IMM-6468-03

2006 FC 1301

Hassan Samimifar (*Plaintiff*)

v.

The Minister of Citizenship and Immigration and **Her Majesty the Queen** (*Defendants*)

INDEXED AS: SAMIMIFAR v. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) (F.C.)

Federal Court, Snider J.—Toronto, September 26; Ottawa, October 30, 2006.

Citizenship and Immigration — Immigration Practice — Motion for summary judgment under Federal Courts Rules, rr. 213 to 219 dismissing action for damages caused by negligence, unreasonable delay on ground no issue for trial — Plaintiff seeking permanent resident status in 1985 — Granted approval-in-principle in 1994 to accept, process application for permanent residence (PR application) from within Canada but PR application refused in 2003 because plaintiff found inadmissible under Immigration and Refugee Protection Act (IRPA), s. 34(1)(f) — That decision quashed on judicial review, redetermination ordered — Plaintiff bringing action in negligence, for violation of Canadian Charter of Rights and Freedoms, ss. 7, 24(1) because of unreasonable delay, abuse of process — Because plaintiff attacking delay, not denial of PR application, not precluded from bringing action because not first seeking relief under Federal Courts Act, s. 18.1 — However, claims for damages based on lack of permanent resident status struck since admissibility, PR application not yet determined; such damages could not be linked to alleged delay in processing — Right to bring application for mandamus during period of delay not barring action for damages — Such right exhausted when PR application refused in 2003 — Motion dismissed.

Practice — Summary Judgment — Motion for summary judgment under Federal Courts Rules, rr. 213 to 219 dismissing action alleging negligence, breach of Canadian Charter of Rights and Fredoms based on undue delays in processing permanent residence application — Summary judgment granted only when no genuine issue for trial — Relevant principles, test in determining whether summary judgment should be granted in present motion examined, applied.

Crown — Torts — Motion for summary judgment under Federal Courts Rules, rr. 213 to 219 dismissing action alleging negligence, breach of Canadian Charter of Rights and Freedoms — Two-part test set out in Anns v. Merton London Borough Council applied — Reliance, proximity between plaintiff, specific immigration officer allegedly responsible for processing application and with whom plaintiff had regular contact during period of delay giving rise to duty of care — Although compelling policy considerations justifying dismissal of action, not precluding imposition of duty of care where, as here, immigration officer completely ignoring file — Negligence allegation could not be dealt with on motion for summary judgment.

Constitutional Law — Charter of Rights — Life, Liberty and Security — Motion for summary judgment under Federal Courts Rules, rr. 213 to 219 dismissing action for damages alleging negligence, breach of Canadian Charter of Rights and Freedoms , ss. 7, 24(1) — Whether Charter, s. 7 engaged, whether deprivation contrary to principles of fundamental justice — Evidence plaintiff suffering severe psychological harm extending beyond mere grief, sorrow emotional distress caused by unreasonable delay in processing permanent residence application — Behaviour of officials responsible for plaintiff's file requiring extensive review — Genuine issue to be tried with respect to Charter damages.

This was a motion for summary judgment pursuant to rules 213 to 219 of the *Federal Courts Rules* (Rules) dismissing all or part of the plaintiff's claim set out in the further amended statement of claim on the grounds that there was no issue for trial. In particular, it was alleged that the plaintiff failed to pursue his available judicial review remedies and that there is no private law duty of care owed by immigration officials to the plaintiff that would give

rise to potential liability in negligence or that would allow recovery of damages pursuant to the *Canadian Charter of Rights and Freedoms* (Charter). The plaintiff, an Iranian, came to Canada in 1985 and has since been seeking permanent resident status. On November 14, 1994, he was granted approval-in-principle to accept and process his application for permanent residence (PR application) from within Canada. From the time he submitted his application to January 2003, when he was informed that his PR application was refused because he was inadmissible to Canada under paragraph 34(1)(*f*) of the *Immigration and Refugee Protection Act* (IRPA) (reasonable grounds to believe that he was a member of a terrorist organization), his PR application does not seem to have been processed. In May 2003, on judicial review, that decision was quashed and a redetermination was ordered and is still pending. The plaintiff also brought an action against the Minister of Citizenship and Immigration on August 20, 2003 and later added Her Majesty the Queen as a defendant, claiming negligence and violation of his rights under section 7 and subsection 24(1) of the Charter. Essentially, the plaintiff claims that the unreasonable delay and abuse of process have resulted in a loss of business, employment and education opportunities, out-of-pocket expenses for him, his common-law wife and children and emotional distress and suffering. He also seeks declaratory relief under section 52 of the *Constitution Act, 1982* but conceded that this declaration cannot normally be combined with a claim under the Charter. The period of alleged delay that gave rise to the plaintiff's claims in damages began in 1994, when he was approved in principle for PR status and ended either in 2001, when his file started to be processed, or in 2003 when he was refused admissibility to Canada.

The main issue was whether there was a genuine issue for trial. The sub-issues were: (1) what is the test for summary judgment; (2) whether the plaintiff is precluded from bringing the action because he did not first seek relief by way of extraordinary remedy under section 18.1 of the *Federal Courts Act* (FCA); (3) whether the defendant owes the plaintiff an actionable private duty of care that would give rise to potential liability in negligence; and (4) whether the plaintiff can seek damages for breach of his Charter rights.

Held, the motion should be dismissed.

(1) Summary judgment should be granted where there is no genuine issue for trial. In determining whether summary judgment should be granted in the present motion, the following relevant principles were applied: the general test is whether the case is so doubtful and "clearly without foundation" that it deserves no further consideration; each case should be interpreted within its own factual context; a question of fact and law may be determined on the motion if it can be done on the material before the Court; summary judgment should not be granted if the necessary facts cannot be found or doing so would be unjust; and the matter should proceed to trial where the outcome depends on serious issues of credibility or where the material facts are in dispute.

(2) The plaintiff could not be precluded from bringing this action because he did not first seek relief by way of extraordinary remedy under section 18.1 of the FCA. The plaintiff is attacking the delay and seeking damages for the consequences flowing therefrom. Such delay was not a "decision" and was no longer affecting the plaintiff since a final decision in his case had already been made. Therefore, it was open to him to bring an action claiming damages. Also, the plaintiff's action was not a collateral attack on the January 2003 decision denying admissibility that could have been pursued by way of judicial review. His statement of claim demonstrated that the alleged damages arose purely from the delay, not the effect of the negative PR administrative decision. However, because the plaintiff's PR application has not been determined and it is not yet known whether the applicant is admissible, no damages based on a lack of status as a permanent resident can be linked to the alleged delay and therefore those claims had to be struck. Finally, the plaintiff could not be barred from bringing the action for damages because he had the right to bring an application for *mandamus* during the period of delay. The 2003 PR application refusal exhausted those rights and therefore an application for *mandamus* could not be brought since it would have no practical possibility and would not address the delay from 1994 to 2003.

(3) In determining whether there was potential liability in negligence, the two-part test set out in *Anns v. Merton London Borough Council* was applied. In the first part of the test—whether the circumstances disclosed reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care—although the relationship between the government and the governed regarding policy matters is not one of individual proximity, there are situations where the Crown is liable as a person and a duty of care exists. In this case, because there was a specific officer who was allegedly responsible for processing the plaintiff's application and with whom he was in regular contact during much of the period of delay, there was more than mere delay: there was reliance and proximity between the plaintiff

and the immigration officer to process his application in a timely fashion and this gave rise to a duty of care. Despite the fact that the Minister has no statutory duty to render a decision in a specific amount of time and delays in the processing of immigration applications are inherent to the system, a common-law duty of care may arise if the facts are sufficient to support the action.

