Federal Court  Cour fédérale

Date: 20200110

Docket: T-676-19

Citation: 2020 FC 27

Ottawa, Ontario, January 10, 2020

PRESENT: THE CHIEF JUSTICE

BETWEEN:

ALEXANDRA MOORE

Plaintiff

And

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

I. Introduction

[1] In this Motion, Ms. Moore appeals an Order of Prothonotary Milczynski striking her Statement of Claim in this proceeding, without leave to amend, and dismissing her action, all without costs.

[2] In her Statement of Claim, Ms. Moore seeks the following relief:

a) a declaration that the entire Canada-U.S. border is an official port of entry or border crossing – this relief is sought in order to close an alleged "loophole" in the Safe Third Country Agreement;

b) a declaration that any and all asylum claims must be initiated in the first safe country the person arrives in, without exception;

c) a declaration that being in a country illegally is not a legitimate ground of fear or persecution;

d) an order of automatic deportation for illegal economic migrants attempting to cross into Canada; and

e) an order that retroactively voids, denies or invalidates any existing claims by persons who have crossed into Canada illegally – this relief is sought on the grounds that those claims "took advantage of the loophole."

[3] In her reasons for striking the Statement of Claim [the "**Decision**"], Prothonotary Milczynski determined that Ms. Moore's claims do not disclose any reasonable cause of action or justiciable issue. In addition, she found that Ms. Moore's allegations "are argumentative, bald assertions and statements of conclusion that adhere to and express [Ms. Moore's] personal opinions without material facts pleaded that would give rise to any cause of action in law or that would result in the remedies that she is seeking."

[4] Having regard to the foregoing, Prothonotary Milczynski concluded that "it is plain and obvious and without doubt that [Ms. Moore's] claim cannot succeed and that in light of what [Ms. Moore] has described as the essence of her claim (her complaints about illegal immigration, fake refugees and border security), that there is no real issue or matter to be tried that could be cured by the granting of leave to make amendments."

[5] For the reasons that follow, I agree. This appeal will therefore be dismissed.

II. **The Relevant Rules**

[6] Pursuant to Rule 174 of the *Federal Courts Rules*, SOR/98-106 [the "***Rules***"], every pleading must contain a concise statement of the material facts on which the party making the pleading relies, but shall not include evidence by which those facts are to be proved.

[7] Pursuant to Rule 175, a party may raise any point of law in a pleading.

[8] Under Rule 221(1)(a) the Court may, on motion, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it discloses no reasonable cause of action or defence, as the case may be. The Court may then order that the action be dismissed.

III. **Ms. Moore's pleadings and the Defendant's Motion to Strike**

[9] Ms. Moore's pleadings pertain to the Safe Third Country Agreement between Canada and the United States (*Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, 5 December 2002, Can TS 2004 No 2 (entered into force 29 December 2004) [the "**STCA**"]) and the legislation that contemplates agreements such as the STCA.

[10] In this latter regard, paragraph 101(1)(e) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [the "***IRPA***"] provides that a claim for refugee protection is ineligible to be referred to the Refugee Protection Division of the Immigration and Refugee Board of Canada if the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence.

[11] In addition, subsection 102(1) of the *IRPA* contemplates the enactment of regulations governing matters relating to sections 100 and 101, including the sharing of responsibility with governments of foreign states for the consideration of refugee claims. Pursuant to paragraph 102(1)(a) and (b), countries that meet certain conditions can be designated and placed on a list. Moreover, paragraph 102(1)(c) authorizes provisions respecting the circumstances and criteria for the application of paragraph 101(1)(e). Finally, subsection 102(2) identifies factors to be considered in designating a country under paragraph 102(1)(a) of the *IRPA*.

[12] There is no dispute between the parties with respect to any of the above-mentioned provisions, or with respect to whether the U.S. meets the requirements for designation that are contemplated by paragraph 101(1)(e) and section 102 of the *IRPA* and the regulations that were passed pursuant thereto.

