Mohiuddin v. Canada, 2006 FC 664 (CanLII)

Date: 2006-05-31
Docket: IMM-7056-05
URL: http://www.canlii.org/en/ca/fct/doc/2006/2006fc664/2006fc664.html

Reflex Record (noteup and cited decisions)

Date: 20060531

Docket: IMM-7056-05

Citation: 2006 FC 664

Ottawa, Ontario, May 31, 2006

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

MOHAMMAD ZAHEER MOHIUDDIN

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

[1] This is a motion by Her Majesty the Queen in Right of Canada (the Defendant) to strike the Amended Statement of Claim filed by Mohammad Zaheer Mohiuddin (the Plaintiff).

[2] The Plaintiff is a Pakistani national and member of the Altaf branch of the Mohajir Quami Movement (MQM-A). The Plaintiff came to Canada in 1998 and was found to be a Convention refugee in December 1998 on the basis of a well-founded fear of persecution due to his membership in the MQM-A. Since that determination, he has been seeking - so far, unsuccessfully - to become a permanent resident of Canada.

[3] The Plaintiff submitted his application for permanent residence status in early 1999. The next important step for the Plaintiff was a notification from an immigration officer representing the Minister of Citizenship and Immigration (the Minister) that the Plaintiff had been identified as a person who might be inadmissible to Canada due to his membership in a terrorist organization, pursuant to s. 34(1)(f) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). According to the Plaintiff's Statement of Claim, this preliminary identification was done on the basis of an information package and other internal documents gathered and prepared by various officials within Citizenship and Immigration Canada (CIC), the Canada Border Services Agency (CBSA), and the Canadian Security Intelligence Service (CSIS) and forwarded to immigration officers. The Plaintiff was found inadmissible by the immigration officer and sought judicial review of that decision; that application was discontinued when the Minister consented to rehear the matter. The matter was reheard and the Plaintiff was again found inadmissible. He has applied again for judicial review of that decision, which is still

outstanding (Court File No. IMM-7498-05).

[4] The Plaintiff, in bringing this proposed class action, is concerned for all members of the MQM-A who face the same package of documentary evidence whenever a decision of admissibility is made in respect of their situations. He and other MQM-A members have held unsuccessful meetings with officials to change the "opinion" of government officials as to the nature of the MQM-A; specifically, the members do not believe that there is any credible evidence that this group is a terrorist organization. In his submission, until and unless the Plaintiff, and those he hopes to represent in a class action, obtain a declaration related to the underlying documentary evidence and the status of the MQM-A organization, they will continue to be thwarted by the decision makers who are directed to find that these persons are inadmissible on the basis of this documentary evidence. Thus, the Plaintiff has commenced this action, pursuant to s. 17 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, seeking the following relief:

- a declaration that his rights pursuant to ss. 7 and 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11 have been breached;
- a declaration that MQM is not a terrorist organization within the meaning of s. 34(1) of the *IRPA* or s. 83.01 of the *Criminal Code of Canada*, R.S.C. c. C-46;
- certification of a class action;
- damages in amount of $50 million; and
- costs of the action.

Issues

[5] The issue before this Court is whether the Statement of Claim should be struck on the basis that:

(a) no cause of action is available to the Plaintiff where judicial review can provide the remedies; or

(b) the pleadings are deficient.

[6] For the reasons that follow, I have concluded that, for most of the claims set out in the Statement of Claim, the Plaintiff must pursue his remedies through the application for judicial review of the immigration officer's decision. The claim for damages may be pursued after that matter is finally determined. Finally, I find that the pleadings in respect of defamation and the possible application of the *Criminal Code* provision do not disclose any reasonable cause of action.

The Contents of the Amended Statement of Claim

[7] Having reviewed the Amended Statement of Claim, I believe that the claim of the Plaintiff, in summary form, can be summarized as follows. The Plaintiff alleges that the Defendant has been negligent by seeking to exclude members of the MQM-A organization from Canada pursuant to s. 34(1)(f) of the *IRPA*. It is alleged that the Minister has wrongly formed the opinion that the MQM or MQM-A is a terrorist organization. It is further alleged that the Minister has distributed documents of dubious credibility and reliability, to immigration officers which further this belief. In the Plaintiff's view this has resulted in unfair decisions being made, in a systematic way, against individuals like the Plaintiff. This has resulted in lost professional and financial opportunities for MQM members who have come to Canada. In effect, the Defendant's actions have been defamatory. Moreover, the Minister's negligent behaviour against the Plaintiff and others like him is an affront to their dignity: it has lowered their reputation and social standing by falsely attaching the stigma of terrorism to them.

[8] The Plaintiff states that the Defendant owes him, and those like him, a duty of care and it has breached that duty of care.

Relevant Statutory Provisions

[9] The Plaintiff has been found to be inadmissible to Canada pursuant to s. 34(1) of the *IRPA*, which is set out in Appendix A to these reasons.