The second part of the test—whether residual policy considerations exist which justify dismissing the action in liability summarily—was answered in the negative. While some policy considerations (e.g. where the imposition of a duty of care would hamper the effective performance of the system of immigration control and the spectre of indeterminate liability would loom large if a common-law duty of care was recognized between the Crown and an immigration applicant) are very compelling, they do not preclude imposition of a duty of care where an immigration officer completely ignores a file, which apparently happened herein. Consequently, the negligence allegation was not an issue that could be dealt with on a motion for summary judgment.

(4) In order to determine whether the plaintiff could claim damages for breach of section 7 Charter rights, it had to be determined whether section 7 was engaged and whether the deprivation was contrary to the principles of fundamental justice. Because there was evidence that the plaintiff had suffered severe psychological harm, which extended beyond mere grief, sorrow or emotional distress as a result of the processing delays, there was an issue for trial. In some cases, delay by state officials can result in a determination that the conduct was not consistent with the principles of natural justice and therefore constituted a breach of the section 7 requirement for fundamental justice. In the present case, the behaviour of the officials who were responsible for the plaintiff's file during the period between 1994 and 2003 will have to be extensively reviewed and was better left for trial. As for damages, if the allegations in the pleadings are proven at trial, they would be considered a gross departure from the behaviour expected from public servants and could give rise to a claim for Charter damages. Therefore, there was a genuine issue to be tried with respect to Charter damages based on the plaintiff's psychological harm caused by negligence or unreasonable delay.

statutes and regulations judicially considered

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 7, 24(1).

Canadian Human Rights Act, R.S.C., 1985, c. H-6.

Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 52.

Crown Liability and Proceedings Act, R.S.C., 1985, c. C-50, ss. 1 (as am. by S.C. 1990, c. 8, s. 21), 3 (as am. by S.C. 2001, c. 4, s. 36), 10 (as am. *idem*, s. 40).

Federal Courts Act, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2000, c. 8, s. 14), 18.1 (as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27).

Federal Courts Rules, SOR/98-106, rr. 1 (as am. by SOR/2004-283, s. 2), 213, 214, 215, 216, 217, 218, 219.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 3(1)(*f*), 34(1)(*f*), 72(1) (as am. by S.C. 2002, c. 8, s. 194).

cases judicially considered

applied:

Granville Shipping Co. v. Pegasus Lines Ltd., [1996] 2 F.C. 853; (1996), 111 F.T.R. 189 (T.D.); *Morgan v. Canada* (1998), 117 B.C.A.C. 296 (B.C.C.A.); *Zarzour v. Canada* (2000), 153 C.C.C. (3d) 284; 268 N.R. 235 (F.C.A.); *Khalil v. Canada* (2004), 252 F.T.R. 292; 2004 FC 732; *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307; (2000), 190 D.L.R. (4th) 513; [2000] 10 W.W.R. 567; 23 Admin. L.R. (3d) 175; 81 B.C.L.R. (3d) 1; 3 C.C.E.L. (3d) 165; 77 C.R.R. (2d) 189; 260 N.R. 1; 2000 SCC 44; *Hawley et al. v. Bapoo et al.* (2005), 76 O.R. (3d) 649; 134 C.R.R. (2d) 86; [2005] O.T.C. 894 (S.C.J.).

distinguished:

Canada v. Tremblay, [2004] 4 F.C.R. 165; (2004), 244 D.L.R. (4th) 422; 327 N.R. 160; 2004 FCA 172; leave to appeal to S.C.C. refused, [2004] 3 S.C.R. xiii ; *Canada v. Grenier*, [2006] 2 F.C.R. 287; (2005), 262 D.L.R. (4th) 337; 344 N.R. 102; 2005 FCA 348; *Mohiuddin v. Canada*, 2006 FC 664; *Dhalla v. Canada (Minister of Citizenship and Immigration)* (2006), 286 F.T.R. 255; 2006 FC 100; *W. v. Home Office*, [1997] E.W.J. No. 3289 (C.A.) (QL); *Premakumaran v. Canada* (2005), 33 C.C.L.T. (3d) 307; 2005 FC 1131; affd [2007] 2 F.C.R. 191; (2006), 270 D.L.R. (4th) 440; 53 Imm. L.R. (3d) 161; 351 N.R. 165; 2006 FCA 213; *Benaissa v. Canada (Attorney General)*, 2005 FC 1220; *Farzam v. Canada (Minister of Citizenship and Immigration)* (2005), 284 F.T.R. 158; 2005 FC 1659.

considered:

Cooper v. Hobart, [2001] 3 S.C.R. 537; (2001), 206 D.L.R. (4th) 193; [2002] 1 W.W.R. 221; 96 B.C.L.R. (3d) 36; 160 B.C.A.C. 268; 8 C.C.L.T. (3d) 26; 277 N.R. 113; 2001 SCC 79; *Pearson v. Canada*, 2006 FC 931.

referred to:

Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick, [2002] 1 S.C.R. 405; (2002), 245 N.B.R. (2d) 299; 209 D.L.R. (4th) 564; 31 C.C.P.B. 55; 17 C.P.C. (5th) 1; 91 C.R.R. (2d) 1; 282 N.R. 201; 2002 SCC 13; *Newtec Print & Copy Inc. v. Woodley* (2001), 46 R.P.R. (3d) 123 (Ont. S.C.J.); leave to appeal to Ont. S.C.J. refused [2001] O.J. No. 5634 (QL); *Mensah v. Robinson*, [1989] O.J. No. 239 (H.C.J.) (QL); *Trojan Technologies, Inc. v. Suntec Environmental Inc.* (2004), 239 D.L.R. (4th) 536; 31 C.P.R. (4th) 241; 320 N.R. 322; 2004 FCA 140; *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 315 (T.D.); *A.O. Farms Inc. v. Canada* (2000), 28 Admin. L.R. (3d) 315 (F.C.T.D.); *Swerid v. Persoage* (1996), 22 R.F.L. (4th) 338 (Man. Q.B.); *Pinnock v. Ontario*, [2001] O.J. No. 2921 (S.C.J.); *Osborne v. Ontario (Attorney General)* (1996), 10 O.T.C. 256 (Ont. Gen. Div.); affd (1998), 115 O.A.C. 291 (Ont. C.A.); *Howell v. Ontario* (1998), 159 D.L.R. (4th) 566; 125 C.C.C. (3d) 278; 61 O.T.C. 336 (Ont. Gen. Div.).

authors cited

Roach, K. *Constitutional Remedies in Canada*, Aurora, Ont.: Canada Law Book, 2004.

MOTION for summary judgment pursuant to rules 213 to 219 of the *Federal Courts Rules* dismissing all or part of the plaintiff's claim for damages with respect to negligence or unreasonable delays in the processing of his permanent resident application, on the ground that there was no issue for trial. Motion dismissed.

appearances:

Lorne Waldman and *Lobat Shadrehashemi* for plaintiff.

Marina Stefanovic and *Claire A. Le Riche* for defendants.

solicitors of record:

Waldman & Associates, Toronto, for plaintiff.

Deputy Attorney General of Canada for defendants.

The following are the reasons for order and order rendered in English by

SNIDER J.:

I. Introduction

[1] Mr. Hassan Samimifar (the plaintiff or Mr. Samimifar) is an Iranian national who came to Canada in 1985. In

the 21 years since his arrival, Mr. Samimifar has been seeking legal status as a permanent resident (PR) of Canada. To date, he has been unsuccessful.

[2] On November 14, 1994, Mr. Samimifar was granted approval-in-principle to accept and process an application for permanent residence from within Canada. He submitted his application for PR status. From then until January 2003, Mr. Samimifar's application appears to have been subject to inattention, inaction and delay for reasons which he alleges amount to negligence and breach of his section 7 Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] rights. Finally, in January 2003, he was informed that his PR application was refused, on the basis that he was inadmissible to Canada under paragraph 34(1)(*f*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), because there were reasonable grounds to believe that he was a member of a terrorist organization. A judicial review resulted in the quashing of this decision in May 2003; the redetermination has not taken place.

