or frivolous action includes an action where the pleadings are so deficient in factual material that the defendant cannot know how to answer. This is echoed again in *Murray v*

Canada (1978), 21 NR 230 (Fed. CA). 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.

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

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

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

GROUNDS

The Minister of Foreign Affairs

[34] The Defendants say that the Minister of Foreign Affairs should be struck from the Claim as he is not a proper or necessary party; nor is he vicariously liable for acts or omissions of employees at visa posts abroad.

[35] Paragraph 104(1)(*a*) of the Rules authorizes the Court to order that a person who is not a proper or necessary party shall cease to be a party to an action. A person is only considered a necessary party where he or she would be bound by the results of the action, and where there is a question in the action "which cannot be effectually and completely settled unless he is a party." The Defendants say that the Minister of Foreign Affairs does not fall into either category. Furthermore, where the Plaintiffs' Claim does not seek relief against a defendant, and makes no allegations against him, that defendant is not a necessary party.

[36] The Defendants say that, in the present case, the Claim does not disclose any material facts that establish wrongdoing on the part of the Minister of Foreign Affairs or that support a cause of action against him. The Claim contains only bald allegations respecting this defendant which are asserted in the form of conclusions. In fact, the Minister of Foreign Affairs is referred to only twice in the Claim: once in paragraph 7(b)(ii), which describes the Minister as a party while making allegations against his staff, and again in paragraph 23 in which the Plaintiffs conclude, without any supporting facts, that the Minister of Foreign Affairs "conspired with and facilitated in the manufacturing of the June 2009 Report." It is possible that the Plaintiffs are also referring to the

Minister of Foreign Affairs in paragraphs 26 and 27 of the Claim, which allege a "Ministerial and IRB effort to attempt to be rid of the Roma problem" and a "Ministerial and RPD conspiracy." However, the term "Ministerial" is not defined in the Claim and no facts are pled to support the conclusions in those paragraphs. Therefore, it is entirely unclear how the Minister of Foreign Affairs is implicated in any alleged wrongdoing.

[37] Furthermore, the Defendants say that the Minister of Foreign Affairs is not vicariously liable for the acts or omissions of the staff members at the embassies and visa posts abroad. While unclear from the vague language in the Claim, the Plaintiffs appear to make this allegation at paragraph 7(b)(ii). The Minister of Foreign Affairs, however, is himself a Crown servant when acting in his official capacity. An individual Crown servant is not vicariously liable for the torts of subordinate Crown servants. This also applies to the statement at paragraph 7(b)(iii) in which the Plaintiffs claim that the Minister of Citizenship and Immigration is liable for the actions of his employees and staff.

[38] Based on the foregoing, the Defendants say that the Claim does not comply with Rules 174 and 181 respecting the allegations against the Minister of Foreign Affairs. He should be removed as a party to the within action and the Claim should be amended accordingly. In addition, the portions of paragraph 7(b) alleging vicarious liability on the part of the Minister of Foreign Affairs and the Minister of Citizenship and Immigration should be struck.

[39] In response, the Plaintiffs argue that, with respect to paragraphs 9 to 23 of the Defendants' submissions:

a. The Minister of Foreign Affairs in statutorily charged with overseeing, *inter alia*, the operations of Canada's embassies and the foreign missions, including the issuance of visas when visa requirements are imposed;

b. Questions with respect to the contact of the two researchers who drafted the "June, 2009 Issue Paper", and the Canadian Embassy were refused answered;

c. The Plaintiffs plead, as a fact, that both the Minister of Citizenship and Foreign Affairs, conspired to:

   (i) 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 Plaintiffs, and all other Canadians (*sic*); and/or

   (ii) To engage in an agreement, to use unlawful means and conduct, whose predominant purpose and conduct directed at the Plaintiffs, and all other Czech Roma, is to cause injury to the Plaintiffs and all other Czech Roma, or the Defendants' officials should know, in the circumstances, that injury to the Plaintiffs, and all other Czech Roma, is likely to, and does result;

d. The Plaintiffs have pleaded that the actions of the Minister, and his officials, breached their Charter and constitutional rights;

e. While Ministers are generally not named as Defendants, there are exceptions to this, particularly with respect to constitutional and Charter issues and the Plaintiffs state that this is such an exception and that, at this juncture, it is premature to strike any parties from the pleadings. See *Liebmann v Canada (Minister of National Defence)*, [1994] 2 FC 3 and *Cairns v Farm Credit Corp.*, [1992] 2 FC 115.