[10] Of particular importance to this application to strike are ss. 17, 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. 41 and Rule 221(1) of the *Federal Courts Rules*, SOR/98-106. I have set out these provisions in full in Appendix A.

[11] In addition, the Plaintiff seeks a declaration with respect to s. 83.01 of the *Criminal Code*. That provision is also set out in Appendix A.

Test for Striking Out a Claim

[12] To begin, the jurisprudence has established that a Statement of Claim should not be struck unless it is "plain and obvious" that the Statement of Claim discloses no reasonable cause of action (*Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (S.C.C.), [1990] 2 S.C.R. 959 at 980). Further, the moving party carries a heavy burden (*British Columbia Native Women's Society v. Canada*, 2001 FCT 646 (CanLII), [2001] 4 F.C. 191), 2001 FCT 646 (CanLII), 2001 FCT 646. In addition, I am guided by the following principles:

· The facts in the Statement of Claim should be accepted as proven (*Hunt*, above).

· The Statement of Claim must contain sufficient pleadings to satisfy all necessary elements of the cause of action (*Howell v. Ontario* reflex, (1998), 159 D.L.R. (4th) 566 (Ont. Div. Ct.), 61 O.T.C. 336; *Benaissa v. Canada (Attorney General)*, 2005 FC 1220 (CanLII), [2005] F.C.J. No. 1487 (QL), 2005 FC 1220)).

· There must be facts to support the claim; a bare assertion of a conclusion is not sufficient (*Canadian Olympic Assn. v. U.S.A. Hockey Inc.*, 1997 CanLII 5256 (F.C.), (1997), 74 C.P.R. (3d) 348 (F.C.T.D.), [1997] F.C.J. No. 824 (QL)).

· Abuse of process is a ground for striking out pleadings. Multiple proceedings may be an abuse of process where actions either duplicate one another, or where all recovery or relief might be obtained in one action (*British Columbia Native Women's Society*, above).

[13] As noted above, the Plaintiff brings this action pursuant to s. 17 of the *Federal Courts Act*. In considering this motion to strike, regard must be had to the interaction between ss. 17 and 18 of the *Federal Courts Act* and to the question of the availability of judicial review to the Plaintiff. In general, the availability of judicial review to a complainant precludes an action. As stated by Justice Létourneau, in *Grenier v. Canada*, 2005 FCA 348 (CanLII), [2005] F.C.J. No. 1778 (QL), 2005 FCA 348, at para. 25,

To accept that the lawfulness of the decisions of federal agencies can be reviewed through an action in damages is to allow a remedy under section 17. Allowing, for that purpose, a remedy under section 17 would, in the first place, disregard or deny the intention clearly expressed by Parliament in subsection 18(3) that the remedy must be exercised only by way of an application for judicial review.

[14] In *Grenier*, above, the Court of Appeal held that a plaintiff cannot use an action in damages to mount a collateral attack against the decision of a federal tribunal where the decision had not already been declared to be invalid or unlawful in a timely application for judicial review. At paragraph 61, Justice Létourneau pointed out that a finding that a decision of a federal tribunal is lawful forecloses a finding of negligence in respect of the decision, and that, moreover, even a finding that such a decision was unlawful does not necessarily entail a finding of fault or negligence and would not necessarily result in a finding of liability. This statement has been relied on by both the Court of Appeal (see, for example, *Prentice v. Canada (Royal Canadian Mounted Police)*, 2005 FCA 395 (CanLII), [2005] F.C.J. No. 1954 (QL), 2005 FCA 395 and *Tremblay v. Canada*, [2006] F.C.J. No. 354) (QL), 2006 FCA 90 (CanLII), 2006 FCA 90 and this Court (see *Renova Holdings Ltd. v. Canada (Canadian Wheat Board)*, 2006 FC 71 (CanLII), [2006] F.C.J. No. 92 (QL), 2006 FC 71, at para. 33).

[15] The Court of Appeal has opined that this principle should also apply to arguments and remedies invoking the *Charter*. In *Prentice*, above at para. 32, Justice Décary, speaking for the Court of Appeal stated that:

I am of the opinion that the same reasoning leads to the conclusion that a plaintiff cannot rely on the *Charter* to claim a remedy under the *Charter* based on the alleged illegality of a decision of a federal tribunal that has not already been declared invalid or unlawful in an application for judicial review.

[16] To the extent that the decision of this Court in *Khalil v. Canada*, 2004 FC 732 (CanLII), [2004] F.C.J. No. 878, 2004 FC 732 stands for the proposition that a plaintiff cannot be forced to proceed by way of judicial review, the decision has been eclipsed by the ruling of the Federal Court of Appeal in *Grenier*, above.

[17] Simply put, if judicial review is available, the plaintiff must pursue that avenue before bringing an action before this Court.

Nature of the Plaintiff's Claim

[18] With these principles as guidance, I turn to the specific claim before me. The question that I must determine is the proper characterization of the claim. Is this - in whole or in part - a genuine attempt to bring an action against the Defendant or is it a collateral attack on the decision of an immigration officer? On the basis of the decision in *Grenier*, above, the former is permissible and the latter is not. To answer this question, the Court must ascertain the true nature of the remedy being sought (*Renova*, above).