[13] In her pleadings, Ms. Moore notes that the STCA contains a "loophole," because it "only covers 'official ports of entry,' or official land border crossings." She states that "[t]his means that the law can be circumvented by merely going AROUND any official border crossings." However, she then suggests that the real issue does not concern the terms of the SCTA, but rather the manner in which it is being interpreted and enforced. In this regard, she states: "No reasonable person could interpret the [STCA] to mean that [it] could be bypassed by ignoring official checkpoints. That would reward lawbreakers." Thus, "the only issue [concerning the STCA] is of enforcing it properly." She alleges that the Defendant's failure to do so "poses security and financial burdens," gives rise to "great expense to taxpayers" and permits "asylum seekers" to "shop around" for a better country, namely, Canada. She adds that "the illegal, economic migrants (fake refugees) would be ineligible" anyway, pursuant to subsection 34(1)(b.1) of the *IRPA*. That provision declares permanent residents and foreign nationals to be inadmissible to Canada on security grounds, for engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada.

[14] In its Motion to Strike, the Defendant advanced two principal arguments. First, it submitted that Ms. Moore does not have private interest standing or public interest standing. Second, it maintained that the "Statement of Claim discloses no reasonable cause of action as the

claim raises no identifiable cause of action and provides no basis for the remedies [Ms. Moore] seeks."

[15] More specifically, the Defendant maintained that Ms. Moore had "not provided the necessary facts that can establish a cause of action, and it is unclear what type of remedies she seeks from the Court and on what basis." The Defendant added: "[Ms. Moore] does not appear to challenge any federal law but seeks to amend the [STCA]. If her remedies do challenge federal law, she has not indicated which law and on what basis the law is unconstitutional or *ultra vires*." Moreover, to amend the STCA would be outside this Court's jurisdiction.

IV. **Issues**

[16] In this Motion appealing the striking of her Statement of Claim without leave to amend, and the dismissal of her action, Ms. Moore raises several issues with respect to the Decision. However, the Defendant states that the sole issues concern the applicable standard of review and whether Ms. Moore has established an error in the Decision.

[17] I agree with the Defendant's broader approach, but would reformulate the issues to be determined on this Motion as follows:

a) What is the applicable standard of review?

b) Does Ms. Moore have standing to bring her action?

c) Did Prothonotary Milczynski err in striking the Statement of Claim without leave to amend and in dismissing Ms. Moore's action?

V. **Analysis**

A. *What is the applicable standard of review?*

[18] A prothonotary's decision with respect to the merits of a motion to strike is a discretionary ruling: *Amos v Canada*, 2017 FCA 213, at para 27 [***Amos***]; *Ducap v Canada (Attorney General)*, 2017 FC 320, at paras 25-26.

[19] Discretionary decisions of prothonotaries are subject to the standards of review set forth in *Housen v Nikolaisen*, 2002 SCC 33: *Amos*, above; *Hospira Healthcare Corp v Kennedy Institute of Rheumatology*, 2016 FCA 215, at paras 28, 65 and 79. Accordingly, questions of fact and questions of mixed fact and law are reviewable on a standard of palpable and overriding error. However, questions of law and questions concerning legal principles that can be extracted from questions of mixed fact and law are reviewable on a standard of correctness: *Pfizer Canada Inc v Amgen Inc*, 2019 FCA 249, at para 36; *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157, at paras 71-74.

[20] A motion to strike an application in this Court will only be granted where it is "plain and obvious" that the application is "bereft of any possibility of success," assuming the facts alleged in application to be true: *Windsor (City) v Canadian Transit Co*, 2016 SCC 54, at paras 24 and 72; *Canada (Minister of National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250, at paras 47 and 52 [***JP Morgan***]; *Chrysler Canada Inc v Canada*, 2008 FC 727, aff'd 2008 FC 1049, at para 20.