[3] In addition to continuing to pursue his administrative efforts to become a permanent resident, Mr. Samimifar commenced an action against the Minister of Citizenship and Immigration by filing a statement of claim with this Court on August 20, 2003. In subsequent amendments to the statement of claim, Mr. Samimifar has added Her Majesty the Queen as a defendant. He claims that the defendant, through her agent Minister, was negligent or in violation of his rights under section 7 and subsection 24(1) of the *Canadian Charter of Rights and Freedoms* (the Charter). He also seeks declaratory relief under section 52 of the *Constitution Act, 1982* [Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, appendix II, No. 44]].

[4] In the motion before me, Her Majesty the Queen seeks summary judgment dismissing all or part of the claim set out in the further amended statement of claim. This motion is brought pursuant to rules 213 to 219 of the *Federal Courts Rules*, SOR/98-106 [r. 1 (as am. by SOR/2004-283, s. 2)], which provisions are set out in Appendix A to these reasons. Briefly, the defendant submits that there is no issue for trial given that:

• Mr. Samimifar has failed to pursue his available judicial review remedies;

• There is no private-law duty of care owed by immigration officials to Mr. Samimifar that would give rise to potential liability in negligence or that would allow recovery of damages pursuant to the Charter.

II. Proper Party to the Action

[5] In his pleadings, Mr. Samimifar named both the Minister of Citizenship and Immigration (Minister) and Her Majesty the Queen as defendants in this action. Mr. Samimifar concedes that the proper party to this action is Her Majesty the Queen. The cause of action will be amended accordingly.

III. Issues

[6] The overarching issue in this case is whether there is a genuine issue for trial, within the meaning of the *Federal Courts Rules*. In determining this question, the following sub-issues arise:

1. What is the test for summary judgment?

2. Is Mr. Samimifar precluded from bringing this action because he did not first seek relief by way of extraordinary remedy under section 18.1 [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27] of the *Federal Courts Act*, R.S.C., 1985, c. F-7 [s. 1 (as am. *idem*, s. 14)]?

3. Is there an actionable private duty of care owed by the defendant to Mr. Samimifar that would give rise to potential liability in negligence?

4. Can Mr. Samimifar seek damages for breach of his Charter rights?

[7] The defendant also questioned Mr. Samimifar's ability to obtain a declaration under the Charter. Mr.

Samimifar concedes that a claim for damages brought under subsection 24(1) of the Charter cannot normally be combined with a declaration under subsection 52(1) of the *Constitution Act, 1982* (*Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405).

IV. Analysis

A. Nature of Claim

[8] The issues raised by this motion relate to the further amended statement of claim filed by Mr. Samimifar. I will begin by reviewing the nature of the pleadings.

[9] Mr. Samimifar bases his claim on unreasonable delay and abuse of process caused by the defendant. He claims damages in the amount of $5,000,000 in negligence and under section 7 and subsection 24(1) of the Charter as a result of: loss of business and employment opportunities; loss of education opportunities; out-of-pocket expenses for, among other things, medical expenses for his common-law wife and children; and, emotional distress and suffering. Mr. Samimifar claims that the Minister and officials of Citizenship and Immigration Canada (CIC) were put on notice of their delay in processing his applications for landing and of the distress and harm he was suffering as a result.

[10] Mr. Samimifar also seeks a declaration that his rights under section 7 and subsection 24(1) have been violated.

[11] The essence of Mr. Samimifar's claims are, in my view, reflected in paragraphs 29 to 31 of his further amended statement of claim.

29. The plaintiff submits that the delay in the processing of his application was the result of improper allegation of resources on the part of the government of Canada. A large number of files that were in the 1989 backlog were sent to the Hamilton office and were neglected there for long time [*sic*] periods of time. CSIS had dealt with the plaintiff by 1995. They have not expressed any further interest in him and hence the delay between the initial decision and the final determination which was subsequently overturned are all the responsibility of the government of Canada. This delay was not the result of any need for further investigation but rather the result of neglect on the part of the immigration authorities.

30. The defendant, including immigration officials processing the plaintiff's file, owe a duty of care to the plaintiff. There is sufficient proximity between the defendant and the plaintiff that a duty of care can be imposed. The plaintiff alleges that the defendant breached this duty of care and failed to conform to the standard of care owed to the plaintiff. Given that the delay in processing the plaintiff's application resulted in the plaintiff not having permanent status in Canada and also given that the plaintiff repeatedly put immigration authorities on notice of the distress he was suffering as a result of the delay, it was reasonably foreseeable that the plaintiff would suffer harm as a consequence of their actions.

31. The plaintiff's emotional and financial life has been severely disrupted as a result of the neglect in the handling of his application and this has caused the plaintiff severe and profound emotional distress and grave economic loss.

[12] From my understanding of Mr. Samimifar's pleadings, and his affidavit and submissions on this motion, the period of alleged delay that gives rise to his claims in damages begins in 1994, when he was approved in principle for PR status, and ends either in 2001, when CIC undisputedly began to take action on his file, or in 2003, when Mr. Samimifar was refused admissibility to Canada. Hence, the pertinent time frame is seven to nine years in length. I make these statements for convenience, without making any conclusive findings of fact.

B. Issue No. 1: What is the test for summary judgment?

[13] The parties agree: summary judgment should be granted where there is no genuine issue for trial (*Granville Shipping Co. v. Pegasus Lines Ltd.*, [1996] 2 F.C. 853 (T.D.), at paragraph 8).

[14] The Court in *Granville* established a number of considerations or principles to be applied in determining whether summary judgment should be granted. These have been widely adopted by the Court and, in some instances, have been augmented by additional jurisprudence. Of most relevance to the motion before me are the following.

(i) There is no determinative test, but the general question is whether the case is so doubtful it deserves no further consideration. The defendant does not need to show that the plaintiff "could not possibly succeed at trial", only that the case is "clearly without foundation" (see also *Premakumaran v. Canada*, [2007] 2 F.C.R. 191 (F.C.A.), at paragraph 8);

(ii) Each case should be interpreted within its own factual context;

(iii) Question of fact and law may be determined on the motion, if it can be done on the material before the Court; however, where there is a genuine issue of credibility, a trial will generally be required to allow the judge the opportunity to observe the demeanour of the witness(es) (*Newtec Print & Copy Inc. v. Woodley* (2001), 46 R.P.R. (3d) 123 (Ont. S.C.J.), at paragraph 34; leave to appeal to Ont. S.C.J. refused, [2001] O.J. No. 5634 (QL); *Mensah v. Robinson*, [1989] O.J. No. 239 (H.C.J.) (QL); see esp. *Trojan Technologies, Inc. v. Suntec Environmental Inc.* (2004), 239 D.L.R. (4th) 536 (F.C.A.), at paragraphs 19-22).

(iv) Summary judgment should not be granted if the necessary facts cannot be found or it would be unjust to do so;

(v) Where the outcome depends on serious issues of credibility or where the material facts are in dispute, the matter should proceed to trial (see above); the judge should take a "hard look" at the evidence, beyond a mere appearance of evidentiary conflict.

[15] With these principles in mind, I turn to the specific issues raised on this motion.

C. Issue No. 2: Availability of Judicial Review Remedies

[16] The defendant characterizes Mr. Samimifar's claim as a complaint against the negative permanent resident decision made in January 2003; the delay leading up to that decision, beginning in 1994 when he was approved in principle for PR status, is part of that decision. From this starting point, the defendant argues that Mr. Samimifar must challenge that decision by way of judicial review, not civil action, a process which was begun and, until the redetermination, continues. In summary form, the defendant's arguments are as follows:

• The Federal Court of Appeal has clearly stated that a party cannot bring an action which amounts to a collateral attack on a final, administrative decision and that a plaintiff must exhaust administrative remedies before proceeding with a claim of damages (*Canada v. Tremblay*, [2004] 4 F.C.R. 165 (F.C.A.); leave to appeal to S.C.C. refused, [2004] 3 S.C.R. xiii and *Canada v.Grenier*, [2006] 2 F.C.R. 287 (F.C.A.); which decisions have been followed by this Court in *Mohiuddin v. Canada*, 2006 FC 664; and *Dhalla v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 100).