[40] I do not think that the Plaintiffs adequately answer the complaints raised by the Defendants. My reading of the Claim leads me to the conclusion that the Plaintiffs' accusations against the Minister of Foreign Affairs are, as pled, nothing more than speculative allegations and conclusions unsupported by material facts.

[41] I agree with the Defendants that, as presently drafted, the Claim does not disclose sufficient material facts to establish and support:

a. Any wrongdoing on the part of the Minister of Foreign Affairs;

b. Any cause of action against him;

c. How the Minister of Foreign Affairs could be vicariously or otherwise liable for the acts and omissions of other people such as staff members at the embassies and visa posts abroad and/or the imposition of visa requirements.

[42] As it stands, the allegations against the Minister of Foreign Affairs are bald accusations. If the Plaintiffs wish to establish that the Minister of Foreign Affairs has conspired to cause them injury, then they must set out the facts upon which they rely. As presently drafted, the Claim merely states what the Plaintiffs hope to prove at trial. At this stage, this amounts to a fishing expedition. As the Federal Court of Appeal made clear in *Simon v Canada*, 2011 DTC 5016; 2011 FCA 6, the requirement that a pleading contain a concise statement of the material facts relied upon is a technical requirement with a precise meaning in law. Each constituent element of a cause of action must be pleaded with sufficient particularity. Making allegations without a factual foundation is an abuse of process. In my view, there is nothing clear and/or inferable in the way the Minister of Foreign Affairs is simply accused of wrongdoing on the basis that he has some vague responsibility

for overseeing embassies and foreign missions, or that embassy officials are somehow conducting a broad “Ministerial” conspiracy.

[43] The Federal Court of Appeal in *Baird v Canada* 2007 FCA 48 affirmed that a statement of claim was fatally flawed where it did not specify a time when the offending activities giving rise to the causes of action took place, and did not specify which Crown servant did something wrong. It is not enough to plead allegations and conclusions. The essential facts grounding a cause of action must be pled.

[44] The applicable rules and jurisprudence interpreting those rules, are readily available to the Plaintiffs and their counsel. The failure to plead sufficient material facts to support a claim against the Minister of Foreign Affairs, or particular Crown servants, leads me to conclude that the Plaintiffs have no such facts and are seeking to use these proceedings as a fishing expedition.

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.

[49] As I read the Claim as presently drafted, the majority of the limited factual allegations upon which the claim in negligence is based relate mainly to members of the Board and/or of the Board's Research Directorate. The Defendants are correct to point out that these individuals are not linked to the named Defendants in the Statement of Claim and factual allegations respecting their conduct are insufficient and fail to ground liability in negligence by the named Defendants.

[50] All that the Plaintiffs say in general reply is that "the proper and complete context and reading [of all their tort claims] illustrate that the various causes of action are properly pleaded."

[51] Once again, if the Claim is read in the light of the relevant rules and governing jurisprudence, I think the Plaintiffs fall a long way short of providing what is required.

Conspiracy

[52] The Defendants point out that the Plaintiffs have not pled the essential elements of the tort of conspiracy and that paragraphs 23, 27 and 28(a)(iv) should therefore be struck from the Claim.