[19] The Plaintiff submits that relief available under judicial review is not sufficient to address the Plaintiff's concerns, since an applications judge would not determine whether the MQM is a terrorist organization. Further, he asserts that the true culprits are the officials of CIC, CBSA and CSIS who have gathered the documentary evidence related to the MQM and who "direct" the immigration officer to have regard to this evidence. Thus, quashing admissibility decisions and returning them to immigration officers for reconsideration will likely result in the same decisions being made over and over, because the Minister, through his delegates, has already formed a certain opinion and distributed documentary material to the decision makers that lead to such inadmissibility findings.

[20] Thus, as I understand the Plaintiff's assertions, his lawsuit is concerned with the actions of the Defendant, rather than the immigration officer who may hear and decide his admissibility. However, this view of the current action is not borne out by a review of the Statement of Claim.

[21] In that document, the Plaintiff points out that his application for permanent residence has twice been refused by immigration officers based on a determination that the MQM-A was an organization that engaged in acts of terrorism. He further states that the immigration officers' findings have been "based on information and instructions provided by senior officials from CIC and CBSA" (paragraph 21). In both paragraphs 21 and 24 of the Statement of Claim, the Plaintiff alleges that applications for permanent residence by MQM-A members are routinely refused on the basis of the documents and the Minister's direction and, also, that "applications for Ministerial relief are being rejected" (paragraph 24). In paragraph 24, the Plaintiff submits that the discretion of local officers who process the applications is fettered by the fact that the Minister is "instructing officers to reject applications on grounds of membership in the MQM". The effects of the alleged actions of the officials include difficulties in traveling and inability to sponsor family members. All of this flows from the inadmissibility determination by the immigration officer and not from the preparation or existence of the information package.

[22] In conclusion, it is difficult to see, on the facts pleaded, how the actions of officials at CIC and CBSA can affect the Plaintiff other that through the decision of an immigration officer regarding admissibility.

[23] It follows that the allegations of the Plaintiff can be addressed through judicial review of the immigration officers' decisions. In fact, the Plaintiff's most recent application for judicial review of such a decision includes, as grounds, that the officer:

- denied the Plaintiff his right of natural justice as a result of the conduct of the hearing;
- misconstrued the facts;
- ignored relevant evidence; and
- unduly fettered his discretion in the manner in which he conducted the determination.

[24] Accordingly, the complaints contained in the Statement of Claim relating to the documentary evidence and the alleged fettering of discretion by the immigration officer can and will be dealt with in the context of an application for judicial review.

[25] On these facts, I conclude that the principles set out in *Grenier*, above apply and the Plaintiff should exhaust his judicial review remedies before bringing any action in damages. That being said, the claim of defamation and the application of the *Criminal Code* require further examination and are discussed later in these reasons.

Remedies Available on Judicial Review

[26] The Plaintiff argues that the extent of powers under judicial review is limited to the Court sending the matter back for reconsideration. There are two points to be made in response. The first is that this may be a perfectly adequate remedy. Let me assume (as I must for purposes of this motion) that the MQM-A is not and has not been a terrorist organization and that an officer has fettered his discretion by following the directive of CIC and CBSA (once again, assuming that such a direction is given to immigration officers). In that case, it is clear to me that the decision would be overturned in the application for judicial review. I would assume that, on the reconsideration, the officer reconsidering the determination would have regard to the reasons given by the Court and would not, again, fetter his discretion or fail to have regard to all of the evidence.

[27] The second point is that far more can be done by a Court in the context of a successful judicial review than the Plaintiff submits. Section 18 of the *Federal Courts Act* specifically contemplates a number of remedies in the context of judicial review. The Court has "exclusive original jurisdiction . . . . to issue an injunction, writ of *certiorari*, writ of *prohibition*, writ of *mandamus* or ... grant declaratory relief". Further, *Charter* determinations may be made. Perhaps of more utility to the Plaintiff, a Court may provide directions to the reconsidering immigration officer related to the use of certain evidence or may provide opinions on the reliability of documents.

[28] I note that the first judicial review was sent back for re-determination without oral argument and with the consent of the Minister. Even in the face of an acknowledgement by the Minister that the immigration officer had erred, the Plaintiff could have sought to continue the oral hearing for the purpose of obtaining either specific direction to the immigration officer upon the re-consideration or guidance on the use of the documents. The reasons that the Court would have provided could have assisted the Plaintiff.

[29] As an example of the role that the Court can play, I refer to two decisions of this Court where the Court questioned the documentary evidence related to the MQM-A that was before an immigration officer:

1. In *Ali v. Canada* (*Minister of Citizenship and Immigration*), 2004 FC 1174 (CanLII), [2005] 1 F.C.R. 485, 2004 FC 1174, Justice Anne Mactavish allowed the application for judicial review of a decision of an immigration officer who had refused an application for permanent residence of an MQM-A member. One question raised by Justice Mactavish was the sufficiency of the evidence supporting the officer's conclusion. While she expressed the view, at para. 65, that the documentation before the officer "would support the conclusion that the MQM generally, and the MQM-H in particular, were engaged in acts of terrorism", she was concerned that the documentary evidence was "much more limited" with respect to MQM-A members.