• Subsection 72(1) [as am. by S.C. 2002, c. 8, s. 194] of the IRPA, which expressly contemplates that "any matter—a decision, determination or order made, a measure taken or a question raised—under this Act" may be challenged by judicial review, is further support for the defendant's position.

• During the period of the delay, Mr. Samimifar should have sought a writ of *mandamus* by way of judicial review (*Morgan v. Canada* (1998), 117 B.C.A.C. 296 (B.C.C.A.); citing *Bhatnager v. Canada* (*Minister of Employment and Immigration*), [1985] 2 F.C. 315 (T.D.)).

• *Mandamus* remains an option for Mr. Samimifar.

[17] I will begin this portion of the analysis by reviewing the jurisprudence relied on by the defendant.

(1) *Canada v. Tremblay*

[18] In *Tremblay*, above, a former member of the Canadian Forces brought an action challenging his mandatory retirement, seeking damages, a reinstatement of his employment, and a declaration that the regulation setting the retirement age and a portion of the *Canadian Human Rights Act* [R.S.C., 1985, c. H-6] be declared invalid. The pertinent portion of the Federal Court of Appeal's reasons is this (at paragraph 14):

Obviously, the respondent cannot obtain reinstatement in the Canadian Forces as well as damages for loss of salary unless he first attacks the decision bearing on his retirement on the basis that the legislation underlying the retirement is inoperative under the Charter. The invalidity of this decision is at the heart of his claim and the relief sought depends on this alleged invalidity. The respondent will only be entitled to reinstatement once the decision is declared invalid. Damages can only be claimed once the reinstatement is ordered.

[19] Addressing specifically the plaintiff's claim for damages, the Court reaffirmed that the decision giving rise to the damages must first be invalidated by way of judicial review (at paragraphs 28-30).

[20] This decision of the Federal Court of Appeal is, in my view, distinguishable. Mr. Samimifar is not attacking the PR decision; rather, he is attacking the delay and seeking damages for the consequences that flowed from that delay.

(2) *Canada v. Grenier*

[21] *Grenier*, above, dealt with an action by a prison inmate for damages resulting from a decision of the institutional head to put him in administrative segregation for 14 days. The plaintiff had not sought judicial review within the required time frame of 30 days. In effect, the plaintiff, in *Grenier*, was seeking the remedy that he had failed to pursue in a timely fashion by way of judicial review. Once again, the situation before me is quite different.

[22] I also note the passage quoted by the Federal Court of Appeal, at paragraph 15 of *Grenier*, from the Federal Court decision below it:

The Federal Court applied the [principle from *Zarzour v. Canada* (2000), 153 C.C.C. (3d) 284 (F.C.A.)] to the facts in this case, and it cannot be criticized for doing so. At paragraph 8 of his decision, the judge hearing the appeal summarized his perception of the law on the issue as follows [(2004), 262 F.T.R. 94]:

> It appears from the precedents applicable in this matter that, in cases in which the decision giving rise to the harm is still operative at the time the remedy is sought, the aggrieved party cannot make use of an action but must proceed by way of judicial review: *Sweet v. Canada*, [1999] F.C.J. No. 1539, on line: QL; *Zarzour*, *supra*; *Tremblay*, *supra*. Conversely, where the decision which gave rise to the alleged harm is no longer effective at the time, it is possible for the applicant to bring an action claiming damages: *Creed v. Canada* (*Solicitor General*), [1998] F.C.J. No. 199, on line: QL; *Shaw v. Canada*, [1999] F.C.J. No. 657, on line: QL. [Emphasis added.]

[23] In my view, this passage favours Mr. Samimifar. I think it can be rightly said that the alleged delay caused by the defendant is no longer effective, because a final decision (which result is not material to Mr. Samimifar's claims in damages) has been made.

[24] The Federal Court of Appeal went on to say that, in that case, the effect of the decision continued to be effective (having a bearing on the plaintiff's administrative record, among other things; see paragraph 17), stating that any decision of a federal agency continues to be effective unless and until being declared invalid (at paragraph 18). It is arguable that the remainder of the Federal Court of Appeal's reasons do not necessarily apply to the case at bar, since the delay before me is: (a) not a decision, as such; and (b) no longer affects Mr. Samimifar. Even if the delay can be said to be a decision (i.e. a decision to refuse to act on the PR application), that decision is now null and void, since a decision on the PR application was in fact made.

(3) Collateral Attack

[25] *Grenier* is also cited for the principle that a complainant cannot bring an action as a "collateral attack" on a decision that can be or could have been pursued by way of judicial review.

[26] Is Mr. Samimifar, in effect, bringing a collateral attack on the administrative decisions that have or are to be made in his case? Just because Mr. Samimifar wishes to acquire Canadian permanent residence, which status requires administrative decisions by the Minister, does not automatically mean that Mr. Samimifar brings a collateral attack. In this case, the statement of claim demonstrates that the overall basis for Mr. Samimifar's claim in damages is not the effect of the administrative decision (the refusal of PR status). Indeed, the outcome of the admissibility decision is mostly irrelevant. Rather, the alleged damages arise purely from the length of time, said to be unreasonable, that the defendant took in processing the file and finally coming to a decision.

[27] In my view, *Grenier* supports a conclusion that an action can be brought against a federal agency if the decision (or the effect of a delay in making a decision) is no longer active or effective on the plaintiff and provided that it is not a collateral attack on an administrative decision.

[28] I would include one caveat. Any claims to damages that stem from Mr. Samimifar's lack of PR status—that is, some or all claims for loss of income or business opportunity or out-of-pocket expenses—cannot be sustained in this action. The outcome of Mr. Samimifar's PR application has not been determined. Although it was refused, that decision was quashed on judicial review with consent of the Crown and is now pending a redetermination. Since it is not known whether Mr. Samimifar is admissible, no damages based on a lack of PR status can be linked to the alleged delay. This is because there is no guarantee that, if the Minister had made an admissibility determination earlier, Mr. Samimifar would have become a permanent resident. Indeed, such claims for damages would be a form of collateral attack. Thus, to the extent that the damages are based on a lack of status as a permanent resident, they should be struck. Thus, for example, in paragraph 38 of his further amended statement of claim, Mr. Samimifar complains of the "lost opportunity to gain better employment, education and business opportunities". I would strike that portion of the claim.

(4) Other Jurisprudence

[29] Similarly, one can distinguish the other cases cited by the defendant. In *Dhalla*, above, the statement of claim was "totally dependent on the legitimacy of the Respondent's decision to deny the permanent residence application" (at paragraph 10). In *Mohiuddin*, the plaintiff sought damages for the actions of the Minister in wrongly forming the opinion that the MQM-A [Mohajir Quami Movement - Altaf] organization was of a terrorist nature and in distributing a package of documentation on the terrorist nature of the MQM-A to immigration officers.

[30] The only case that has considered this issue in the context of a delay is the decision of *Khalil v. Canada* (2004), 252 F.T.R. 292 (F.C.). In that case, Ms. Khalil was determined to be a Convention refugee in 1994 and her application for landing was approved in principle in 1995. In 2000, she was advised that she was inadmissible to Canada. A judicial review of the inad-missibility decision was allowed and the redetermination was still outstanding. Ms. Khalil commenced an action. Justice Heneghan was considering an appeal of a Prothonotary's decision refusing a motion to strike the statement of claim. The appeal was dismissed. At paragraph 13, Justice Heneghan quoted and approved the Prothonotary's description of the plaintiff's claim:

With respect to the Plaintiffs' claims for monetary relief, the Plaintiffs plead two causes of action—the first is an action for damages for regulatory negligence—the Plaintiffs allege a breach of a duty of care for the failure to make a decision in a timely fashion. Second, the Plaintiffs' claim the delay was such that the [*sic*] their rights pursuant to section 7 of the Charter were breached, giving rise to damages under subsection 24(1) of the Charter. Both claims are for damages and are properly brought by way of action.