[53] The Defendants direct the Court to the Supreme Court of Canada decision in *Canada Cement LaFarge Ltd. v British Columbia Lightweight Aggregate Ltd.*, [1983] 1 SCR 452 (SCC) at paragraph 33 for the constituents of the tort of conspiracy:

> … whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy, if:
>
> 1. whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants'conduct is to cause injury to the plaintiff; or,
>
> 2. where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff… and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

[54] In *Normart Management Ltd. v West Hill Redevelopment Co.*, (1998), 37 OR (3d) 97 (OCA) the Ontario Court of Appeal provided guidance with respect to pleading the tort of conspiracy at paragraphs 21 and 22. Applied to the present context, I think this means that, as the Defendants point out,

a. All the parties to the conspiracy must be identified and their relationship to each other must be described;

b. Agreements between the various defendants must be pled with all facts material to such agreements including the parties to each agreement, the date of the agreement, and the object and purpose of each agreement;

c. Overt acts of each of the alleged conspirators in pursuance or furtherance of the conspiracy must be pled with clarity and precision, including the times and dates of such overt acts; and

d. The pleadings must allege the injury and the damage occasioned to the plaintiffs and special damages in the sense of the monetary loss the plaintiffs have sustained must be pled and particularized.

[55] Once again, I have to agree with the Defendants that the Claim is entirely deficient with respect to pleading the elements of the tort of conspiracy. Bald allegations of a conspiracy involving undefined Ministers, the Board, and unidentified “Defendants’ officials” are made at paragraphs 23, 27 and 28(a)(iv) without any reference to the above requirements. The Plaintiffs also accuse the “Defendants’ officials” of engaging in unlawful conduct at paragraph 28(b)(iii)(A), but provide no details to describe this conduct or establish its unlawfulness. This is scandalous and vexatious.

[56] Once again, the Plaintiffs provide no detailed response and say little more than that, in their opinion, they have complied with the rules and the governing jurisprudence.

[57] I have to conclude that, once again, when the Claim is read against the rules and governing jurisprudence, the paragraphs alleging conspiracy should be struck.

Misfeasance in Public Office/Abuse of Authority

[58] The Defendants make similar complaints in relation to this aspect of the Claim. They say that the Plaintiffs have not pled the essential elements of the tort of misfeasance in public office/abuse of authority, so that, paragraphs 24 and 28(a)(i) and (iii) of the Claim should be struck.

[59] In *Freeman-Maloy v Marsden*, (2006) 79 OR (3d) 401, the Ontario Court of Appeal provided the following guidance regarding the constituents of the tort of misfeasance in a public office:

> [10] The tort of misfeasance in a public office is founded on the fundamental rule of law principle that those who hold public office

> and exercise public functions are subject to the law and must not abuse their powers to the detriment of the ordinary citizen. As Lord Steyn put it in *Three Rivers District Council v. Bank of England* (No. 3), [2000] 2 W.L.R. 1220, at p. 1230 W.L.R.: “The rationale of the tort is that in a legal system based on the rule of law executive or administrative power ‘may be exercised only for the public good’ and not for ulterior and improper purposes.” The “underlying purpose” of the tort of misfeasance in a public office “is to protect each citizen’s reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions”: *Odhavji*, *supra*, at para. 30.
>
> [11] In *Three Rivers*, *supra*, the House Lords identified the ingredients of the tort as being: (1) the defendant must be a public officer; (2) the claim must arise from the exercise of power as a public officer; and (3) the mental element, namely, the defendant must have acted with malice or bad faith. In *Odhavji*, at para. 23, [page407] Iacobucci J. described the elements of the tort in similar terms: “First, the public officer must have engaged in deliberate and unlawful conduct in his 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.”

[60] The Supreme Court of Canada has also provided extensive guidance with regard to this tort. In *Odhavji Estate v Woodhouse* 2003 SCC 69 (SCC), the Supreme Court of Canada emphasized the following:

> 22 What then are the essential ingredients of the tort, at least insofar as it is necessary to determine the issues that arise on the pleadings in this case? In *Three Rivers*, the House of Lords held that the tort of misfeasance in a public office can arise in one of two ways, what I shall call Category A and Category B. Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff. This understanding of the tort has been endorsed by a number of Canadian courts: see for example *Powder Mountain Resorts, supra*; *Alberta (Minister of Public Works, Supply and Services)* (C.A.), *supra*; and *Granite Power Corp. v. Ontario*, [2002] O.J. No. 2188 (QL) (S.C.J.). It is important, however, to recall that the

two categories merely represent two different ways in which a public officer can commit the tort; in each instance, the plaintiff must prove each of the tort's constituent elements. It is thus necessary to consider the elements that are common to each form of the tort.