[21] In considering such motions, the initiating pleadings should be read as generously as possible, in a manner that accommodates any inadequacies in the allegations that are merely the result of drafting deficiencies: *Operation Dismantle Inc v Canada*, [1985] 1 SCR 441, at 451["***Operation Dismantle***"]; *Amnesty International Canada v Canada (Minister of National Defence)*, 2007 FC 1147, at para 33; *Toyota Tsusho America Inc v Canadas (Canada (Border Services Agency)*, 2010 FC 78 at para 13, aff'd 2010 FCA 262.

B. *Does Ms. Moore have standing to bring her action?*

a) Personal Interest Standing

[22] In her Statement of Claim, Ms. Moore did not assert any personal interest. Instead, she referred to (i) the "security and financial burdens" imposed on Canada by the "fake refugees" who have come into Canada, (ii) the "great expense to taxpayers", and the federal government's "obligation to the public to enforce agreements in good faith, and to not allow loopholes to undermine public policy." She explained that "it is the complete flaunting of a legitimate international agreement that is the issue."

[23] Nevertheless, in her written submissions on the present Motion, Ms. Moore asserted that "providing a secure border is arguably the most important function a government should serve" and that, as a citizen of this country, she has "a legitimate interest in having secure borders." She added that "letting people into the country who are unscreened is a danger to [her] well being."

[24] To the extent that a state's duty to provide a framework for the security of its citizens has been recognized to be an important part of the fundamental bargain between the state and its citizens (*Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, at paras 40-41), I consider that Ms. Moore has a personal interest in the integrity of Canada's borders.

[25] However, that alone is not sufficient for her to have personal interest standing to challenge the terms of a public legal instrument such as the STCA, or the manner in which the STCA is being interpreted and enforced by the federal government. For those purposes, Ms. Moore must demonstrate that she is directly affected either by the alleged deficiencies in the STCA or by the government's interpretation and enforcement of the SCTA. In this regard, speculative or remote impacts are not sufficient: *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607, at 623-624 [***Finlay***]. Instead, Ms. Moore must establish that she "is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest," or that she is likely to "suffer some disadvantage, other than a sense of grievance or a debt for costs": *Finlay*, above, at 623, *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2010 BCCA 439, at para 29**.** In this latter regard, it is possible that a demonstration of prejudice that is exceptional, relative to what is experienced by the general public, may suffice, as it does in other contexts: see, e.g., *Hy and Zel's Inc v Ontario (Attorney General)*, [1993] 3 SCR 675 at 707-708.

[26] In my view, Prothonotary Milczynski did not commit a palpable and overriding error in concluding that Ms. Moore did not have such a direct personal interest in the outcome of her action, and that therefore she did not have personal interest standing to bring her action.

[27] Ms. Moore did not articulate anywhere in her pleadings any material facts that suggest that she is directly affected, in the sense described above, by the alleged "loophole" in the STCA, or by the manner in which it is being interpreted and enforced by the federal government. For greater certainty, Ms. Moore has not demonstrated that she is likely to gain some advantage or suffer some disadvantage, impact or prejudice that is non-speculative, non-remote or exceptional, relative to what is, or may in the future be, experienced by the general public.

b) Public Interest Standing

[28] To establish public interest standing, Ms. Moore must establish that a consideration of the following three factors favours a grant of standing: (i) whether a serious justiciable issue has been raised, (ii) whether she has a real stake or a genuine interest in the issues she has raised, and (iii) whether, in all the circumstances, her action is a reasonable and effective way to bring the issue(s) before the courts: *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, at para 37 ["***Downtown Eastside Sex Workers***"].

[29] In my view, Prothontary Milczynski did not commit a palpable and overriding error in concluding that Ms. Moore had not established the first of the above-mentioned factors. Although her conclusion was not expressed in such terms, it is implicit from her Decision that she considered that this pre-condition had not been met. This is the logical implication of her conclusion that Ms. Moore had not pleaded material facts "that would give rise to any cause of action in law or that would result in the remedies that she is seeking."