[31] Thus, *Khalil* was decided on remarkably similar facts to the instant case.

[32] In dismissing the appeal, Justice Heneghan also determined that the delay in finalizing the plaintiff's PR application did not relate to "any matter, determination or order made, a measure taken or a question raised" as specified by subsection 72(1) of the IRPA.

[33] Given the Federal Court of Appeal decisions in *Tremblay* and *Grenier*, *Khalil* does not stand for a proposition that a claimant cannot be forced to proceed by way of judicial review. However, where the nature of the claim is not a collateral attack on a reviewable administrative decision, *Khalil* continues to be applicable. Further, in my view, *Khalil* is correct to the extent that a claim for damages as a result of delay does not relate to "any matter—a determination or order made, a measure taken or a question raised—under this Act" as specified by subsection 72(1) of the IRPA. A delay in action appears to fall outside the wording of this section.

(5) Availability of *Mandamus*

[34] The defendant correctly points out that Mr. Samimifar always had the right to bring an application for *mandamus* during the period of delay and that he failed to do so. Should Mr. Samimifar be barred from bringing this action because he should have sought *mandamus* during the period of delay?

[35] While Mr. Samimifar could have brought such an application during the period of delay, the effect of the PR application refusal in 2003 has been that those rights have been exhausted; one cannot bring an application for *mandamus* once the requested decision or action has been taken. Logically, the principles in *Grenier*, *Tremblay* and other cases can only apply if the plaintiff has a judicial review remedy available. As stated in *Mohiuddin*, at paragraph 17, "if judicial review is available, the plaintiff must pursue that avenue" [underlining added]. The problem here, of course, is that judicial review was available but may no longer be available.

[36] Had Mr. Samimifar commenced his action prior to the inadmissibility determination in 2003, my conclusion might have been different. In that situation, *mandamus* was available and would have been of practical effect.

[37] A similar question was dealt with by the Prothonotary in a decision dismissing the plaintiff's motion to strike (order dated February 5, 2004). As described in the order, the defendant restricted her argument to strike "on the grounds that at any time during the past eighteen years, the Plaintiff could, and should have filed an application with the Court for an order of *mandamus*." In her endorsement of the order, the Prothonotary characterized the defendant's arguments as an assertion that there is a duty on the plaintiff to mitigate his damages by bringing an application for *mandamus*. The Prothonotary stated, "Whether or not the Plaintiff was under a duty to mitigate his damages . . . is a matter for the trial judge to consider following a finding of liability". I agree.

[38] This conclusion is supported by the case of *Morgan*, above. The case involved a claim for damages based upon the failure of the Canadian Human Rights Commission to deal expeditiously with Mr. Morgan's claim against the Canadian Armed Forces. After a trial, the British Columbia Court of Appeal dismissed the claim, apparently on the basis that Mr. Morgan could have, during the period of delay, sought *mandamus*; in other words, the delay was largely attributable to Mr. Morgan. In my view, the case demonstrates that the availability of *mandamus* in the context of any particular claim and a plaintiff's behaviour during the delay are relevant facts to be determined by the trial judge.

[39] The defendant argues that Mr. Samimifar may still bring an application for *mandamus*. While there may be a theoretical ability to so, there is no practical possibility. At this time, Mr. Samimifar is awaiting a new admissibility hearing. In any event, a writ of *mandamus* would not address the delay from 1994 to 2003.

(6) Conclusion on Issue No. 2

[40] At first blush, the Federal Court of Appeal's findings in *Grenier* and *Tremblay* appear to preclude Mr. Samimifar's actions. However, having considered those decisions, I am not persuaded that this jurisprudence can be applied to the facts before me. Applying these cases to the substance of Mr. Samimifar's claim is akin to fitting a square peg into a round hole. In sum, I am satisfied that:

1. In general, Mr. Samimifar's claim is not in the nature of a collateral attack on the January 2003 decision that refused his application for permanent residence on the basis that he was inadmissible to Canada;

2. The delay complained of is not part of the negative PR decision in January 2003;

3. This is not a case where Mr. Samimifar has failed to exhaust his administrative remedies;

4. To the extent that Mr. Samimifar's claims for damages are based on a lack of status as a permanent resident, they should be struck as being, in effect, a collateral attack on the administrative decision;

5. Subsection 72(1) of the IRPA is not applicable; and

6. The fact that Mr. Samimifar did not bring an application for *mandamus* during the period of delay may be relevant, at trial, to the mitigation of damages, but is not relevant at this stage.

[41] Accordingly, I conclude that Mr. Samimifar is not precluded from bringing this action because he did not first seek relief by way of extraordinary remedy under section 18.1 of the *Federal Courts Act*.

D. Issue No. 3: Potential liability in negligence

[42] The defendant submits that there is no cause of action in negligence. The defendant argues that Mr. Samimifar has not pleaded any relationship between himself and the government officials referred to in the further amended statement of claim that would support a claim in negligence.

[43] The two-part test to be applied is that set out in *Anns v. Merton London Borough Council* [[1978] A.C. 728 (H.L.)]. Specifically, the Court must determine:

1. Whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care.

2. If so, whether there exist residual policy conside-rations which justify denying liability.

[44] I will examine each of these in the context of the pleadings at issue.

(1) *Prima Facie* Duty of Care

[45] In general, the relationship between the government and the governed in respect of policy matters is not one of individual proximity (*Premaku-maran v. Canada*, [2007] 2 F.C.R. 191 (F.C.A.), at paragraph 22). Nevertheless, there are situations where the Crown is liable as a person and a duty of care exists (see sections 3 [as am. by S.C. 2001, c. 4, s. 36] and 10 [as am. *idem*, s. 40] of the *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50 [s. 1 (as am. by S.C. 1990, c. 8, s. 21)]). The question in this claim is whether the duty could arise on these facts.

[46] The cases cited by the defendant appear to set an exceedingly high bar in a case such as this that involves public officials and decision makers. Do these cases apply to preclude Mr. Samimifar's action?

(a) *W. v. Home Office*

[47] A case cited by the defendant (and that has been cited, with approval, in other Canadian cases) is the decision of the English Court of Appeal in *W. v. Home Office*, [1997] E.W.J. No. 3289 (QL). In that case, the plaintiff was detained upon his arrival from Liberia on the basis of mistaken information. When this mistake was discovered, the plaintiff was immediately released from detention and granted temporary admission into the U.K. The plaintiff commenced a lawsuit against the defendant for negligence. The allegations of negligence were seen to be divided into two categories. The first is an allegation that the defendant conducted the original interviews negligently by failing to ask the right questions and/or by failing to require the plaintiff to sit the Liberian Nationality Test. The second allegation is that the defendant was negligent in placing someone else's questionnaire and answer in the plaintiff's immigration file.

[48] The Court of Appeal found that an immigration officer did not owe a duty of care to the plaintiff. In coming to this conclusion, the Court of Appeal said (at paragraph 28):

The process whereby the decision making body gathers information and comes to its decision cannot be the subject of an action in negligence. It suffices to rely on the absence of the required proximity. In gathering information, and taking it into account the Defendants are acting pursuant to their statutory powers and within that area of their discretion where only deliberate abuse would provide a private remedy. For them to owe a duty of care to immigrants would be inconsistent with the proper performance of their responsibilities as immigration officers. In conducting their inquiries, and making decisions in relation to immigrants, including whether they should be detained pending those inquiries, they are acting in that capacity of public servant to which the considerations outlined above apply.

