Federal Court  Cour fédérale

Date: 20210208

Docket: T-341-19

Citation: 2021 FC 127

Ottawa, Ontario, February 8, 2021

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

COOPER MALONE, AN INFANT BY HIS LITIGATION GUARDIAN, JERI MALONE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Cooper Malone, is a minor who is represented in this proceeding by his mother, Jeri Malone. Both self-identify as Mi'kmaq Acadian, with their connections to the Mi'kmaq First Nations people flowing through the maternal side of Ms. Malone's family dating back to the 1700s.

[2] The Applicant seeks judicial review of a decision of the Jordan's Principle Appeals Committee [Appeals Committee] dated January 25, 2019, upholding its denial of an appeal by the Applicant of a decision by the Department of Indigenous Services Canada [Indigenous Services] denying the Applicant funding of services under the Jordan's Principle.

[3] For the following reasons, the application is dismissed.

I. Background Facts

A. *Jordan's Principle*

[4] Before summarizing the relevant facts in this case, it is useful to set out the genesis of the Jordan's Principle and its objectives.

[5] In December 2007, the House of Commons unanimously adopted a private member's motion urging the federal government [Canada] to adopt a child-first principle based on Jordan's Principle, which reads as follows:

> That, in the opinion of the House, the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children (House of Commons Debates, 39-2, No. 27 (12 December 2007) at 296 (Hon Ms. Crowder).

[6] Jordan's Principle is named in honour of Jordan River Anderson, a young boy from Norway House Cree Nation in Manitoba. Jordan encountered tragic delays in services due to governmental jurisdictional disputes that denied him an opportunity to live outside of a hospital setting before his death in 2005.

[7] Jordan's Principle is designed to prevent First Nations children from being denied essential public services or experiencing delays in receiving them. It ensures that where a government service is available to all other children, the government or department of first contact will pay for the service and then seek reimbursement as required from other governments or departments after the child has received the service.

[8] Jordan's Principle requires the government or department of first contact to evaluate the individual needs of the child to determine if the requested service should be provided to ensure substantive equality in the provision of services to the child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child.

[9] Following the adoption of the motion by the House of Commons, Canada began to build a policy around Jordan's Principle. However, defining and recognizing First Nations identity proved to be a sensitive and complex issue. The matter was addressed through consultation with First Nations governments and has been the subject of numerous decisions of the Canadian Human Rights Tribunal [CHRT]. Proceedings before the CHRT are ongoing.

[10] Indigenous Services implemented Standard Operating Procedures [SOPs], which are a guide to the implementation of Jordan's Principle across Canada, and which set out the eligibility policy for access to Jordan's Principle [Eligibility Policy].

[11] On June 19, 2018, after discussion with the parties to the CHRT proceedings, Canada approved a definition that expanded eligibility of Jordan's Principle to non-status Indigenous

children ordinarily resident on reserve. The decision took into consideration the fact that most federal programs are residency based, not status based, and that Canada, as a matter of policy, already provides funding for services on reserve regardless of status.

[12] At the time of the Applicant's request for funding under Jordan's Principle, section 3.1 of the SOPs stipulated that services provided under Jordan's Principle were available to:

A. Registered First Nations children living on or off reserve;

B. First Nations children entitled to be registered under the *Indian Act*, RSC 1985, c I-5 [*Indian Act*], including

i. Those who became entitled to register under the December 22, 2017 amended provisions of the *Indian Act*, under Bill S-3;

ii. Infants under 18 months; and

C. Any Indigenous children, including non-status First Nations, who are ordinarily resident on reserve.

B. *Background Facts*

[13] In March 2018, Ms. Malone made a request to Indigenous Services on behalf of the Applicant for medication coverage, a psychoeducational assessment, therapeutic riding lessons and mental health counselling under the Jordan's Principle.

[14] By letter dated July 6, 2018, Ms. Malone was informed that Jordan's Principle funding was not available for the Applicant's request for services. The basis for the denial was that such funding was only available to First Nations children registered Indians under the *Indian Act*, or those entitled to be registered, living on and off reserve. According to the information provided to Indigenous Services, the Applicant did not meet the eligibility criteria.