23 In my view, there are two such elements. First, the public officer must have engaged in deliberate and unlawful conduct in his 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. What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such [page282] as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.

24 Insofar as the nature of the misconduct is concerned, the essential question to be determined is not whether the officer has unlawfully exercised a power actually possessed, but whether the alleged misconduct is deliberate and unlawful. As Lord Hobhouse wrote in *Three Rivers, supra*, at p. 1269:

> The relevant act (or omission, in the sense described) must be unlawful. This may arise from a straightforward breach of the relevant statutory provisions or from acting in excess of the powers granted or for an improper purpose.

Lord Millett reached a similar conclusion, namely, that a failure to act can amount to misfeasance in a public office, but only in those circumstances in which the public officer is under a legal obligation to act. Lord Hobhouse stated the principle in the following terms, at p. 1269: “If there is a legal duty to act and the decision not to act amounts to an unlawful breach of that legal duty, the omission can amount to misfeasance [in a public office].” See also *R. v. Dytham*, [1979] Q.B. 722 (C.A.). So, in the United Kingdom, a failure to act can constitute misfeasance in a public office, but only if the failure to act constitutes a deliberate breach of official duty.

> 25 Canadian courts also have made a deliberate unlawful act a focal point of the inquiry. In *Alberta (Minister of Public Works, Supply and Services) v. Nilsson* (1999). 70 Alta. L.R. (3d) 267, 1999 ABQB 440, at para. 108, the Court of Queen's Bench stated that the essential question to be determined is whether there has been deliberate misconduct on the part of a public official. Deliberate misconduct, on this view, consists of: (i) an intentional illegal act; and (ii) an intent to harm an individual or class [page283] of individuals. See also *Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)* (2001), 156 Man. R. (2d) 14, 2001 MBCA 40, in which Kroft J.A. adopted the same test. In *Powder Mountain Resorts, supra*, Newbury J.A. described the tort in similar terms, at para. 7:
>
>> ... it may, I think, now be accepted that the tort of abuse of public office will be made out in Canada where a public official is shown either to have exercised power for the specific purpose of injuring the plaintiff (i.e., to have acted in "bad faith in the sense of the exercise of public power for an improper or ulterior motive") or to have acted "unlawfully with a mind of reckless indifference to the illegality of his act" and to the probability of injury to the plaintiff. (See Lord Steyn in *Three Rivers*, at [1231].) Thus there remains what in theory at least is a clear line between this tort on the one hand, and what on the other hand may be called negligent excess of power -- i.e., an act committed without knowledge of (or <u>subjective</u> recklessness as to) its unlawfulness and the probable consequences for the plaintiff. [Emphasis in original.]
>
> Under this view, the ambit of the tort is limited not by the requirement that the defendant must have been engaged in a particular type of unlawful conduct, but by the requirement that the unlawful conduct must have been deliberate and the defendant must have been aware that the unlawful conduct was likely to harm the plaintiff.

[61] It seems to me, then, that in order to establish a cause of action based on the tort of public misfeasance/abuse of authority, the Claim must meet the following requirements:

a. It must be established that the Defendant(s) is a public officer;

b. The Claim must arise from the exercise of power as a public officer; and

c. The mental element, namely that the Defendant(s) must have acted in bad faith or with malice, must be present.