2. In *Jalil v. Canada* (*Minister of Citizenship and Immigration*), 2006 FC 246 (CanLII), [2006] F.C.J. No. 320 (QL), 2006 FC 246, Justice Richard Mosley allowed the application for judicial review of a decision of an immigration officer who had refused an application for permanent residence of an MQM-A member. A specific issue before the Court was the reliability of the documentation relied on by the officer. It appears that Justice Mosley did not deal directly with this issue, as the application was allowed on the basis that the officer's reasons failed to stand up to a somewhat probing examination (see para. 32). However, on the issue of the quality of evidence, Justice Mosley expressed concern as follows, at para. 40:

[T]he applicant has identified a number of frailties with the sources relied upon by the immigration officer which one would not expect to find if due care and attention had been paid to the material. The integrity of the process of determining whether there are reasonable grounds to believe that an individual is a member of an organization that has engaged in terrorist activities deserves greater diligence than was displayed in this instance.

[30] The Plaintiff argues that the quashing of an individual decision is not sufficient; the immigration officers will continue to be directed to determine that MQM-A members are inadmissible. I find this pessimism to be troubling. Surely, a clear statement from this Court that the decision maker is relying on flawed documents or that his ability to act has been fettered would result in a changed decision-making process for the Plaintiff and, if

applicable, for other MQM-A members.

Availability of Judicial Review to challenge actions of CIC and CBSA

[31] Even if I am wrong in concluding that judicial review of the decision of the immigration officer does not provide all of the remedies sought by the Applicant, there is another level of judicial review that could be considered. The responsible Ministers, through the actions of their delegates in CIC, CBSA and CSIS, are presumably exercising their statutory authority. Each Minister, in such a context, is a "federal board, commission or other tribunal" as defined in section 2 of *the Federal Courts Act* (*Markevich v. Canada* (T.D.), 1999 CanLII 7491 (F.C.), [1999] 3 F.C. 28 (reversed on another point, 2001 FCA 144 (CanLII), [2001] 3 F.C. 449, confirmed 2003 SCC 9 (CanLII), [2003] 1 S.C.R. 94); *Krause v. Canada*, 1999 CanLII 9338 (F.C.A.), [1999] 2 F.C. 476, [1999] F.C.J. No. 179 (C.A.) (QL)). In my view, it follows that a challenge to the legality or propriety of the assembly of documentary evidence by the officials of CIC, CBSA and CSIS may be the subject of an application for judicial review in the Federal Court, pursuant to sections 18 and 18.1 of the *Federal Courts Act*.

[32] In oral argument before me, neither party was prepared to address this possibility. Accordingly, I leave this thought with the parties without undertaking an exhaustive review or reaching a definitive opinion on the potential for pursuing an application for judicial review of the Minister's actions.

Defamation

[33] The Plaintiff argues that judicial review cannot address his claim for damages as a result of defamation. I accept that the claim of defamation could not be addressed by the application for judicial review. However, the question is whether the Statement of Claim discloses a claim in defamation.

[34] Paragraph 28 addresses this specific claim.

One's good reputation represents and reflects one's innate dignity, a concept which underlies all *Charter* rights. It is submitted that the contents of the information package, as well as other internal documents, provided to local officers who process applications for permanent residence, which indicate that the MQM is a terrorist organization are defamatory to the plaintiff and all of the members of the MQM. The sources relied on in producing the information package and other internal documents are neither objective nor accurate. However, once produced, these internal documents are widely circulated and form the basis for decision-making. The contents of these documents not only tend to lower the plaintiff and other members of the MQM in the estimation of society, they completely destroy the reputation and social standing of these individuals. Branding the MQM as a terrorist organization is not merely capable of adversely affecting the plaintiff and other members of the MQM, it is actually defamatory, as the plaintiff and other members of the MQM have already lost professional and financial opportunities and will permanently continue to suffer the adverse consequences of being falsely classified as terrorists. [emphasis added]

[35] The first concern that I have with this portion of the claim is that a careful reading of the Statement of Claim demonstrates that much, if not all, of the harm that constitutes this claim of defamation actually flows from the consequences of the admissibility finding of an immigration officer and does not flow directly from the opinion of the Defendant or its actions in preparing the information package. The Plaintiff describes the nature of "lost financial and professional opportunities", in paragraph 29 of the Statement of Claim, as arising "due to their inability to travel because of their lack of immigration status". Similarly, the Plaintiff offers, as descriptive of the emotional distress, the inability of effecting family reunion "due to the fact that they are unable to sponsor their family members and reunite with them in Canada" (paragraph 29). Thus, in the very words of the Plaintiff, the alleged destruction of reputation and social standing is the result of the inadmissibility decision of an immigration officer and not from the existence of the opinion or information package of CIC or CBSA. Viewed with the opposite lens, should the Plaintiff's application for permanent residence be accepted, he would be able to travel and apply to sponsor family members, thus reducing the alleged harm. On these facts, judicial review would address the possible remedy.

