Federal Court Cour fédérale

Date: 20181207

Docket: 18-T-67

Citation: 2018 FC 1234

Ottawa, Ontario, December 7, 2018

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

DR. V.I. FABRIKANT

Applicant

and

HER MAJESTY THE QUEEN

Respondent

ORDER AND REASONS

[1] On September 8, 2018, the Applicant, Dr. Fabrikant, filed a motion in writing under Rule 369 of the *Federal Courts Rules*, SOR/98-106 for the following:

a) GRANT leave to file this proceeding pursuant to s. 40(3) of the *Federal Courts Act*;

b) SET ASIDE the decision of Commissioner of Correctional Service Canada dated July 27, 2018 and received August 24, 2018 on Appellant's grievance V30R00045515;

c) ORDER Respondent to authorize prisoners' access to private clinics for essential health care.

[2] In a separate motion, the Applicant seeks an order waiving the filing fees for both motions.

[3] Dr. Fabrikant is a federally sentenced inmate and this Court has designated him a vexatious litigant pursuant to section 40 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 [the Act]. As a result of that designation, he must apply to this Court for leave to initiate a proceeding. He has done so on a number of occasions as noted in an order of Prothonotary Tabib dated January 18, 2013 denying one such application:

> In the exercise of my discretion, I have taken into account the fact that the Plaintiff has been designated a vexatious litigant, and that he appears to have been multiplying motions for leave to commence legal proceedings in recent years. Many of these motions are refused for filing, or are not successful, or when successful, are not pursued diligently, such that the use of these motions for leave by the Plaintiff is becoming a significant burden on the Court's resources.
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> Cited in *Fabrikant v Canada*, 2014 FCA 273 at para 5.

[4] On October 22, 2018, Mr. Justice Annis ordered that the two motion records be accepted for filing. In that Order, the first motion was limited to seeking leave pursuant to section 40(3) of the Act to bring a judicial review application contesting the decision concerning the Correctional Service of Canada (CSC)'s prohibition on the use of private clinics for the provision of essential health care services (the Decision).

[5] Pursuant to section 40(4) of the Act, the Court may grant the Applicant leave to institute a proceeding "if it is satisfied that the proceeding is not an abuse of process and that there are reasonable grounds for the proceeding."

[6] In his affidavit and written representations in support of the first motion, the Applicant asserts that the Respondent's policy, described in a document entitled the National Essential Health Services Framework, "forbids prisoners to use private doctors for essential health care, while it allows prisoners such use for non-essential healthcare." The Applicant states that he was refused permission to obtain treatment by a private doctor for the removal of a cancerous lesion on his hand on July 7, 2017. He acknowledges that the surgery was performed by a CSC Doctor on August 1, 2017. The Applicant claims that he now has symptoms of colorectal cancer which he believes to be the result of the three week delay in removing the skin cancer.

[7] The Applicant contends that the policy embodied in the National Essential Health Services Framework violates the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA] because it deprives him of a right, the right to private health care, unrelated to his incarceration, contrary to subsection 4(d).

[8] The Respondent submits that the Court should refuse to grant leave for four reasons:

a) The case is moot;

b) The Applicant does not raise any reasonable grounds to challenge the Decision's reasonableness;

c) Only actions or decisions of CSC employees are grievable under the inmate grievance process; and

d) There is a complete absence of evidence that the National Essential Health Services Framework was not adopted as a result of a *bona fide* exercise of discretionary power.

[9] Under the principles established by the Supreme Court of Canada in *Borowski v Canada*, [1989] 1 SCR 342 at 353, 57 DLR (4th) 231, in considering whether a case is moot, the Court must first determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. If the response is affirmative, the Court should then decide if it should exercise its discretion to hear the case. In doing so, it should consider, among other things, judicial economy.

[10] The Respondent submits that the required tangible and concrete dispute in this case has clearly disappeared and that examining the final grievance response on judicial review would serve no practical purpose; the Applicant has received the treatment he sought, albeit after a delay of three weeks.