[62] As the Defendants point out, while the Plaintiffs have listed the generic elements of the tort of misfeasance in public office/abuse of authority at paragraph 28(a)(iii) of their Claim, they have failed to provide material facts to substantiate the allegations. Again, the "Defendants' officials" are not identified, there are no particulars respecting the nature of the public offices that particular individuals are alleged to have held, the unidentified "Defendants' officials" are not connected to the named Defendants, and the bald allegation of "unlawful conduct" is not substantiated by material facts. Also, the majority of the factual allegations in the Claim refer to members of the Board and/or of the Board's Research Directorate and their relationship to the named Defendants, or to the "Defendants' officials" is not established in the Claim.

[63] With respect to the allegations in this regard against the Minister of Citizenship and Immigration at paragraph 24 of the Claim I agree with the Defendants that insufficient material facts are pled and details of the public comments that were allegedly made are not provided. Paragraph 24 of the Claim is not sufficient to ground a cause of action against the Minister of Citizenship and Immigration based on public misfeasance/abuse of authority.

[64] Once again, the Plaintiffs provide no substantial response to these deficiencies in their Claim. They simply say that they disagree and that their Claim complies with the relevant rules and jurisprudence. I cannot accept this position.

[65] Based on the foregoing, paragraphs 24 and 28(a)(i) and (iii) of the Claim should be struck, as well as any other reference to the tort of public misfeasance/abuse of authority.

Abuse of Process

[66] The Defendants have similar complaints with regard to the abuse of process claims. They say the Plaintiffs have not pled the essential elements of the tort of abuse process and it is not relevant to the within proceedings.

[67] An allegation of "abuse of process" is made at paragraph 28(a)(ii) of the Claim. The Plaintiffs assert that unidentified Defendants' officials "engaged in an abuse of process at common law." This allegation is not factually substantiated.

[68] The tort of abuse of process usually involves the misuse of the process of the Court to coerce someone in a way that is outside the ambit of the legal claim upon which the Court is asked to adjudicate. The Federal Court of Appeal in *Levi Strauss & Co. v Roadrunner Apparel Inc.* (1997), 76 CPR (3d) 129 (FCA) held that:

> A review of the authorities shows that the essential element of the tort of abuse of process is that the abuser must have used the legal process for a purpose other than that which it was designed to serve, in other words for a collateral, extraneous, ulterior, improper or illicit purpose. The gist of the tort is the misuse of or perversion of the Court's process and there is no abuse when a litigant employs regular legal process to its proper conclusion, even with bad intentions.

[69] The Defendants say that it is entirely unclear from the Claim how the tort of abuse of process could be applied to the actions of any of the named Defendants and that, in any case, the

elements of the tort have not been pled. For these reasons they say that paragraph 28(a)(ii) should therefore be struck, as well as any other reference to the tort of abuse of process.

[70] Once again, the Plaintiffs assert that they have pled this matter appropriately. However, they also say that abuse of process is not restricted to Court proceedings and that it can attach to Ministerial abuse. They say that the essential point is that the Ministers have interfered with the IRB which is supposed to be as independent as the judiciary. The Plaintiffs say that the Ministers and their staffs have interfered with the IRB both by their comments and their actions.

[71] Quite apart from whether abuse of process can be applied in this context (basically a legal point that can be left for future determination) it is my view that the Plaintiffs still need to provide the factual underpinnings for the tort. Before the Defendants can properly respond, they still need to know the who, where, when, what and how of these allegations. Factual substantiation is missing from the Claim. For this reason, I think I have to strike paragraph 28(a)(ii) and other reference to the tort of abuse of process.

Conclusions on the Named Torts

[72] Generally speaking, then, with regard to the named private law causes of action, I feel that the Defendants' objections to the pleadings are substantially justified, and that the Claim fails to comply with Rule 174 and the "plain and obvious" test posited in *Hunt*, above.

Sections 7 and 15 of the Charter

[73] The Defendants allege that the Plaintiffs' allegations at paragraphs 24, 28(a)(v) and 28(b)(iii)(A), (B) and (D) of the Claim respecting alleged breaches of sections 7 and 15 of the Charter are speculative and hypothetical and are not supported by adequate facts. In both respects, the Plaintiffs assert that the actions of unidentified officials of the Defendants breached the Plaintiffs' sections 7 and 15 Charter rights, resulting in damages. They 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 any factual basis. This does not meet the requirements set out by the Supreme Court of Canada in *MacKay v Manitoba*, [1989] 2 SCR 357.