[36] Assuming for the purposes of this analysis that the claim could arise from the actions of the officials, there are problems with the defamation pleadings. The Plaintiff asserts that the internal documents are *prima facie* defamatory and that this portion of the claim should not be struck before a full exploration of all the circumstances

and evidence that would permit a trial judge to make a final determination on the claim (*Kenora* (*Town*) *Police Service v. Savino*, [1995] O.J. No. 486 (QL), 36 C.P.C. (3d) 46). I do not agree.

[37] The Plaintiff is correct that the determination of defamation would be better left for trial, if the Plaintiff had pleaded the specific defamatory statements as required (*Djukic v. Canada* (*Attorney General*), 2001 FCT 714 (CanLII), [2001] F.C.J. No. 1037 (QL), 2001 FCT 714 at para. 9; *Lysko v. Braley*, [2006] O.J. No. 1137 (QL) at para. 90 (Ont. C.A.)). However, in my view, the pleadings do not satisfy this requirement.

[38] Although the Plaintiff describes the "internal documents" as being "widely circulated", the only reference to the circulation is in the same paragraph 28 where the Plaintiff claims that the internal documents are provided to "local officers who process applications for permanent residence". There is no claim that the documents complained of (which I take to mean, in this context, the internally prepared documents as opposed to the publicly available reports such as that of Amnesty International) are provided to anyone beyond the officers. The Plaintiff does not plead that either the Defendant, through CIC or CBSA officers, or immigration officers disseminated the information publicly so that the Plaintiff's reputation was affected in the world at large. There is no explanation for how information which was kept internal to the immigration system would affect the Plaintiff's reputation in the public.

[39] In *Kenora*, above, referred to by the Plaintiff, the allegedly defamatory statements were made by the defendant to reporters representing the print and electronic media. The Ontario Court of Justice (General Division) refused to strike the claim. The specific words attributed to the defendant, as set out in the Statement of Claim, were found to be "*prima facie* defamatory in law". In that context, I would agree that further exploration of the claim was warranted. This is a far different situation from that before me, where the only claim is that immigration officers are provided with the documents. The specific "words" or statements that are allegedly defamatory are not set out. It is difficult to see how forming or holding an opinion that is not widely communicated could be *prima facie* defamatory.

[40] In sum on this question, the Plaintiff's claim of defamation should be struck, either on the basis that: (a) it is a collateral attack on the immigration officer's decision; or (b) there are no circumstances pleaded to support the claim of defamation.

Criminal Code

[41] Part II.1 of the *Criminal Code* provides for a number of measures that may be taken in respect of "terrorist activities" and "terrorist groups". These terms are defined in s. 83.01 of the *Criminal Code* and are set out in Appendix A. While there is a process for listing an organization by Governor in Council regulation (s. 83.05), inclusion on the list is not necessary for the consequences set out in Part II.1 of the *Criminal Code* to apply. The MQM-A has not been listed.

[42] The Plaintiff does not plead that he has suffered any consequences arising from the application of these provisions of the *Criminal Code*. In fact, at paragraph 27 of his Statement of Claim, he states that MQM-A members operate openly and that the government has not sought to prevent the organization from continuing its activities. Nevertheless, the Plaintiff seeks a declaration that the MQM "is not an organization for whom there are reasonable grounds to believe that it has, is or will engage in acts of terrorism within the meaning ... of s. 83.01 of *the Criminal Code*". The fear of the Plaintiff, as expressed during oral submissions before me, is that, absent a clear declaration from the Court, he may be charged or suffer other consequences of this *Criminal Code* provision.

[43] The most significant problem with this part of the claim is that there are absolutely no facts pleaded upon which such declaratory relief could be granted. This alone is fatal to the claim. Thus, it is not necessary for me to consider whether this Court could or should, in the absence of actions taken under the *Criminal Code* provisions, issue such declaratory relief.

Conclusion

[44] I have considerable sympathy for the Plaintiff and other members of the MQM-A. It is evident that MQM-A members in Canada are frustrated. Their efforts to rectify what they view as a mistaken belief of the nature of their organization have not met with success. Their members continue to be declared inadmissible and

refused permanent residence status in Canada. Nevertheless, I cannot see that an action is the appropriate vehicle for addressing their concerns. To the extent that individual decisions are made by immigration officers, judicial review is available. As shown by this Courts' decisions in *Ali*, aboveand *Jalil*, above, this process can provide a clear - and, in my view, effective - opportunity to address the reliability of the documentary evidence and internal information. In expressing my concern, however, I wish to state categorically that I have formed no opinion on the nature of the MQM-A or any other related organization.