[11] In his Reply, the Applicant submits that the controversy is not moot given his age and state of health. He argues that it is obvious that he will need ongoing medical care and that the prohibition on using private clinics will adversely affect him. This, of course, is tantamount to asking the Court to rule on a hypothetical issue that may or may not arise in the future. It is not at all clear from the sparse information provided in his affidavit that the Applicant is in fact suffering from another form of cancer or, if his self-diagnosis were to be confirmed, that it stems from the skin cancer that was removed from his hand.

[12] The Applicant also submits that he needs a declaration that denying him access to a private clinic was illegal. This, he says, would allow him to start a legal action in which he could seek regular and punitive damages against the Respondent for the delay in his treatment. While that may be his intent, it is not the Court's role to facilitate a party's future litigation prospects in determining whether a current application for judicial review should proceed.

[13] I acknowledge that the Supreme Court of Canada has expressed the view that when the government puts in place a scheme to provide health care to the public, it must comply with the *Canadian Charter of Rights and Freedoms* (*Charter*). Delays in obtaining medical treatment under such a scheme may trigger the application of *Charter* section 7: *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at 104, 118, [2005] 1 SCR 791. To bring such a challenge, however, would require a proper evidentiary foundation. The Applicant's motion record does not provide the Court with any confidence that he would be capable of collecting and presenting such evidence should the proposed application be allowed to proceed.

[14] I agree with the Respondent that the matter is now moot as Dr. Fabrikant has received the treatment that he sought, and I am not satisfied that the Court should exercise its discretion to allow the application to proceed notwithstanding that it is moot. In reaching this conclusion, I make no ruling on whether the National Essential Health Services Framework is compliant or not with the CCRA or the *Charter*. That could only be determined on the basis of a full evidentiary record and legal argument. Such a record is not before the Court on this motion. Nor is such a case likely to be compiled and presented by the Applicant given his history. It is not in the interests of judicial economy to indulge Dr. Fabrikant's speculative complaints about the policy

and its administration by CSC by allowing him to command the expenditure of public resources and the Court's time.

[15] As for the motion to relieve Dr. Fabrikant of the filing fees required to initiate proceedings, the Court has the discretion under Rule 55 to grant such a waiver and does so in meritorious cases. In a previous decision involving Dr. Fabrikant, the Court held that this should only be done in special circumstances where the Applicant has demonstrated that he is impecunious and that the requirement would prevent him from pursuing a reasonably good claim: *Fabrikant v Canada (Attorney General)*, 2017 FC 576 at para 5.

[16] I note that Justice Stratas has stated in yet another matter involving Dr. Fabrikant that the question of whether filing fees should be waived does not need to be addressed when the notice of appeal (or application as in this case) suffers from a fatal defect: *Fabrikant v Canada*, 2018 FCA 171 at para 6. I agree with that proposition. However, it may be a relevant factor where the Court is considering whether or not to exercise its discretion to hear an otherwise moot application. Such fees should not be an obstacle to accessing justice when the case has a reasonable prospect of success. That is not the situation here.

[17] The Applicant has filed an affidavit in support of his motion that describes his prison income, expenses and debts. He avers that he has no real estate, securities or term deposits in any bank but not that he has disclosed all of his sources of income or holdings in other bank accounts. The Applicant has managed to acquire the means to launch numerous prior

applications. Given Dr. Fabrikant’s litigation history, I would need considerably more evidence to be satisfied that the Court should waive the filing fees in this instance.

[18] The Respondent not having requested costs, none will be awarded.

ORDER IN 18-T-67

THIS COURT ORDERS that:

1. the motion for leave pursuant to s. 40(3) of the *Federal Courts Act* to bring a judicial review application contesting the grievance decision by the Commissioner of the Correctional Service of Canada concerning the use of private clinics for the provision of essential health care services is dismissed; and

2. the motion for an Order to waive the filing fees required under the *Federal Courts Rules* is dismissed.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	18-T-67
STYLE OF CAUSE:	DR. V.I. FABRIKANT V HER MAJESTY THE QUEEN

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

ORDER AND REASONS:	MOSLEY J.
DATED:	DECEMBER 7, 2018

WRITTEN REPRESENTATIONS BY:

Dr. V.I. Fabrikant	FOR THE APPLICANT (Self-represented)
Joshua Wilner	FOR THE RESPONDENT (Department of Justice)

SOLICITORS OF RECORD:

Joshua Wilner	FOR THE RESPONDENT (Department of Justice)