[49] The Court of Appeal found that there was no proximity between the plaintiff and immigration officers that gave rise to a duty of care.

[50] The facts before me differ in a significant way. Arguably, there is proximity between the plaintiff and Ms. K., the officer who was allegedly responsible for processing Mr. Samimifar's application. Ms. K. and Mr. Samimifar were in regular contact with one another during much of the period of delay. Further, Mr. Samimifar relied directly on Ms. K. assuming that she would process his permanent residence application in a timely fashion. Finally, this case is arguably about the failure of the defendant—and, in particular, one agent of the defendant—to carry out her statutory duties for a period of seven to nine years.

(b) *Premakumaran v. Canada*

[51] In the case of *Premakumaran v. Canada* (2005), 33 C.C.L.T. (3d) 307 (F.C.); affd [2007] 2 F.C.R. 191 (F.C.A.), the Crown brought a motion for summary judgment against the plaintiffs' action for fraudulent misrepresentation with regard to the use of a misleading point system and negligent misrepresentation that certain job categories are in high demand in Canada and false information with regard to the use of application processing fees. The plaintiffs were a married couple who came to Canada from England in 1998 as immigrants under the category of professional skilled immigrants.

[52] Justice von Finckenstein found that the defendant owes a duty of care to the public as a whole and not to the individual plaintiffs. Consequently, he concluded that the plaintiffs did not meet the first stage of the test in *Anns*. Thus, he found that there was no genuine issue for trial regarding the negligent misrepresentation allegation. He allowed the summary judgment motion and dismissed the plaintiffs' action.

[53] In affirming this decision, the Federal Court of Appeal stated (at paragraph 24):

In this case, however, no duty of care arises. As the motions Judge correctly found, no special relationship of proximity and reliance is present on the facts of this case. There were no personal, specific representations of fact made to these particular appellants upon which they could reasonably have relied. The printed documentation and information given to them was merely general material for them to use in making an application for immigrant status. As the motions Judge observed, it is not correct to say that someone [at paragraph 25] "who picks up a brochure or reads a poster at the High Commission is a 'neighbour'" and is owed a duty as a result. More is required. [Emphasis added.]

[54] Once again, there are significant distinguishing features. Justice von Finckenstein pointed out, at paragraph 20, that the plaintiffs did not allege that any particular Crown servant committed a tort against them. In contrast, in the further amended statement of claim, Mr. Samimifar alleges that Ms. K. was too busy with other work, did not have the appropriate security clearance to work on his file, and also took sick leave (paragraph 19). While Mr. Samimifar does not specifically state that Ms. K. committed a tort against him, the inference is clear from a number of allegations in the pleadings:

• This delay was not the result of any need for further investigation but rather the result of neglect on the part of the immigration authorities (paragraph 29).

• The defendant, including immigration officials processing the plaintiff's file, owe a duty of care to the plaintiff (paragraph 30).

• The plaintiff's emotional and financial life has been severely disrupted as a result of the neglect in the handling of his application and this has caused the plaintiff severe and profound emotional distress and grave economic loss (paragraph 31).

[55] Consequently, the reader would understand that a critical aspect of the claim of negligence is directed at Ms. K.

[56] Arguably, the "more" that is required by the Court of Appeal occurred here with Mr. Samimifar. Mr. Samimifar had a personal relationship with the immigration officers handling his file and, in particular, Ms. K. He was in constant communication with them since he would inquire about the status of his file. They were on notice of the harm that he was suffering because of the delay. Mr. Samimifar spoke to immigration officers numerous times and relied on them to process his application in a timely fashion.

(c) *Benaissa v. Canada* (*Attorney General*)

[57] The Defendant also cites *Benaissa v. Canada* (*Attorney General*), 2005 FC 1220, at paragraph 37, in which Prothonotary Lafrenière cited *W. v. Home Office*, above for the proposition that the process whereby the decision-making body gathers information and comes to its decision cannot be the subject of an action in negligence.

[58] In *Benaissa*, the defendant was successful in a motion to strike the plaintiff's amended statement of claim on the grounds that it did not disclose a reasonable cause of action and that the action was moot. The case, on its face, appears very relevant as it dealt with a delay in processing an application for permanent residence in Canada. The plaintiff brought an action against the Crown in November 2003 seeking a declaration that CIC's failure to finalize his application for landing was negligent and in breach of his Charter rights.

[59] Prothonotary Lafrenière found that the plaintiff made a bare assertion that unidentified servants of the Crown deliberately failed to process the plaintiff's application for permanent residence in a timely fashion. As well, he found that the facts pleaded failed to disclose any factual basis for the allegation that the Crown acted negligently. He pointed out that, even if sufficient material facts had been pleaded establishing breaches or damages, it would appear that the Crown owed no duty of care to the plaintiff in the particular circumstances of his case. He said (at paragraph 33): "Mere delay, absent further facts, does not constitute a reasonable cause of action". (Emphasis added.)

[60] Unlike the plaintiff in *Benaissa*, Mr. Samimifar is not making a bare assertion; he has set out a factual basis for the allegation that the defendant acted negligently, including naming a specific immigration officer, Ms. K. As well, arguably, there is more than mere delay here by the defendant. In my view, *Benaissa* is distinguishable on the basis that the facts, as pleaded in the amended statement of claim by the plaintiff in *Benaissa*, did not support a cause of action while the facts as pleaded by Mr. Samimifar could, if sustained at trial, support a cause of action for negligence. Although there is no statutory duty on the Minister to render a decision in a specific amount of time, a common-law duty of care may arise if the facts are sufficient to support the action. Arguably this is the case here.

(d) *Farzam v. Canada (Minister of Citizenship and Immigration)*

[61] In *Farzam v. Canada (Minister of Citizenship and Immigration)* (2005), 284 F.T.R. 158 (F.C.), the plaintiff sued the Crown for damages resulting from an alleged marriage breakdown in 1993 due to the negligence of immigration officials in Damascus in processing either a Minister's permit or a permanent resident visa for his wife. Justice Martineau found that it would be unfair, unjust and unreasonable to impose a duty of care on immigration officers. In coming to this conclusion, he found that it was not reasonably foreseeable that Ms. Mohiti would divorce the plaintiff because of some additional delay or misstatement to the effect that the undertaking of assistance had not yet been provided by the plaintiff. Justice Martineau relied on *A.O. Farms Inc. v. Canada* (2000), 28 admin. L.R. (3d) 315 (F.C.T.D.); *Benaissa*, above, and *Premakumaran*, above, for the point of view that the relationship between the government and the governed is not one of individual proximity. He pointed out (at paragraph 105): "Delays in the processing of immigration applications are inherent to the system."

[62] *Farzam* is distinguishable on the basis that, in the case before me, it is reasonably foreseeable that negligently

processing Mr. Samimifar's permanent residence application would cause him emotional distress and anxiety. However, as Justice Martineau pointed out (at paragraph 93):

But even if I accept that forseeability has been adequately established, as stated by the House of Lords in *Hill v. Chief Constable of West Yorkshire*, [1989] 1 A.C. 53 (H.L.) at 60: "(…) foreseeability of likely harm is not in itself a sufficient test of liability in negligence. Some further ingredient is invariably needed to establish the requisite proximity of relationship between the plaintiff and the defendant (…)".

[63] Although delays in the processing of immigration applications are inherent to the system, in my view, there was more than mere delay in the plaintiff's situation.

[64] In sum on the question of duty of care, the jurisprudence relied on by the defendant is distinguishable. I agree that the further amended statement of claim could be clearer with respect to the role of one particular officer in the processing of his application. Nevertheless, I believe that it would be appropriate to allow Mr. Samimifar to further amend his statement of claim to rectify this deficiency. On this question of duty of care, I believe that sufficient facts have been pleaded to show a *prima facie* case that the defendant, in this particular situation, owed a duty of care to Mr. Samimifar. Mr. Samimifar should be permitted to bring this question before the trier of fact at trial.