[45] In conclusion, I find that the Plaintiff is not free to choose between a judicial review proceeding and an action in damages; he must proceed by judicial review in order to have the decision invalidated. Further, for the claim in defamation or for declaratory relief in respect of s. 83.01 of the *Criminal Code*, it is "plain and obvious" that the Statement of Claim discloses no reasonable cause of action. The motion to strike the Statement of Claim should be allowed.

[46] After oral argument on the motion, submissions were made in respect of the Court's recent decision in *Szebenyi v. Canada* (*Minister of Citizenship and Immigration*), 2006 FC 602 (CanLII), 2006 FC 602, in particular, addressing the question of duty of care. I have not found it necessary to consider whether the Statement of Claim discloses facts by virtue of which the law recognizes the existence of a duty of care. Accordingly, this case and the submissions on it are not relevant to my decision.

[47] I wish to thank both counsel for their capable and thorough submissions and for their professional courtesy to each other and to this Court. They have been of great assistance.

[48] The Defendant does not seek costs on this motion. In my discretion, I decline to award costs.

ORDER

This Court orders that:

1. the motion is granted; and
2. the Amended Statement of Claim is struck.

"Judith A. Snider"

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Judge

APPENDIX "A"

to the

Reasons for Order and Order dated May 31, 2006

In

MOHAMMAD ZAHEER MOHIUDDIN

and

HER MAJESTY THE QUEEN

IMM-7056-05

Immigration and Refugee Protection Act,	*Loi sur l'Immigration et la protection des réfugiés*,
34. (1) A permanent resident or a foreign national is inadmissible on security grounds	34. (1) Emportent interdiction de territoire

for

(*a*) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;

(*b*) engaging in or instigating the subversion by force of any government;

(*c*) engaging in terrorism;

(*d*) being a danger to the security of Canada;

(*e*) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or

(*f*) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (*a*), (*b*) or (*c*).

pour raison de sécurité les faits suivants :

a) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;

b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;

c) se livrer au terrorisme;

d) constituer un danger pour la sécurité du Canada;

e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;

f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas *a*), *b*) ou *c*).

Federal Courts Act,

17. (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.

(2) Without restricting the generality of subsection (1), the Federal Court has concurrent original jurisdiction, except as otherwise provided, in all cases in which

(*a*) the land, goods or money of any person is in the possession of the Crown;

(*b*) the claim arises out of a contract entered into by or on behalf of the Crown;

(*c*) there is a claim against the Crown for injurious affection; or

(*d*) the claim is for damages under the *Crown Liability and Proceedings Act*.

(3) The Federal Court has exclusive original jurisdiction to hear and determine the following matters:

(*a*) the amount to be paid if the Crown and any person have agreed in writing that the Crown or that person shall pay an amount to be determined by the Federal Court, the

Loi sur les Cours fédérales,

17. (1) Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, la Cour fédérale a compétence concurrente, en première instance, dans les cas de demande de réparation contre la Couronne.

(2) Elle a notamment compétence concurrente en première instance, sauf disposition contraire, dans les cas de demande motivés par :

a) la possession par la Couronne de terres, biens ou sommes d'argent appartenant à autrui;

b) un contrat conclu par ou pour la Couronne;

c) un trouble de jouissance dont la Couronne se rend coupable;

d) une demande en dommages-intérêts formée au titre de la *Loi sur la responsabilité civile de l'État et le contentieux administratif*.

(3) Elle a compétence exclusive, en première instance, pour les questions suivantes :

Federal Court - Trial Division or the Exchequer Court of Canada; and

(*b*) any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing shall be determined by the Federal Court, the Federal Court - Trial Division or the Exchequer Court of Canada.

(4) The Federal Court has concurrent original jurisdiction to hear and determine proceedings to determine disputes in which the Crown is or may be under an obligation and in respect of which there are or may be conflicting claims.

(5) The Federal Court has concurrent original jurisdiction

(*a*) in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief; and

(*b*) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown.

(6) If an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Federal Court has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on that court.

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

(2) The Federal Court has exclusive

a) le paiement d'une somme dont le montant est à déterminer, aux termes d'une convention écrite à laquelle la Couronne est partie, par la Cour fédérale - ou l'ancienne Cour de l'Échiquier du Canada - ou par la Section de première instance de la Cour fédérale;

b) toute question de droit, de fait ou mixte à trancher, aux termes d'une convention écrite à laquelle la Couronne est partie, par la Cour fédérale - ou l'ancienne Cour de l'Échiquier du Canada - ou par la Section de première instance de la Cour fédérale.

(4) Elle a compétence concurrente, en première instance, dans les procédures visant à régler les différends mettant en cause la Couronne à propos d'une obligation réelle ou éventuelle pouvant faire l'objet de demandes contradictoires.

(5) Elle a compétence concurrente, en première instance, dans les actions en réparation intentées :

a) au civil par la Couronne ou le procureur général du Canada;

b) contre un fonctionnaire, préposé ou mandataire de la Couronne pour des faits - actes ou omissions - survenus dans le cadre de ses fonctions.

