Federal Court  Cour fédérale

Date: 20170327

Docket: T-1644-16
T-1643-16

Citation: 2017 FC 320

[ENGLISH TRANSLATION]

Montréal, Quebec, March 27, 2017

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

ALAIN DUCAP
DWAYNE LEWIS

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] The Attorney General of Canada [the AGC] is appealing the decision rendered on January 12, 2017, by Prothonotary Morneau, dismissing his motion to strike the applications for judicial review filed by Messrs. Ducap and Lewis, the applicants.

[2] The applicant's files having been gathered, the Court will only render a decision which will apply with any necessary modifications to each file.

[3] In short, Prothonotary Morneau concluded that it is not plain and obvious that the applicants' applications do not disclose any cause of action, and the Court was not persuaded that this decision is tainted by a palpable and overriding error. The Court will therefore dismiss the AGC's appeal.

II. BACKGROUND

A. *The original application for judicial review*

[4] On September 29, 2016, the applicants each served and filed a Notice of Application under section 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. They were seeking declaratory relief regarding the Correctional Service of Canada's [CSC] right to ask them to undergo pharmacological treatment to control their deviant sexual urges in the foreseeable future.

[5] As remedies, they were asking the Court (1) to declare null, illegal and/or unconstitutional CSC's request that they undergo pharmacological treatment to control their deviant sexual urges in the foreseeable future; (2) refer the matter herewith to the Government and/or the Governor in Council and/or the Commissioner of the CSC for reconsideration in accordance with the requirements of the constitutional standard; (3) direct CSC to stop requesting that they undergo pharmacological treatment to control their deviant sexual urges in

the foreseeable future; (4) order any other appropriate measures; and (5) all the foregoing without costs.

[6] Both applicants' factual situation is essentially the same with respect to their appeal. They are both detained in the Special Handling Unit (SHU) and allege that, following a psychiatric assessment requested by the National Committee, they were asked to undergo pharmacological treatment to control their sexual urges in the foreseeable future. What the applicants characterize as a *demand* is characterized as a *recommendation* by the AGC. Without ruling on the issue, the Court will use the term *Recommendation* to facilitate reading.

[7] The applicants point out that this treatment is still mentioned in their assessments for a decision by the National Committee, as well as in the National Advisory Committee's recommendations and in the Regional Deputy Commissioner's negative decisions, despite the fact that this treatment is not recognized as a program or goal to be achieved and is not officially recognized for controlling sexual urges and disinhibition. The applicants also maintain that CSC is encouraging them to undergo treatment to reduce the risk they represent and thus to be transferred to a regular maximum-security penitentiary, despite the fact that they were placed in the SHU as a result of non-sexual violence and that undergoing the treatment has not been shown to reduce risk.

[8] The applicants allege that this treatment is the only option they are offered to reduce the risk they represent. As a result, it appears that their only option for a transfer from the SHU to a regular maximum-security penitentiary is contingent upon this treatment. The applicants refer to

the “Lupron© Treatment Consent” form which states: “I understand, however, that my decision to accept or decline the recommended medical treatment, or that my decision to withdraw my consent, may affect the conditions of my release or any supervisory measures in an institution or in the community.”

[9] The applicants argue that CSC’s conduct violates subsection 88(1) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the Act), which stipulates that “treatment shall not be given to an inmate, or continued once started, unless the inmate voluntarily gives an informed consent thereto,” and sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, which is Schedule B to the *Canada Act* (UK), 1982, c 11 (the Charter).

B. *The AGC’s motion to strike*

[10] In November 2016, the AGC served and filed a motion to strike each of the applicants’ application for judicial review. The AGC then argued that the application for declaratory relief was so clearly improper that it was plain and obvious that it had no prospect of success.

[11] The AGC submitted (1) that the non-binding Recommendation cannot be subject to judicial review; and (2) declaratory relief to the effect that CSC cannot recommend any program to reduce the applicants’ risk of criminal recidivism runs counter to CSC’s legal obligations and ultimately will not change their current situation.

[12] The AGC pointed out that declaratory relief is discretionary. According to the AGC, the Court must, in order to exercise this power, assess whether relief is useful, if granted, and the likelihood that the declaration will resolve the issues between the parties. The AGC essentially argued that, in this case, such a declaration will not resolve the dispute between the parties.

[13] With respect to the nature of the dispute between the parties, we should bear in mind that, in his notice of motion to strike, the AGC stated that declaratory relief would not be helpful "because there is no real dispute between the parties: the applicant expressed his refusal to undergo the proposed treatment, and his refusal was respected." However, in his written submissions in support of this appeal, the AGC argued that the subject matter of the case between the parties is penitentiary placement, which has no chance of being affected by the Recommendation.