(2) Existence of residual policy considerations

[65] The second prong of the test in *Anns* is whether residual policy considerations exist which justify denying liability? In *Benaissa*, above at paragraphs 40-43, Prothonotary Lafrenière pointed out four policy considerations:

First, there is nothing in the statutory scheme to suggest that simple mistakes or errors in the processing of applications for landing resulting in delay should give rise to a right of compensation. The opposite is true.

Second, applicants for permanent residence have viable alternative remedies by way of *mandamus* and judicial review. Mandatory orders could be made to put any alleged mistake or non-performance right.

Third, as in *Cooper*, the spectre of indeterminate liability would loom large if a common law duty of care was recognized as between the Crown and an applicant based solely on the negative impact of delay on the applicant, as opposed to actual misconduct on the part of immigration officials. The class of persons to whom the duty of care would be owed is large, i.e., all applicants for permanent residence in Canada. Imposing a duty of care would trigger further claims, which (a) would require funds to be diverted and time to be devoted to enable them to be resisted, and (b) would be a drain on public resources if the claims were successful. Indeed, as in *Cooper*, one must consider the impact of a duty of care on the taxpayers of Canada generally.

Fourth, and more importantly, imposing a duty of care would hamper the effective performance of the system of immigration control.

[66] In *Farzam*, above, Justice Martineau cited the same policy consideration discussed in *Cooper* [*Cooper v. Hobart*, [2001] 3 S.C.R. 537] with regards to the "spectre of unlimited liability." After citing *Cooper*, he pointed out, at paragraph 106, that "[i]n effect, the Crown would act as an unlimited insurer for every possible economic and emotional loss that a plaintiff claims to have suffered as a result of a delay or a *bona fide* error made in the processing of an immigration file".

[67] While these policy considerations are very compelling, I am unsure whether they are sufficiently compelling for the Court to deny liability on the facts of this case. I do not believe that policy considerations preclude the imposition of a duty of care where an immigration officer completely ignores a file. Mr. Samimifar has produced disturbing evidence that appears to show that Ms. K. was assigned this file, even without the requisite security clearance, and that, in spite of requests from others in her department, continued to ignore Mr. Samimifar's case. If these facts are true, the actions of Ms. K. and, more generally, CIC officials are far outside of what we expect from our public service. Indeed, failing to impose a duty of care at this minimal level would not be consistent with the principles of accountability of our public service. Surely, there must be some level of service that one can expect in the context of these immigration matters.

[68] At trial, the defendant may be able to provide a satisfactory explanation of why this matter languished for at least seven years. Given the unusual nature of the claim before me, involving allegations against a particular immigration officer in the context of the harm allegedly suffered by Mr. Samimifar, I am not persuaded that this action should be summarily dismissed on broad policy grounds.

(3) Conclusion on Issue No. 3

[69] In sum, there is a genuine issue for trial regarding the negligence allegation. Mr. Samimifar has persuaded me that there is some foundation for his claim in negligence. Consequently, this is not an issue that can be dealt with on a motion for summary judgment. I acknowledge that there are many difficulties with Mr. Samimifar's case. Nevertheless, he should be allowed to bring forward further evidence at trial and have the issue of negligence dealt with fully by the trial Judge.

E. Issue No. 4: Damages for breach of Charter rights

[70] In paragraph 39 of his further amended statement of claim, Mr. Samimifar claims that:

The conduct of the Canadian officials has caused the severe emotional stress which engages section 7 and the unconscionable delay in making a determination has resulted in the violation of section 7, life, liberty and security of the person rights of the plaintiff

Therefore, he claims damages under subsection 24(1) of the Charter.

[71] An analysis of rights under section 7 of the Charter involves addressing two questions (see: *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, at paragraph 47):

1. Has the plaintiff been deprived of the right to "life, liberty and security of the person"?

2. Was the deprivation contrary to the principles of natural justice?

(1) Engagement of section 7

[72] With respect to the first threshold question, *Blencoe* reinforced the principle that "serious state-imposed psychological stress" can constitute a breach of an individual's security of the person. However, Justice Bastarache, speaking for the majority in *Blencoe*, at paragraph 83, cautioned that:

It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest. While these fundamental personal choices would include the right to make decisions concerning one's body free from state interference or the prospect of losing guardianship of one's children, they would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings.

[73] Thus, psychological stress and effects caused by a delay in processing an application for permanent residence could trigger the security of the person interest in "exceptional cases". However, the threshold is very high. The Supreme Court did not agree that Mr. Blencoe, who had been waiting for three years for an inquiry to be held into allegations of sexual harassment, met that standard for the engagement of section 7. This determination was made even though the Court acknowledged that Mr. Blencoe's life had been "terribly affected" (at paragraph 64).

[74] Has Mr. Samimifar's life been so affected that section 7 of the Charter is engaged? To answer this question, I turn first to his statement of claim or to his affidavit filed in support of this motion. In his statement of claim, Mr. Samimifar alleges that the situation has caused "severe and profound emotional distress" (paragraph 31). There are other references to "severe emotional stress" and emotional stress to the plaintiff and his wife. These bare assertions cannot, in my view, support the section 7 claim. However, in his affidavit, Mr. Samimifar provides a fuller description of the effects of the delay. He states at paragraph 16 that:

The delays have also caused stress in my family life. I often have trouble sleeping because my future and my family's future [are] so uncertain. I find that I feel hopeless and depressed about my situation after so many years of waiting to receive [a] decision on my status in Canada. My life has been in limbo for over twenty years. I am very anxious about the future and worry all of the time about the precarious and vulnerable situation that my family is living in. My eldest daughter is well aware of everything that has happened. She is very worried about the future of our family and it breaks my heart to see how this entire process has affected her so dramatically.

[75] Mr. Samimifar also attaches psychological assessments for himself and his wife. The professional who carried out the assessment concluded that both Mr. Samimifar and his wife have suffered from chronic depression and anxiety and from symptoms associated with depression and anxiety. In the text of his report, the psychologist appears to link the condition of Mr. Samimifar and his wife to the delay in processing his claim.

[76] This evidence, in my view, indicates that there is an issue for trial. The alleged harm extends beyond mere grief, sorrow, or emotional distress, which would likely not satisfy the threshold in *Blencoe*, above (*Farzam v. Canada (Minister of Citizenship and Immigration)* (2005), 284 F.T.R. 158 (F.C.), at paragraph 115; *Swerid v. Persoage* (1996), 22 R.F.L. (4th) 338 (Man. Q.B.)). Despite the defendant's assertions, Mr. Samimifar has put forward at least some evidence that he has suffered severe psychological harm. Whether the type of stress, anxiety and stigma allegedly suffered by Mr. Samimifar is sufficient to meet the threshold for a section 7 violation is a complex matter requiring a full view of the evidence at trial.

[77] Thus, I am satisfied that the pleadings disclose an issue as to whether section 7 is engaged.

(2) Fundamental Justice

[78] The second part of this test requires that the Court consider whether the alleged deprivation of Mr. Samimifar's right to security of the person was in accordance with the principles of natural justice. The Court in *Blencoe* did not reject the notion that delay by state officials could result in a determination that the conduct was not consistent with the principles of natural justice. In particular, was the behaviour of one of the officials who had carriage of Mr. Samimifar's file for a significant part of the period of delay so egregious as to constitute a breach of the section 7 requirement for fundamental justice? In light of the facts pleaded, answering the question will require an extensive review of the behaviour of the officials who bore responsibility for Mr. Samimifar's file during the period between 1994 and 2003. In my view, this question is better left for trial.