(6) Elle n'a pas compétence dans les cas où une loi fédérale donne compétence à un tribunal constitué ou maintenu sous le régime d'une loi provinciale sans prévoir expressément la compétence de la Cour fédérale.

18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa *a*), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

(2) Elle a compétence exclusive, en première instance, dans le cas des demandes suivantes visant un membre des Forces canadiennes en poste à l'étranger : bref d' *habeas corpus ad subjiciendum*, de *certiorari*, de prohibition ou de *mandamus*.

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

(3) On an application for judicial review, the Federal Court may

(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(*b*) failed to observe a principle of natural justice, procedural fairness or other

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu

procedure that it was required by law to observe;

(*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(*e*) acted, or failed to act, by reason of fraud or perjured evidence; or

(*f*) acted in any other way that was contrary to law.

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(*a*) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(*b*) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

Federal Courts Rules

221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

(*a*) discloses no reasonable cause of action or defence, as the case may be,

(*b*) is immaterial or redundant,

(*c*) is scandalous, frivolous or vexatious,

(*d*) may prejudice or delay the fair trial of the action,

(*e*) constitutes a departure from a previous pleading, or

(*f*) is otherwise an abuse of the process of the Court,

de respecter;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

Règles des Cours fédérales

221. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

a) qu'il ne révèle aucune cause d'action ou de défense valable;

b) qu'il n'est pas pertinent ou qu'il est redondant;

c) qu'il est scandaleux, frivole ou vexatoire;

d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;

e) qu'il diverge d'un acte de procédure antérieur;

f) qu'il constitue autrement un abus de procédure.

Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

Code criminel

and may order the action be dismissed or judgment entered accordingly.

Criminal Code

83.01 (1) The following definitions apply in this Part.

"Canadian" means a Canadian citizen, a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act* or a body corporate incorporated and continued under the laws of Canada or a province.

"entity" means a person, group, trust, partnership or fund or an unincorporated association or organization.

"listed entity" means an entity on a list established by the Governor in Council under section 83.05.

"terrorist activity" means

(*a*) an act or omission that is committed in or outside Canada and that, if committed in Canada, is one of the following offences:

(i) the offences referred to in subsection 7(2) that implement the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on December 16, 1970,

(ii) the offences referred to in subsection 7(2) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on September 23, 1971,

(iii) the offences referred to in subsection 7(3) that implement the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, adopted by the General Assembly of the United Nations on December 14, 1973,

(iv) the offences referred to in subsection 7(3.1) that implement the *International Convention against the Taking of Hostages*, adopted by the General Assembly of the United Nations on December 17, 1979,

(v) the offences referred to in subsection 7(3.4) or (3.6) that implement the

83.01 (1) Les définitions qui suivent s'appliquent à la présente partie.

a) Soit un acte - action ou omission, commise au Canada ou à l'étranger - qui, au Canada, constitue une des infractions suivantes :

(i) les infractions visées au paragraphe 7(2) et mettant en oeuvre la *Convention pour la répression de la capture illicite d'aéronefs*, signée à La Haye le 16 décembre 1970,

(ii) les infractions visées au paragraphe 7(2) et mettant en oeuvre la *Convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile*, signée à Montréal le 23 septembre 1971,

(iii) les infractions visées au paragraphe 7(3) et mettant en oeuvre la *Convention sur la prévention et la répression des infractions contre les personnes jouissant d'une protection internationale, y compris les agents diplomatiques*, adoptée par l'Assemblée générale des Nations Unies le 14 décembre 1973,

(iv) les infractions visées au paragraphe 7(3.1) et mettant en oeuvre la *Convention internationale contre la prise d'otages*, adoptée par l'Assemblée générale des Nations Unies le 17 décembre 1979,

(v) les infractions visées aux paragraphes 7(3.4) ou (3.6) et mettant en oeuvre la *Convention sur la protection physique des matières nucléaires*, conclue à New York et Vienne le 3 mars 1980,

(vi) les infractions visées au paragraphe 7(2) et mettant en oeuvre le *Protocole pour la répression des actes illicites de violence dans les aéroports servant à l'aviation civile internationale, complémentaire à la Convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile*, signé à Montréal le 24 février 1988,

(vii) les infractions visées au paragraphe 7(2.1) et mettant en oeuvre la *Convention pour la répression d'actes illicites contre la sécurité de la navigation maritime*, conclue à Rome le 10 mars 1988,

(viii) les infractions visées aux paragraphes

Convention on the Physical Protection of Nuclear Material, done at Vienna and New York on March 3, 1980,

(vi) the offences referred to in subsection 7(2) that implement the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, supplementary to the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on February 24, 1988,

(vii) the offences referred to in subsection 7(2.1) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, done at Rome on March 10, 1988,

(viii) the offences referred to in subsection 7(2.1) or (2.2) that implement the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, done at Rome on March 10, 1988,