C. *Prothonotary Morneau's decision to dismiss the motion to strike*

[14] On January 12, 2017, Prothonotary Morneau dismissed the AGC's motion to strike He noted that motions to strike applications for judicial review are permitted only in exceptional cases (*David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 FCR 588 (FCA) at paragraph 16). He reiterated the factual background. He noted the applicants' allegations that their refusal to follow the Recommendation would have an impact on their penitentiary placement, and he stated the two main grounds of attack raised by the AGC against the application for declaratory relief. These reasons are the same as those at issue in this case, set out in paragraph 12 of this decision.

[15] Prothonotary Morneau also cited the case law allowing judicial review of a recommendation when it "affects the legal rights or interests of a party" (*Canada (Attorney General) v. Beyak*, 2011 FC 629 at paragraph 62 [*Beyak*]), which affirms that subsection 18.1(1) of the *Federal Courts Act* does not limit recourse to appeal a decision or order. The Prothonotary concluded that it was not plain and obvious that the Recommendation at issue could not be subject to judicial review.

[16] Finally, having noted the connection drawn by the applicants between the constant presence of the Recommendation and their current penitentiary placement, the Prothonotary found that it was not plain and obvious that the declaratory relief sought was futile.

III. ISSUES

[17] In support of his appeal against the Prothonotary's decision, the AGC submitted the following two issues:

1) Did the Prothonotary err in ignoring the remedies sought after having held that the Treatment Recommendation affected the applicants' interest in a different penitentiary placement?

2) Did the Prothonotary err in exercising his discretion when the application for declaratory relief was of no use in resolving the real dispute between the parties?

IV. POSITIONS OF THE PARTIES

A. *AGC's position*

[18] The AGC argued that the Prothonotary erred in his legal characterization of the rights affected by the Recommendation at issue, erroneously holding that the Treatment Recommendation affected the applicants' interest in another penitentiary placement. However, according to the AGC, the remedies sought in the application for declaratory relief are not related to the applicants' penitentiary placement.

[19] According to the AGC, the Prothonotary correctly identified the subject matter of the case, penitentiary placement. However, the AGC contended that penitentiary placement had no chance of being affected by the Treatment Recommendation. In his view, for the Prothonotary's premise to be legally acceptable, the Act would have to provide for adherence to the suggested treatment as a factor to be considered in the penitentiary placement decision. However, section 28 of the Act does not stipulate this factor; rather, it reads as follows:

> 1) (28) If a person is or is to be confined in a penitentiary, the Service shall take all reasonable steps to ensure that the penitentiary in which they are confined is one that provides them with an environment that contains only the necessary restrictions, taking into account
>
> (a) *the degree and kind of custody and control necessary for*
>
> *(i) the safety of the public,*
>
> *(ii) the safety of that person and other persons in the penitentiary, and*
>
> *(iii) the security of the penitentiary;*

(b) *accessibility to*

(i) the person's home community and family,

(ii) a compatible cultural environment, and

(iii) a compatible linguistic environment; and

(c) *the availability of appropriate programs and services and the person's willingness to participate in those programs.*

[20] Thus, even by deleting all references to the Recommendation in the applicants' prison record, the applicants would remain incarcerated in the SHU because of the dangerousness they represent, pursuant to section 28 of the Act. Their sole refusal to adhere to the suggested treatment does not lead to penitentiary placement in the SHU or elsewhere, making it incorrect to consider that this Recommendation may be subject to judicial review because the subject matter of the case is not affected by the Recommendation.

B. *Status of the applicants*

[21] The applicants submitted that a recommendation may be subject to review by a Court of Justice where a decision is based solely on that recommendation, or where the recommendation affects the legal rights or interests of a party, as is the case here.

[22] The applicants contended that the subject matter of the case did not lie in their option to be transferred from penitentiary, but in determining the legality of the CSC's Recommendation. They added that the Recommendation was a roundabout way for CSC to impose medical treatment on them.

[23] In dealing with the questions posed by the AGC, the applicants first argued that the Prothonotary did not ignore the remedies sought. The main remedy sought was to declare the Recommendation null, illegal and/or unconstitutional, given that, in the applicants' view, the Recommendation was the sole option proposed to reduce the risk they represent and that they be transferred to a regular maximum-security penitentiary.

[24] Secondly, they contended that the Prothonotary did not err in exercising his discretion since declaratory relief was still useful in settling the dispute between the parties. The applicants pointed out that, contrary to the AGC's allegations, the subject matter of the case did not only concern a transfer from the SHU, it also involved having the CSC's request declared null, illegal and/or unconstitutional.