[30] If, as Ms. Moore repeatedly asserts in her pleadings, there is a "loophole" in the terms of STCA, that is a matter to be addressed between the Government of Canada and the Government of the United States of America. It is not the role of this Court to modify the terms of an international agreement between Canada and another country. Stated differently, this is not a justiciable issue for this Court to resolve.

[31] I recognize that Ms. Moore has also stated that her concern with respect to the STCA relates to the manner in which it is being interpreted and enforced by the federal government. However, that is not a serious or substantial issue in the sense contemplated by the jurisprudence: *Downtown Eastside Sex Workers*, above, at para 42. In the absence of such an issue, public interest standing ought not to be granted: *Downtown Eastside Sex Workers*, above, at paras 40-41.

[32] Article 4(1) of the STCA explicitly confines that agreement to persons who arrive at "a land border port of entry," and this Court has confirmed that the STCA does not apply to refugee applicants who made their claim for refugee protection at a location that is not port of entry: *Zhao v Canada (Minister of Public Safety and Emergency Preparedness and Minister of Citizenship and Immigration)*, 2015 FC 1384, at para 16. Moreover, on a plain reading of section 159.4(1)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the "**Regulations**"], it is clear that paragraph 101(1)(e) of the *IRPA* does not apply to a refugee claimant who seeks to enter Canada at a location that is not a port of entry. Therefore, persons who enter Canada at such locations are not precluded from applying for refugee protection in this country, unless another exception to their ability to make such an application applies. The only

such exception identified by Ms. Moore is paragraph 34(1)(b.1) of the *IRPA*, which was baldly asserted without any supporting material facts whatsoever.

[33] In summary, Prothontary Milczynski did not commit a palpable and overriding error in concluding that Ms. Moore had not met the test for public interest standing, because she had not raised a serious justiciable issue for determination by this Court.

[34] I pause to note that in light of the conclusion I have reached in part V.C. of these reasons immediately below, nothing turns on my conclusions regarding the findings that were made with respect to Ms. Moore's lack of personal or public interest standing.

C. *Did Prothonotary Milczynski err in striking the Statement of Claim without leave to amend and dismissing Ms. Moore's action?*

[35] The analysis of this issue can be confined to an assessment of whether Prothonotary Milczynski erred in law, or committed a palpable and overriding error, in determining that (i) Ms. Moore did not plead material facts that would give rise to any cause of action in law or that would provide a basis for the remedies she is seeking, and (ii) it was plain and obvious that Ms. Moore's claim could not succeed, even if leave were granted to make amendments. If Prothonotary Milczynski did not err, in the manner I have described above, in reaching these conclusions, then that constitutes a sufficient basis upon which to dismiss this appeal.

[36] In my view, Prothonotary Milczynski did not err in law and did not commit any palpable and overriding error in reaching these conclusions.

[37] With respect to alleged errors of law, Ms. Moore asserts Prothonotary Milczynski did not appropriately consider "the argument of unjust enrichment or unconscionability." However, Ms. Moore's Statement of Claim did not refer to either of those legal doctrines.

[38] Although Ms. Moore briefly raised those doctrines in her Respondent's Motion Record, she did not raise any potentially meritorious issues in respect thereof. With respect to the doctrine of unjust enrichment, Ms. Moore simply asserted that the "so called 'refugees' have been accessing public services" and thereby "taking away from actual citizens", and that they have been obtaining "Canadian residence or citizenship" on the basis of false pretences. Regarding the doctrine of unconscionability, Ms. Moore merely stated that persons "trying to circumvent proper immigration channels should not be rewarded." In my view, these statements did not give rise to an obligation on Prothonotary Milczynski to specifically consider the two doctrines, or the possibility of amendments in relation thereto. Moreover, the relief sought by Ms. Moore was not in any way connected to the doctrines of unjust enrichment or unconscionability. The closest Ms. Moore came to anything that might remotely be considered to be apposite in this regard was when she referred to "financial burdens" and "the great expense to taxpayers." That said, towards the end of her Statement of Claim, Ms. Moore explicitly stated that "this case is not about money."