[74] Charter allegations in the Claim that are made in a "factual vacuum" should be struck. In *MacKay*, above, the Supreme Court of Canada provided the following guidance:

> 9 *Charter decisions should not and must not be made in a factual vacuum.* To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. Charter [page362] decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel. [emphasis added]

[75] Once again, the Plaintiffs say that their Claim sufficiently pleads the facts and grounds upon which the Defendants can respond to the allegations of Charter breaches, but they have also indicated that they are not adverse to providing particulars if the Defendants require them.

[76] Once again, I have to agree that, with regard to sections 7 and 15 and the Charter, the Claim is deficient in the ways alleged by the Defendants.

Redundant and Immaterial Material

[77] The Defendants say that, pursuant to subsection 222(1) of the Rules, the Court can strike out a pleading on the ground that it is "immaterial or redundant." Immaterial or redundant allegations in a claim result in useless expense and prejudice the trial by involving the parties in a dispute that is wholly apart from the issues. Similarly, portions of a pleading that are irrelevant or inserted for colour should also be struck as they are scandalous.

[78] On this basis, the Defendants seek to strike the following paragraphs from the Claim for the following reasons:

a. Paragraphs 12(c) and 14 - in these paragraphs, the Plaintiffs purport to have knowledge of the opinions of "members of the refugee bar, and others" respecting the June 2009 Report and assert that this ill-defined group predicted that the situation was a repeat of the "Hungarian (Roma) Lead Case." Such opinions cannot be proven, the scope of the group is not clearly identifiable, the allegations are unsubstantiated and they are irrelevant and redundant to the Claim. Such allegations

are inserted for colour only and should be struck as they are scandalous and violate the Rules;

b. Paragraph 12(f) and 17- these paragraphs also refer to the "Hungarian Lead Case" and are argumentative, inserted for colour only, and are irrelevant and redundant to the within Claim;

c. Paragraph 20 - this paragraph refers to the cross-examination of Gordon Ritchie and the Defendants' alleged refusal to answer undertakings. These factual details are irrelevant to the Claim;

d. Paragraph 25 - this paragraph should be struck because it is repetitive of paragraph 28 which is in fact pled with more specificity (although factually insufficient in any event). Paragraph 25 does not refer to a specific cause of action upon which the Plaintiffs base their entitlement to the damages claimed and is redundant;

e. Paragraph 27 - this paragraph is immaterial to the Claim. It refers to the treatment of the Roma during the Holocaust and is inserted for colour only and is redundant.

[79] In response, the Plaintiffs simply say that "these 'facts' with respect to the Hungarian Roma Lead Case, in *Geza v Canada (Minister of Citizenship and Immigration)*, [2006] FCJ No 477, (FCA) were not only pleaded, and advanced, but also further *accepted* by the Court of Appeal in that case."

[80] It is difficult to know what the Plaintiffs mean by this allegation, and which "facts" they are referring. *Geza* was not an action and we are in the present case dealing with particular rules of pleadings. The Rules are clear that the pleadings are to contain facts, not evidence. I just do not see,

for instance, what the unsubstantiated collective opinion of the immigration bar has to do with the factual underpinnings of this case. The same goes for most of the other points. In my view, the redundant material simply has no place in this Claim and impedes progress towards a clear statement of facts and issues to which the Defendants can respond, and the Court can adjudicate. The Plaintiffs may well feel a sense of historical grievance, and they may have good reason for it, but I think it better to wait until the facts are provided before the government of Canada and the RPD are connected with Hitler's Holocaust and a historical "continuum of persecution." I am well aware of the cases referred to earlier where the Court has refused to strike "surplus" statements that do not give rise to prejudice. However, accusations of this kind are not self-evident facts. All they do is raise the emotional and rhetorical temperature of the action and impede the just, most expeditious and least determination of the action on its merits.