(ix) the offences referred to in subsection 7(3.72) that implement the *International Convention for the Suppression of Terrorist Bombings*, adopted by the General Assembly of the United Nations on December 15, 1997, and

(x) the offences referred to in subsection 7(3.73) that implement the *International Convention for the Suppression of the Financing of Terrorism*, adopted by the General Assembly of the United Nations on December 9, 1999, or

(*b*) an act or omission, in or outside Canada,

(i) that is committed

(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is

(viii) les infractions visées aux paragraphes 7(2.1) ou (2.2) et mettant en oeuvre le *Protocole pour la répression d'actes illicites contre la sécurité des plates-formes fixes situées sur le plateau continental*, conclu à Rome le 10 mars 1988,

(ix) les infractions visées au paragraphe 7(3.72) et mettant en oeuvre la *Convention internationale pour la répression des attentats terroristes à l'explosif*, adoptée par l'Assemblée générale des Nations Unies le 15 décembre 1997,

(x) les infractions visées au paragraphe 7(3.73) et mettant en oeuvre la *Convention internationale pour la répression du financement du terrorisme*, adoptée par l'Assemblée générale des Nations Unies le 9 décembre 1999;

b) soit un acte - action ou omission, commise au Canada ou à l'étranger :

(i) d'une part, commis à la fois :

(A) au nom - exclusivement ou non - d'un but, d'un objectif ou d'une cause de nature politique, religieuse ou idéologique,

(B) en vue - exclusivement ou non - d'intimider tout ou partie de la population quant à sa sécurité, entre autres sur le plan économique, ou de contraindre une personne, un gouvernement ou une organisation nationale ou internationale à accomplir un acte ou à s'en abstenir, que la personne, la population, le gouvernement ou l'organisation soit ou non au Canada,

(ii) d'autre part, qui intentionnellement, selon le cas:

(A) cause des blessures graves à une personne ou la mort de celle-ci, par l'usage de la violence,

(B) met en danger la vie d'une personne,

(C) compromet gravement la santé ou la sécurité de tout ou partie de la population,

(D) cause des dommages matériels considérables, que les biens visés soient publics ou privés, dans des circonstances telles qu'il est probable que l'une des situations mentionnées aux divisions (A) à (C) en résultera,

inside or outside Canada, and

(ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,

(B) endangers a person's life,

(C) causes a serious risk to the health or safety of the public or any segment of the public,

(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

"terrorist group" means

(*a*) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or

(*b*) a listed entity,

and includes an association of such entities.

(1.1) For greater certainty, the expression

(E) perturbe gravement ou paralyse des services, installations ou systèmes essentiels, publics ou privés, sauf dans le cadre de revendications, de protestations ou de manifestations d'un désaccord ou d'un arrêt de travail qui n'ont pas pour but de provoquer l'une des situations mentionnées aux divisions (A) à (C).

Sont visés par la présente définition, relativement à un tel acte, le complot, la tentative, la menace, la complicité après le fait et l'encouragement à la perpétration; il est entendu que sont exclus de la présente définition l'acte - action ou omission - commis au cours d'un conflit armé et conforme, au moment et au lieu de la perpétration, au droit international coutumier ou au droit international conventionnel applicable au conflit ainsi que les activités menées par les forces armées d'un État dans l'exercice de leurs fonctions officielles, dans la mesure où ces activités sont régies par d'autres règles de droit international.

« Canadien » Citoyen canadien, résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés* ou personne morale constituée ou prorogée sous le régime d'une loi fédérale ou provinciale.

« entité » Personne, groupe, fiducie, société de personnes ou fonds, ou organisation ou association non dotée de la personnalité morale.

« entité inscrite » Entité inscrite sur la liste établie par le gouverneur en conseil en vertu de l'article 83.05.

« groupe terroriste »

a) Soit une entité dont l'un des objets ou l'une des activités est de se livrer à des activités terroristes ou de les faciliter;

b) soit une entité inscrite.

Est assimilé à un groupe terroriste un groupe ou une association formé de groupes terroristes au sens de la présente définition.

(1.1) Il est entendu que l'expression d'une

of a political, religious or ideological thought, belief or opinion does not come within paragraph (*b*) of the definition "terrorist activity" in subsection (1) unless it constitutes an act or omission that satisfies the criteria of that paragraph.

(2) For the purposes of this Part, facilitation shall be construed in accordance with subsection 83.19(2).

(1.1) Il est entendu que l'expression d'une pensée, d'une croyance ou d'une opinion de nature politique, religieuse ou idéologique n'est visée à l'alinéa *b*) de la définition de « activité terroriste » au paragraphe (1) que si elle constitue un acte - action ou omission - répondant aux critères de cet alinéa.

(2) Pour l'application de la présente partie, faciliter s'interprète en conformité avec le paragraphe 83.19(2).

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-7056-05

STYLE OF CAUSE: MOHAMMAD ZAHEER MOHIUDDIN v. HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 28, 2006

REASONS FOR ORDER **AND ORDER:** Snider J.

DATED: May 31, 2006

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