[15] It is important to note from the outset that the Applicant does not dispute that he does not have Indian status, is not eligible for Indian status, and does not live on reserve. The information before the Appeals Committee regarding the Applicant's eligibility for funding was quite scant. In an email dated March 20, 2018 to the First Nations Child & Family *Caring Society*, a non-profit organization that works with Indigenous and non-Indigenous people of all ages and organizations, Ms. Malone writes that she and her son "are non status and have lost our connection to the band". The Appeals Committee was also informed that "the family is Metis, there is no linkage lineage going back 3 generations, they are 14th generation removed (Daniel's decision would not impact them)."

[16] On July 24, 2018, the Applicant appealed the decision made by Indigenous Services to the Appeals Committee, which is comprised of the Senior Assistant Deputy Minister of the First Nations Inuit Health Branch, and the Assistant Deputy Minister of the Education and Social Development Programs and Partnerships Sector of Indigenous Services.

[17] In his appeal letter, the Applicant outlined his position that Indigenous Services had taken an overly narrow interpretation of Jordan's Principle, which was inconsistent with the

interpretation given to it by the House of Commons in December 2007 and by the Canadian Human Rights Tribunal in a series of decisions concerning systemic discrimination in government funding policies, namely *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 2, *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada*, 2016 CHRT 10, *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada*, 2016 CHRT 16, and *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada*, 2017 CHRT 35.

[18] The Appeals Committee initially upheld the decision made by Indigenous Services denying the Applicant's request for funding. On consent of the parties, the decision was set aside by Order of Mr. Justice Sébastien Grammond dated December 11, 2018 in Court Docket No. T-1735-18. The matter was remitted back to the Appeals Committee for redetermination, without any reasons or directions being provided.

[19] As part of the reconsideration process, the Applicant was invited to submit any further documents or information for consideration by the Appeal Committee.

[20] On January 7, 2019, counsel for the Applicant submitted a package of documents with a covering letter that reads in part as follows:

> The Applicant maintains that the decision of FNIHB [Indigenous Services Canada *First Nations and Inuit Health Branch]* to refuse funding for Cooper Malone on the basis that he is non-status, does not have a status number with Indigenous Services, and does not live on reserve is inconsistent with the articulation of Jordan's Principle adopted by the House of Commons in December 2007 and

> repeatedly confirmed by the Canadian Human Rights Tribunal. Jordan's Principle applies to all First Nations children and is not limited to only First Nations children who are registered with the Department of Indigenous Services or who live on a reserve.

[21] Counsel essentially repeated and relied on submissions made in the earlier appeal letter and requested that they be given fresh consideration.

[22] In its decision letter dated February 27, 2019, the Appeals Committee maintained its denial of the Applicant's appeal, citing the following reasons:

> In making its decision, the Appeals Committee considered the new information provided, and determined that your request cannot be approved under Jordan's Principle, based on the information presented, as Cooper is non-status, not eligible for status, and not ordinarily resident on reserve.

II. Summary of the Parties' Positions

[23] The Applicant submits that the Appeals Committee's decision is lacking in transparency, intelligibility and justification. According to the Applicant, the Appeals Committee did not engage with the critical issue of whether the criteria used to deny the Applicant's request were appropriate or in keeping with the CHRT's orders. The Applicant also argues that the criteria applied by the Appeals Committee are unreasonable in light of the CHRT's binding orders and the broad approach that must be taken to interpreting and applying Jordan's Principle. The Applicant therefore submits that this Court's intervention is warranted here.

[24] The Respondent counters that Jordan's Principle has informed Canada's approach to providing services to First Nations children since 2007. Eligibility for these services is determined

through the application of eligibility requirements, an approach that the Respondent submits is efficient, transparent, and fair. The Respondent maintains that the eligibility policy was adopted in a good faith attempt to implement Jordan's Principle, and is rationally connected to its purpose. Given that the Applicant admits that he is not eligible for services under the policy, the Respondent submits that it was reasonable for the Appeals Committee to deny his request.

