

Federal Court



Cour fédérale

**Date: 20210204**

**Docket: T-1392-20**

**Citation: 2021 FC 114**

**Toronto, Ontario, February 4, 2021**

**PRESENT: Mr. Justice Diner**

**BETWEEN:**

**OKSANA NEVOSTRUYEVA**

**Plaintiff**

**and**

**HER MAJESTY THE QUEEN**

**Defendant**

**JUDGMENT**

**UPON MOTION** in writing dated December 9, 2020, by the Deputy Attorney General of Canada, on behalf of Her Majesty the Queen (the Crown), pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 [*Rules*] for:

- a) an order pursuant to Rules 8, 221(1)(a), (c) and (f) of the *Rules* striking the Statement of Claim, without leave to amend, and dismissing the action, with costs of this motion awarded to the Defendant;

- b) if the Statement of Claim is not struck, an order extending the time for the Defendant to serve and file a statement of defence by 30 days from the date of the order in respect of this motion; and
- c) such further and other relief as may seem just to this Honourable Court;

**AND UPON** noting the Defendant's Solicitor's Certificate of Service filed on December 9, 2020, confirming service of the Defendant's motion record on the Plaintiff by e-mail on the same date; the Plaintiff has not filed a response to the Defendant's Motion and the time for doing so has expired.

**AND UPON** reading the Defendant's Motion Record, including:

- the Notice of Motion on behalf of the Defendant filed on December 09, 2020;
- Affidavit of Aleksandra Wojciechowski and related exhibits including the Plaintiff's Statement of Claim;
- Written representations, and authorities.

**THIS COURT NOTES that:**

[1] The Plaintiff commenced the underlying action against the Crown and the Attorney General of Canada on November 16, 2020.

[2] The 9-page Statement of Claim raises the following points:

- At paragraphs 1-3, that Associate Chief Justice Gagne (ACJ) dismissed files IMM-4233-18 and IMM-4926-18;

- At paragraphs 4-18, that there are four divisions of the Immigration and Refugee Board, which are responsible for different areas of adjudication under the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]*;
- And in the remaining paragraphs of her Statement of Claim (18-22):

(18) To put it simply, the proceeding at the IRB is possible only when the party to it is in Canada, and the legislature ultimately provides only for two possible outcomes: a person either obtains or reconfirms his/her legal status in Canada, or alternatively gets a removal order on his/her name and becomes obliged to leave Canada.

(19) Since the Plaintiff has never received any requests to leave Canada, and records of the CBSA confirm that there are no removal orders on Plaintiff's name or any other restrictions on exit/entry from/to Canada;

(20) And since Madam Justice Gagné confirmed the existence of the status by rejecting the request for its' repeated issuance, because the status cannot be granted on conditions of overriding existing status;

(21) It is plain and obvious that Plaintiff's status document were issued before February 20, 2019, the date of Madam's Justice Gagné decisions. However, none of the status documents were handed to the Plaintiff.

### **B. Relief Thought [sic]**

(22) Thus, the Plaintiff is seeking an order obliging Immigration, Refugees and Citizenship Canada to present her all status documents issued or have to be issued on her name.

[3] Rule 221 reads as follows:

#### **Motion to strike**

**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

#### **Requête en radiation**

**221 (1)** À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans

	autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be,	a) qu'il ne révèle aucune cause d'action ou de défense valable;
(b) is immaterial or redundant,	b) qu'il n'est pas pertinent ou qu'il est redondant;
(c) is scandalous, frivolous or vexatious,	c) qu'il est scandaleux, frivole ou vexatoire;
(d) may prejudice or delay the fair trial of the action,	d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
(e) constitutes a departure from a previous pleading, or	e) qu'il diverge d'un acte de procédure antérieur;
(f) is otherwise an abuse of the process of the Court,	f) qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

#### **Evidence**

(2) No evidence shall be heard on a motion for an order under paragraph (1)(a).

#### **Preuve**

(2) Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)a).

[4] On a motion to strike out a pleading under Rule 221, the test to show that there is no reasonable cause of action is whether it is plain and obvious on the facts that the claim cannot succeed. The claim should be read generously with allowance for inadequacies due to drafting deficiencies.

[5] The case law establishes that the Court should exercise its discretion to strike only in the clearest of cases (*Hunt v Carey*, [1990] 2 SCR 959 at 976 [*Hunt*]). The general principle that allegations that are capable of being proved must be taken as true does not apply to allegations

based on assumptions and speculation, where adduction of evidence would not prove the allegation to be true: *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at 455.

[6] Here, the ACJ's two Orders finally disposed of those applications for leave and judicial review, both for the failure to conform to prior directions of the Court, and for the failure to file an Application Record.

[7] The Court must read the pleading generously with a view to accommodating drafting deficiencies (*Lewis v Canada*, 2012 FC 1514 at para 10).

[8] Read in its broadest possible right, the Plaintiff does not advance any reasonable argument that could properly form the subject matter of a trial (*Hunt* at 971).

[9] As Justice Gauthier stated in *Carten v Canada*, 2010 FC 857 at para 29, "it must be plain and obvious that the plaintiffs have no chance of success because their Statement of Claim discloses no reasonable cause of action".

[10] I conclude that the Statement of Claim is without merit: it is plain and obvious on the facts that it discloses no reasonable cause of action. There is no basis upon which this Court could grant the relief sought.

[11] That is the situation at hand, due to the lack of material facts and particulars in the pleading as to how the two Orders of the ACJ give rise to an actionable wrong (*Baird v Canada*, 2006 FC 205 at para 13, *aff'd* 2007 FCA 48). For instance, there is no information relating to current status in Canada, past immigration proceedings, the relevance of documents sought, and the relevance of the Orders cited.

[12] From what is discernable from the Statement of Claim, what the Plaintiff seeks is not predicated on any reasonable cause of action. At best, the relief may more appropriately constitute the basis for an application for *mandamus*. In short, the action cannot proceed because it discloses no basis upon which the Court could grant relief, and that the relief sought cannot be granted in an action

[13] Finally, as I am satisfied that no amendments could cure the defects in his claim, this Order to strike will be without leave to amend. No amendment can be made to the pleading to cure its fundamental defects (see *Bjorkman v Canada*, 2018 FC 721 at para 7, citing *Simon v Canada*, 2011 FCA 6 at para 8).

[14] As no costs have been requested, none shall issue.

**THIS COURT’S JUDGMENT is that:**

1. The Statement of Claim is struck out, without leave to amend.
2. No costs shall issue.

“Alan S. Diner”

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Judge