[39] Ms. Moore further maintains that Prothonotary Milczynksi erred in law by "striking out a matter that is not simple, or established law." Once again, I do not agree. The decision to strike Ms. Moore's Statement of Claim in its entirety was a discretionary decision that turned on issues of mixed fact and law, and in particular, the absence of pleaded material facts that would give

rise to any cause of action in law or that would provide a basis for the remedies that she sought. Accordingly, the standard of review applicable to that aspect of the Decision is that of "palpable and overriding error." In my view, no such error was made in striking the Statement of Claim, regardless of the novel nature of some or all of the claims made by Ms. Moore.

[40] Ms. Moore also submits that Prothonotary Milczynski erred by not providing her with an opportunity to cure the deficiencies in her Statement of Claim, through amendments. In my view, that was not an error of law, but rather a discretionary determination that is subject to review on the "palpable and overriding error" standard. I do not consider that any such error was made by failing to provide Ms. Moore with the opportunity to amend her Statement of Claim, in order to cure the deficiencies that were identified in the Decision. Having reviewed the Statement of Claim in the light of the various submissions that Ms. Moore has made, on this Motion as well as on the Motion that was before Prothonotary Milczynski, it is not apparent to me how the identified deficiencies could have been cured through amendments. I pause to note that, on the latter Motion, Ms. Moore did not identify any particular potential amendments that could have been made to her Statement of Claim in order to overcome its deficiencies.

[41] Ms. Moore also alleges that Prothonotary Milczynski erred by failing to conduct research or "due diligence" regarding her claims. However, that is not the role of the Court in an adversarial proceeding.

[42] In addition, Ms. Moore alleges that the Defendant brought its Motion to Strike in bad faith, and that this constituted an abuse of process, because the Defendant is defending the STCA

in another proceeding before this Court. In support of these allegations, Ms. Moore states that the Defendant has been maintaining in the other proceeding that the STCA is "vital," and "necessary to protect Canadian borders from abuse," while at the same time it moved to strike the Statement of Claim that she brought in an effort "to close the loophole." Without more, these are not meritorious allegations.

[43] In my view, the Decision to strike Ms. Moore's Statement of Claim in its entirety turned on the determination that Ms. Moore did not plead sufficient material facts that would give rise to any cause of action in law or that would provide a basis for granting the remedies that she is seeking. Based on that determination, Prothonotary Milczynski concluded that it is plain and obvious that Ms. Moore's claim could not succeed, and that there is no real issue or matter to be tried that could be cured by the granting of leave to make amendments. Even when Ms. Moore's pleadings are read as generously as possible, I am satisfied that Prothonotary Milczynski did not commit a palpable and overriding error in reaching that conclusion or in making the determination upon which it rested.

[44] In summary, I am satisfied that Prothonotary Milczynksi did not commit any errors of law in reaching the Decision, and did not commit a palpable and overriding error in determining that (i) Ms. Moore did not plead material facts that would give rise to any cause of action in law or that would provide a basis for the remedies she is seeking, and (ii) it was plain and obvious that Ms. Moore's claim could not succeed, even if leave were granted to make amendments. The deficiencies in Ms. Moore's Statement of Claim were not merely "inadequacies in the allegations that are merely the result of drafting deficiencies": *Operation Dismantle*, above.

VI. **Conclusion**

[45] For the reasons provided above, this Motion is denied.

ORDER in T-676-19

THIS COURT ORDERS that:

1. This Motion is denied. Prothonotary Milczynski's decision to strike Ms. Moore's Statement of Claim in its entirety, without leave to amend, and to dismiss Ms. Moore's action, without costs, is affirmed.

"Paul S. Crampton"
Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-676-19
STYLE OF CAUSE:	ALEXANDRA MOORE v HER MAJESTY THE QUEEN

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	CRAMPTON C.J.
DATED:	JANUARY 10, 2020

WRITTEN REPRESENTATIONS BY:

Alexandra Moore	ON HER OWN BEHALF
Alexandra J. Scott	FOR THE DEFENDANT

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