III. Analysis

[25] In the Notice of Application, the Applicant cites three grounds for seeking judicial review in respect of the decision of the Appeals Committee to deny his request for coverage for medical and educational services. I propose to deal summarily with the last two grounds before turning to what I consider to be the more significant one raised in this proceeding.

A. *Procedural Fairness*

[26] The Applicant pleaded that the Appeals Committee violated principles of natural justice or procedural fairness in the course of arriving at its decision. In his written submissions, he argued that the Appeals Committee failed to deal with a central issue raised on appeal and did not provide sufficient reasons. According to the Applicant, this alleged failure constitutes a breach of the procedural fairness obligation owed by the Appeal Committee, to which no deference should be accorded by this Court. I disagree.

[27] The role of this Court on judicial review consists in ascertaining that the tribunal's decision is consistent with the rule of law: *Canada (Minister of Citizenship and Immigration) v Vavilov*,

2019 SCC 65 [*Vavilov*] at paras 2, 82. A reasonable decision is one "that is justified in light of the facts" and "meaningfully account[s] for the central issues and concerns raised by the parties", and under the reasonableness standard of review, "the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable" (*Vavilov* at paras 83, 126, and 127).

[28] In the present case, the Appeals Committee concluded that the Applicant was not eligible for funding under the Jordan Principle. The denial letter plainly, albeit tersely, sets out that the Applicant's request was denied for that reason alone.

[29] If reasons have been provided, the sufficiency or adequacy of those reasons is not a question of procedural fairness, but is considered as an aspect of the substantive review of the decision: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras. 20-22.

[30] Short reasons are often adequate and all that is needed to be written by a tribunal in order to explain its decision. The reasons provided by the Appeals Committee are in my view sufficient to allow this Court to understand on what basis the decision was made. In the circumstances, the Applicant has failed to establish any violation of the principles of natural justice or procedural fairness in this case.

B. *Alleged Factual Errors*

[31] A third ground pleaded by the Applicant is that the Appeals Committee based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it. In his written submissions, the Applicant baldly asserts that the Re-Determination of Appeal summary before the Appeals Committee contains a number of factual errors and contradictory statements about his First Nations heritage. However, no factual errors or contradictions have been identified. In fact, the matter was not pressed by his counsel in argument. In the result, I see no merit to this argument.

C. *Reasonableness of the Decision*

[32] The Applicant claims, as a first ground, that the Appeals Committee erred in law and rendered an unreasonable decision by deciding to refuse the Applicant's request. The first step is to determine the standard of review to be applied.

(1) Standard of Review

[33] In *Vavilov*, the Supreme Court of Canada concluded at para 10 that there is a presumption that reasonableness is the applicable standard of review where a court reviews the merits of an administrative decision and that the reviewing court should only depart from this presumption "where required by a clear indication of legislative intent or by the rule of law". There is no such indication in this case.

[34] The Appeals Committee decision comes before this Court by way of judicial review, and not by way of a statutory appeal. There is also no indication that Parliament intended a standard of review other than reasonableness to apply to decisions such as these.

[35] As a result, I agree with the parties that the standard to be applied in reviewing the Appeals Committee decision is reasonableness - in other words, whether the decision falls within the range of possible, acceptable outcomes, which are defensible in respect of the facts and the law.

(2) Fettering of Discretion

[36] The Applicant is not suggesting that the Appeals Committee erred by unreasonably applying the eligibility criteria to the evidence which he presented in support of his request for services. In fact, the Applicant expressly admits that he does not meet the Jordan's Principle Eligibility Policy.

[37] At the hearing, counsel for the Applicant advanced an argument that was not raised in the Applicant's memorandum of fact and law. He asserts that the Appeals Committee fettered its discretion by failing to engage with the critical issue of whether the criteria used to deny the Applicant's request were appropriate or in keeping with the CHRT's orders and by narrowly interpreting and applying Jordan's Principle.

[38] This new argument is based on the assumption that the Appeals Committee had the discretion to expand the eligibility criteria set out in the SOPs. In my view, it did not.