V. ANALYSIS

A. *Standard of review*

[25] The Federal Court of Appeal recently determined that our Court must review a discretionary decision of a prothonotary in accordance with the standard developed by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33. Thus, "with respect to factual

conclusions reached by a trial judge, the applicable standard was that of palpable and overriding error. It also stated that with respect to questions of law and questions of mixed fact and law, where there was an extricable legal principle at issue, the applicable standard was that of correctness" (*Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at paragraph 66).

[26] In this case and as recently stated by this Court, a prothonotary's decision on a motion to strike is a discretionary ruling that raises questions of mixed fact and law. The issues currently in dispute are no exception and are therefore subject to the so-called "palpable and overriding error" standard of review (*Bossé v. Canada*, 2017 FC 48 at paragraph 7).

B. *Motion to strike*

[27] On a motion to strike, "[t]he moving party must show it is 'plain and obvious' that the pleading discloses no cause of action. Put another way, the moving party must show that the claim has no reasonable prospect of success" (*Scheuer v. Canada*, 2016 FCA 7 at paragraph 11 [*Scheuer*]). Furthermore, on such a motion, the allegations of fact must be accepted as proven (*Scheuer* at paragraph 12).

C. *Nature of the dispute between the parties*

[28] The parties do not agree on the subject matter of the legal dispute between them. The applicants' arguments focus on the legality and constitutionality of the Recommendation, relying in particular on sections 7 and 12 of the Charter. However, the AGS believes the issue lies

elsewhere. He contends that the applicants are actually challenging the validity of their penitentiary placement and that having the Recommendation declared null, illegal or unconstitutional will not improve their prospects of being transferred to another institution. The applicants argue instead that their refusal to follow the Recommendation undermines their ability to transfer out of the SHU, which would help support their contention that the Recommendation is illegal.

[29] The Court must accept the allegations of facts as proven at the stage of the motion to strike.

[30] Thus, the Court accepts the applicants' contention that the subject of the dispute is indeed for the Court to determine the legality of the Recommendation, not the legality of the penitentiary placement. The applicants argue that their placement is contingent on their undergoing treatment, which makes adherence to this treatment a requirement rather than a recommendation, thus rendering the Recommendation potentially illegal. It therefore seems possible for the Court to address the issue of the Recommendation's legality, without considering whether the applicants' placement is legal.

[31] Thus, without determining the scope of the possible underlying disputes between the parties, the Court understands that determining the legality of the Recommendation is the subject matter of this dispute between the parties.

D. *Response to questions from the AGC*

(1) First question asked by the AGC

[32] In paragraph 13 of his decision, the Prothonotary indicated that he had to distinguish between [TRANSLATION] "any placement decision by the federal authorities and the treatment recommendation" and he accepted the applicant's allegation that [TRANSLATION] "this recommendation and its refusal in connection with this request hamper any possibility of transfer." This allegation certainly provides some basis for finding that the Recommendation affects the legal rights or interests of a party, that the Recommendation may be subject to judicial review, and that the declaratory relief sought is not futile.

[33] The AGC maintains that the applicants in this case want to challenge their penitentiary placement and that having the Recommendation declared illegal, assuming this were to happen, will not lead to this outcome and is therefore futile.

[34] However, the remedy sought by the applicants in this case is not the one identified by the AGC, but the one identified by the applicants, namely a declaration that the Recommendation itself is illegal.

[35] Thus, given this determination, the Court is satisfied that the Prothonotary did not err. The impact of the applicants' refusal to follow the Placement Recommendation can be considered in order to determine the legality of the Recommendation. It follows that the Prothonotary did not ignore the remedies sought by the applicants.

(2) Second question asked by the AGC

[36] As mentioned above, the AGC maintains that the real dispute between the parties is not the one indicated by the applicants, that is, to have the Recommendation declared legal or illegal, but another one: to determine the validity of the applicants' penitentiary placement.

[37] The Court does not agree with this position. Rather, it finds that the sole purpose of this case is to decide whether or not the Recommendation is legal. Thus, it is important to consider whether the Prothonotary erred in deciding that it was not plain and obvious that the Recommendation could not be subject to judicial review.

[38] As such, the Court finds that a recommendation will be subject to judicial review if a decision relies solely on the recommendation or when the recommendation affects the legal rights or interests of a party (*Beyak* at paragraph 62). The applicants allege that the Recommendation affects their rights or interests, because their refusal to follow the Recommendation would result in their continued detention in the SHU, an assertion that the Court must at this stage accept as true.

[39] Thus, given that the "real dispute" between the parties concerns the legality of the Recommendation and not the broader issue of the applicants' placement, the Court cannot find that the Prothonotary [TRANSLATION] "erred in exercising his discretion when the application for declaratory relief was of no use in resolving the real dispute between the parties."

[40] In sum, the Prothonotary's decision is not tainted by any palpable and overriding error.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The appeal is dismissed.

2. Without costs.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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