[81] I disagree with the Defendants regarding paragraph 12(f) which, although it refers to the "Hungarian Lead Case" and unspecified public comments by Minister Kenney, does allege facts which may be relevant and may help to ground the principal claim of institutional bias.

[82] As regards paragraph 25, because paragraph 24 is not substantiated by relevant facts, there is nothing to ground the Minister's alleged public references and the balance of the paragraph is really pleading evidence.

Improperly Pleading Evidence

[83] As the Defendants point out, Rule 174 of the Rules directs that a statement of claim shall not include evidence by which the facts of the case are to be proven.

[84] On this basis, the Defendants say that the following paragraphs of the Claim should be struck:

a. Paragraph 12(c) - not only should this paragraph be struck on the basis that it is irrelevant and/or immaterial, it also constitutes evidence.;

b. Paragraph 12(g) - this paragraph lists the credentials of Paul St. Clair. This is evidence that has no place in the Claim;

c. Paragraph 14 - as noted above, this paragraph purports to confirm the opinion in the minds of "anyone involved with refugees, particularly the members of the immigration bar" which could constitute evidence.

[85] The Plaintiffs provide little by way of response on this issue other than disagreement. There is significant overlap here with other grounds of complaint and I think I have said enough already to explain why I agree with the Defendants on these points.

Miscellaneous Deficiencies

[86] The Defendants also complain of the following deficiencies:

a. The term “Minister” is used throughout the Claim without proper specificity given that two Ministers are named as Defendants. In this regard, it is unclear which Minister the Plaintiffs are referring to in certain sections of the Claim. Further, the Plaintiffs appear to use the Minister of Immigration, Minister Kenney, Minister, Immigration Minister and the Minister of Citizenship and Immigration interchangeably (see, for example, paragraph 12(b), 12(c), 22 and 24.) Such terminology must be clarified so that the Defendants can properly respond to the Claim;

b. The Plaintiffs have not defined or listed the statutory provisions or legislation upon which they rely despite making numerous, vague references to statutory breaches through the Claim;

c. The relief outlined in paragraph 6 of the Claim is duplicative of the relief outlined in paragraph 1(a) to (d). As well, the Plaintiffs have only particularized their damages with respect to their negligence claim.

[87] Given that I have already accepted the Defendants arguments as outlined above, I think that these difficulties disappear and/or do not sufficiently offend the Rules to warrant striking.

Conclusions

[88] It seems to me that the Defendants have provided ample authority and justification for striking certain portions of the Claim as outlined above.

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

> i. A document that demonstrates a complete absence of material facts;
>
> ii. Portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations;
>
> iii. A document that contains only argument and includes unfounded and inflammatory attacks on the integrity of a party, and speculative, unsupported allegations of defamation;
>
> iv. Documents that are replete with conclusions, expressions of opinion, provide no indication whether information is based on personal knowledge or information and belief, and contain many irrelevant matters.

[90] A statement of claim containing bare assertions but no facts on which to base those assertions discloses no reasonable cause of action and may also be struck as an abuse of process. Furthermore, as indicated above, a claimant is not entitled to rely on the possibility that new facts may arise as the case progresses. On the contrary, the facts must be pled in the initial claim. The question of whether those facts can be proven is a separate issue, but they must be pled nonetheless.

[91] The authorities cited above also show that when a particular cause of action is pled, the claim must contain pleadings of fact that satisfy all of the necessary elements of that cause of action. Otherwise, it will be plain and obvious that the claim discloses no reasonable cause of action.

[92] A statement of claim will also be struck on the grounds that it is so unruly that the scope of the proceedings is unclear. As stated by this Court in *Ceminchuk v Canada*, [1995] FCJ No 914, at paragraph 10

> A scandalous, vexatious or frivolous action may not only be one in which the claimant can present no rational argument, based upon the evidence or law, in support of the claim, but also may be an action in which the pleadings are so deficient in factual material that the defendant cannot know how to answer, and a court will be unable to regulate the proceedings. It is an action without reasonable cause, which will not lead to a practical result.