[39] The SOPs in this case establish criteria that must be satisfied for a candidate to qualify for benefits under the Jordan's Principle. While the SOPs also provide information and guidance as to how the policy is to be implemented, nothing in the document confers any discretion on the Appeals Committee to modify or waive the policy's eligibility requirements. Consequently, no fettering of discretion occurred when the Appeals Committee determined that the Applicant did not meet the eligibility criteria.

(3) Sufficiency of Reasons

[40] The Applicant also argues that the Appeals Committee provided insufficient reasons for its decision. He submits that the question of whether Canada's definition of Jordan's Principle was excessively narrow and whether it contravened the binding orders of the CHRT was critical and required analysis. Instead, the Committee's decision provides no rationale for how restrictions related to residence and *Indian Act* status are consistent with the CHRT's repeated direction that Jordan's Principle be immediately applied to "all First Nations Children," nor does it explain how such criteria are relevant to the needs-based, child-first assessment that is required under Jordan's Principle.

[41] The Applicant maintains that the Appeals Committee did not grapple with these issues. Rather, it treated the re-determination of the Applicant's appeal as strictly a question of the applying Canada's unreasonably narrow definition of Jordan's Principle.

[42] In support of his position, the Applicant cites *Vavilov*, and argues that a decision maker's failure to grapple with a significant issue calls into question the reasonableness of the decision (*Vavilov*, at paras. 127-128).

[43] The Applicant relies on interim orders released by the CHRT after the Appeals Committee's decision in this matter in support of his position that the Appeals Committee failed to grapple with a critical issue. In February 2019, the CHRT ordered a new hearing into the question of whether it should issue further remedial orders with respect to the Canada's definition of Jordan's Principle. In doing so, it noted concern that a definition grounded in *Indian Act* status raised considerable risk of denying eligibility to certain children based on both historic and present-day discriminatory eligibility requirements for status under the *Indian Act*.

[44] In an application for judicial review, the general rule is only the evidence before the decision maker is relevant and thus admissible. As a result, post-decision evidence is normally irrelevant and thus inadmissible (*Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para 86). While there may be exceptions to this rule, none of them apply here.

[45] The Appeals Committee could not have considered evidence or jurisprudence that post-dates its decision. Nor can Canada be faulted for failing to adhere to what the Applicant speculates the eventual order of the CHRT may contain.

[46] In any event, the CHRT declined to define First Nations' children and instead said that the government and stakeholders are better suited to make that decision (*First Nations Child & Family*

Caring Society of Canada v Canada (Minister of Indigenous and Northern Affairs), 2019 CHRT 7, at paras. 20-22 [*CHRT, 2019*]; *First Nations Child & Family Caring Society of Canada v Canada (Minister of Indigenous and Northern Affairs),* 2020 CHRT 20 at paras. 321-324) 22 [*CHRT, 2020*].

[47] As acknowledged by the Applicant, this question was subject to a hearing before the CHRT and the decision was under reserve when the Appeals Committee made its decision.

[48] The Appeals Committee was required to determine the threshold issue of whether the Applicant met the eligibility requirements before moving on to assess substantive equality or the best interests of the child. This is exactly what the Appeals Committee did in this case.

[49] At the time of the Applicant's request for funding under Jordan's Principle, the November 9, 2018 version of Section 3.1 of the SOPs stipulated that services provided under Jordan's Principle were available to three specific classes of First Nations or Indigenous children. These classes are defined and unambiguous terms. One is either a member of a class or not. Given that the Appeals Committee did not have authority to expand or alter the criteria, the Applicant's argument that the decision is unreasonable because the Appeals Committee failed to address a central issue has no merit. No useful purpose would be served by making a determination on other issues raised by the Applicant in the circumstances.

(4) Reasonableness of the Eligibility Policy

[50] Even if I am incorrect in my analysis above, I am of the view that the Applicant has failed to establish that the Appeals Committee's decision should be set aside.