(3) Availability of damages under subsection 24(1)

[79] The final argument of the defendant on the Charter issue is that Charter damages can only be sought where the Crown has acted in bad faith or with willful disregard (see *Pinnock v. Ontario*, [2001] O.J. No. 2921 (S.C.J.), where the Court describes bad faith as "willful disregard"; *Osborne v. Ontario (Attorney General)* (1996), 10 O.T.C. 256 (Ont. Gen. Div.); affd (1998), 115 O.A.C. 291 (Ont. C.A.); *Howell v. Ontario* (1998), 159 D.L.R. (4th) 566 (Ont. Gen. Div.)). However, I am not so certain.

[80] My first response is that the pleadings, while not using the words "willful disregard" or "bad faith" certainly lay out a pattern that, if proven at trial, would be considered to be a gross departure from the behaviour expected from our public servants. Thus, it is arguable that the pleadings are adequate for a claim for Charter damages.

[81] Secondly, I am not persuaded that the law is as settled as the defendant submits. It may be that bad faith or willful disregard is not essential to the claim.

[82] In *Pearson v. Canada*, 2006 FC 931, Justice Yves de Montigny wrote the following, in the context of deciding whether a provincial, statutory limitation period applied to a claim for damages under the Charter [at paragraphs 48-49):

It is also well established that the award of damages, both compensatory and punitive, is a remedy available to an individual whose rights have been infringed by the state. If there were any remaining doubts on this issue, they were finally put to rest in *RJR-MacDonald Inc. v. Canada* (*A.G.*), [1994] 1 S.C.R. 311. Writing for a unanimous court,

Justices Sopinka and Cory stated at p. 342 that "[t]his Court has on several occasions accepted the principle that damages may be awarded for a breach of Charter rights".

Despite this clear pronouncement to the effect that damages can be a remedy for a Charter breach, there have been very few cases where such damages have been awarded. As a result, it is not yet entirely clear on what legal basis such damages rest. In most cases where damages have been awarded, there has been no real discussion of the underlying principles. For example, there has been much debate as to whether section 24(1) of the Canadian Charter creates a separate and independent right to damages, or whether the infringement of a guaranteed right must be equated to the wrongful behaviour requirement allowing the victim to claim damages according to the general legal regime of civil liability. Similarly, there has been disagreement about the need for bad faith on the part of the government actor before damages can be awarded. I shall revert to these issues later on in these reasons.

[83] Justice de Montigny did not decide, in that case, whether bad faith was a requirement, but noted that the case law across the country has gone in every direction on the issue. He recommended the recent decision of Justice Ducharme in *Hawley et al. v. Bapoo et al.* (2005), 76 O.R. (3d) 649 (S.C.J.) for a broader review of the jurisprudence.

[84] In *Hawley*, Justice Ducharme does indeed canvass much of the relevant law, including the cases cited by the defendant, in which courts have sometimes imposed a requirement of bad faith, sometimes not, and sometimes imposed unclear requirements.

[85] Justice Ducharme himself rejected the imposition of a fault requirement on the government or government actor, finding that the requirement was contrary to the spirit and intent of the Charter (at paragraphs 194-197). He held that any malice, bad faith, or gross negligence on behalf of the Crown was instead relevant when considering "what the just and appropriate remedy is in a particular case" (at paragraph 196). At paragraph 197, Justice Ducharme adopted a passage from Professor Roach in his text *Constitutional Remedies in Canada*:

There is much to be said for the proposition that the defendant's state of mind should only be relevant to the extent, if any, required to find a violation of a *Charter* right. Malice or gross negligence could perhaps justify awarding extra damages, but a fault requirement, independent of the violation of the right sits uneasily with fundamental principles of *Charter* interpretation which stress the effects as opposed to the purposes of State action. The structure of the *Charter* suggests that once there had been a violation that is not justified under s. 1, the next issue should be whether damages would be an appropriate and just remedy. [K. Roach, *Constitutional Remedies in Canada* (Aurora, Ont.: Canada Law Book, 2004), at para. 11.560.]

[86] I find the reasoning in *Hawley* persuasive. It follows that it is possible for Mr. Samimifar to establish Charter damages on the basis of negligence or unreasonable delay. On the basis of the facts before me, I am not able to state that such a claim is without foundation.

(4) Conclusion on Issue No. 4

[87] In conclusion, I believe that there is a genuine issue to be tried with respect to Charter damages based on psychological harm caused by negligence or unreasonable delay.

[88] The Court is permitted to dismiss claims pursuant to rule 213 of the *Federal Courts Rules* when the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial. In the case before me, I am not satisfied that the requirement for granting summary judgment has been met. I am not able to hold that the case is without foundation. Rather, Mr. Samimifar has raised allegations of fact regarding the processing of his PR application that should, in my view, be explored at trial.

[89] For these reasons, the motion will be dismissed.

[90] As discussed above, there are two areas that should be clarified in the further amended statement of claim. In that regard, I would allow Mr. Samimifar a period of time to provide a further amendment that would:

(a) clarify his claim as it relates to the actions of Ms. K.; and

(b) remove any claims for damages that are based on a lack of status as a permanent resident.

[91] Although the defendant argued that costs should not be awarded, I see no reason to depart from the usual practice of awarding costs to the successful party.

ORDER

THIS COURT ORDERS that:

1. The motion is dismissed with costs to the plaintiff, in any event of the cause.

2. The plaintiff will have 30 days from the date of this order to serve and file a further further amended statement of claim;

3. The defendant will have 30 days from the date of service of the further further amended statement of claim to file a further further statement of defence; and

4. The filing dates provided in this order may be amended upon consent of both parties and written notice to the Court.

Federal Courts Rules

213. (1) A plaintiff may, after the defendant has filed a defence, or earlier with leave of the Court, and at any time before the time and place for trial are fixed, bring a motion for summary judgment on all or part of the claim set out in the statement of claim.

(2) A defendant may, after serving and filing a defence and at any time before the time and place for trial are fixed, bring a motion for summary judgment dismissing all or part of the claim set out in the statement of claim.

214. (1) A party may bring a motion for summary judgment in an action by serving and filing a notice of motion and motion record at least 20 days before the day set out in the notice for the hearing of the motion.

(2) A party served with a motion for summary judgment shall serve and file a respondent's motion record not later than 10 days before the day set out in the notice of motion for the hearing of the motion.

215. A response to a motion for summary judgment shall not rest merely on allegations or denials of the pleadings of the moving party, but must set out specific facts showing that there is a genuine issue for trial.

216. (1) Where on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

(2) Where on a motion for summary judgment the Court is satisfied that the only genuine issue is

(*a*) the amount to which the moving party is entitled, the Court may order a trial of that issue or grant summary judgment with a reference under rule 153 to determine the amount; or

(*b*) a question of law, the Court may determine the question and grant summary judgment accordingly.

(3) Where on a motion for summary judgment the Court decides that there is a genuine issue with respect to a claim or defence, the Court may nevertheless grant summary judgment in favour of any party, either on an issue or generally, if the Court is able on the whole of the evidence to find the facts necessary to decide the questions of fact and law.

(4) Where a motion for summary judgment is dismissed in whole or in part, the Court may order the action, or the issues in the action not disposed of by summary judgment, to proceed to trial in the usual way or order that the action be conducted as a specially managed proceeding.

217. A plaintiff who obtains summary judgment under these Rules may proceed against the same defendant for any other relief and against any other defendant for the same or any other relief.

218. Where summary judgment is refused or is granted only in part, the Court may make an order specifying which material facts are not in dispute and defining the issues to be tried, including an order

(*a*) for payment into court of all or part of the claim;

(*b*) for security for costs; or

(*c*) limiting the nature and scope of the examination for discovery to matters not covered by the affidavits filed on the motion for summary judgment or by any cross-examination on them and providing for their use at trial in the same manner as an examination for discovery.

219. In making an order for summary judgment, the Court may order that enforcement of the summary judgment be stayed pending the determination of any other issue in the action or in a counterclaim or third party claim.