[93] The Plaintiffs claim that this motion to strike is premature and the Defendants were obliged to request particulars first. However, as pointed out above, I think the jurisprudence of the Court is clear that there is no obligation on defendants to demand particulars and a plaintiff cannot cure an otherwise deficient statement of claim by arguing that the defendants have not sought particulars. See *Paul v Kingsclear Indian Band*, (1997), 132 FTR 145 (TD).

Amendments

[94] I have no motion or request before me from the Plaintiffs that they be allowed to amend their Claim to correct the deficiencies outlined above. By and large, they have simply alleged that they have already pled in accordance with the relevant rules and governing jurisprudence. For the most part, and for reasons given, I cannot accept this position. I am well aware that an amendment should be allowed where a claim might possibly succeed if the pleading is amended and that to deny an amendment there must be no scintilla of a cause of action. See *Larden v Canada* (1998), 145 FTR 140. However, the Plaintiffs have not sought leave to amend and I have nothing before me to

suggest that the Plaintiffs can establish the scintilla of a cause of action in relation to those portions of the Claim that have been struck.

[95] It will soon be a year since I ordered this matter converted to an action, and yet we are still dealing with the fundamentals of the Claim. The time has come to adopt a more urgent approach to this action and I want counsel on both sides to acknowledge this factor and to proceed and conduct themselves accordingly. I know that Mr. Galati plans to take a break during the rest of January and February, but he has indicated he can be available to deal with this file during March 2012. In any event, the matter cannot be allowed to drag on and both counsel must expect to have to prioritize this action in future. Both sides acknowledge the importance of the issues raised for the immigration system generally and there is already a significant body of applications in this Court awaiting the outcome of these proceedings. That body will grow and will, eventually, begin to cause problems for the administration of justice in this Court, as well as for the handling of cases before the IRB. This uncertainty must be addressed quickly and the Court will be looking for counsel's enhanced assistance in ensuring the just, most expeditious and least expensive determination of the merits.

ORDER

THIS COURT ORDERS that

1. For reasons given, the following are struck from the Amended Statement of Claim pursuant to Rule 221(1) of the *Federal Court Rules* without leave to amend:

   (i) Paragraph 6(b)

   (ii) Paragraph 12(c);

   (iii) Paragraph 14;

   (iv) Paragraph 17;

   (v) Paragraph 20;

   (vi) Paragraph 24;

   (vii) Paragraph 25;

   (viii) Paragraph 27;

   (ix) Paragraph 12(g);

   (x) The Minister of Foreign Affairs as a party;

   (xi) All references to the Minister of Foreign Affairs in the body of the Claim;

   (xii) Paragraph 28(b) and all other references to the tort of negligence;

   (xiii) Paragraphs 23, 27 and 28(a)(iv) and all references to the tort of conspiracy;

   (xiv) Paragraphs 24, 28(a)(i) and (iii) and all references to the tort of public misfeasance/abuse of authority;

   (xv) Paragraphs 28(a)(ii) and all references to the tort of abuse of process;

(xvi) All allegations of breach of sections 7 and 15 of the Charter contained in paragraphs 24, 28(a)(v), 28(b)(iii)(A), (B) and (D), and elsewhere in the claim.

2. The Defendants shall have the costs of this motion.

3. Counsel will confer and prepare and provide to the Court on or before March 20th, 2012, an itemized list of the further steps to be taken in this action and a preliminary timetable for accomplishing them. If necessary, the Court will then establish the time for a conference meeting to discuss and resolve points of concern.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF COUNSE:	

DOCKET: T-1700-11

STYLE OF CAUSE: SIVAK et al.

Plaintiffs

- and -

HER MAJESTY THE QUEEN and
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Defendants

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 16, 2012

REASONS FOR ORDER AND ORDER: HON. MR. JUSTICE RUSSELL

DATED: February 28, 2012

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