[51] The Applicant is essentially asking the Appeals Committee, or alternatively this Court, to ignore the Eligibility Policy and substitute its own views. It is important to bear in mind that Canada did not establish the eligibility criteria unilaterally, but rather through consultation with First Nations governments and other stakeholders, as explained by Ms. Leila Gillis, Acting Director of Jordan's Principle at Indigenous Services, in her affidavit filed in response to the application:

> 27. It is reasonable and desirable for Canada to create and rely on a policy outlining who is eligible for consideration for Jordan's Principle funding. The Eligibility Policy ensures consistent application of Jordan's Principle, and ensures that dedicated resources are directed to those whom Jordan's Principle is intended to benefit. It also allows Jordan's Principle requests to be triaged fairly and efficiently so that urgent requests can be processed within 12 hours and all other requests are processed within 48 hours. Finally, the Eligibility Policy provides a workable definition of "First Nations child", reflecting extensive discussion, the CHRT rulings to date, and policy considerations such as the manner in which status and residency operate with respect to most federal programs. For the same reasons, it is also reasonable for the requirements set out in the Eligibility Policy to be assessed first before moving on to assess substantive equality or the best interests of the child.

[52] A key distinction must be drawn between challenging a government policy itself and seeking judicial review of the application of the policy to an applicant. In the present case, the

Applicant collapses this distinction and submits that the same level of deference applies to both issues. I disagree.

[53] A very high degree of deference is owed by a reviewing Court to discretionary policy choices made by the executive that involve both economic considerations and other complex public interest concerns. In *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 SCR 2 [*Maple Lodge*], the Supreme Court held that in order to interfere with such a decision, discretion must have been exercised in bad faith, for an ulterior motive or without regard to principles of natural justice, or in reliance on predominantly irrelevant factors.

[54] More recently, the Federal Court of Appeal affirmed in *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, at para. 67, that the test from *Maple Lodge* is compatible with the standard of review analysis in *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[55] While the review of a discretionary policy falls under the umbrella of reasonableness, a reviewing court will grant the decision maker "a very large margin of appreciation": *Hupacasath*, at para. 67. A decision will only be unreasonable where it is made in bad faith, for considerations irrelevant or extraneous to the legislative purpose, or is irrational, incomprehensible or otherwise an abuse of discretion: *Malcolm v. Canada (Fisheries and Oceans)*, 2014 FCA 130, at para. 35.

[56] Jordan's Principle was created to provide funding and government services to First Nations children first, and to resolve jurisdictional disputes second. In order to give effect to Jordan's

Principle, Indigenous Services, in discussions with the parties to the CHRT proceedings, crafted the Eligibility Policy, which is used to determine which children are eligible to receive funding under Jordan's Principle. The Eligibility Policy is not the product of legislation or regulations, but is instead a clear policy choice. Consequently, the range of reasonable possible outcomes is wide.

[57] Developing eligibility criteria for the provision of Indigenous services is a complex matter. Indigenous Services should be afforded great latitude in developing an Eligibility Policy. There is no indication that Indigenous Services failed to consider any key issues, misinterpreted the law or developed the policy irrationally. Quite the opposite, the Eligibility Policy continues to develop in response to orders from the CHRT, discussions with stakeholders and the needs of the First Nations' community. With any policy, it is sometimes necessary to draw a line in the sand, otherwise it will not be able to serve those who need it.

[58] . For pure policy decision to be overturned, they must rise to the level of egregious. On the basis of the limited record before me, I am satisfied that the Policy is not unreasonable and certainly not egregious.

IV. Conclusion

[59] For the above reasons and for the reasons set out in paragraphs 16 to 49 of the Respondent's memorandum of fact and law, which I adopt and make mine, I conclude that the application should be dismissed. Counsel for the Applicant conceded at the hearing that if this Court finds that the policy is reasonable then the Appeals Committee's decision is also reasonable. Having found that the policy is reasonable, I am satisfied that there was transparency and intelligibility in the decision

making process of Appeals Committee, and its decision falls within a range of possible, acceptable outcomes, which are defensible in respect of the facts and law.

V. Costs

[60] Costs typically follow the event. However, in this case, the Respondent is not seeking its costs. Therefore, none will be awarded.

JUDGMENT IN T-341-19

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, without costs.

"Roger R. Lafrenière"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Morgan Rowe	FOR THE APPLICANT
Sarah Dawn Norris Fraser Harland	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raven, Cameron, Ballantyne & Yazbeck, LLP/s.l.r. Barristers and Solictors Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT