Federal Court  Cour fédérale

Date: 20171025

Docket: T-1550-17

Citation: 2017 FC 953

Vancouver, British Columbia, October 25, 2017

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

FRANK COLASIMONE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] Frank Colasimone [the Applicant] is a federal inmate at Kent Institution [Kent] in British Columbia. He says that he has filed a complaint with the Canadian Human Rights Commission [CHRC], alleging that Correctional Service Canada [CSC] has failed to accommodate his mental health and drug dependency disabilities. Pending the resolution of his human rights complaint, the Applicant seeks injunctive relief from this Court compelling the CSC to provide various services to him, including a transfer from Kent. For the reasons that follow, I conclude that the Applicant is not entitled to mandatory

interlocutory injunctive relief from this Court, the threshold for which is high (*Canadian Council for Refugees v Canada*, 2006 FC 1046 at para 15; *Madeley v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 634 at para 26 [*Madeley*]).

I. Requested Relief

[2] By Motion pursuant to s. 44 of the *Federal Courts Act*, the Applicant seeks the following interim relief:

1. an injunction pursuant to s. 44 of the *Federal Courts Act*, requiring CSC to refrain from discriminating against the Applicant and specifically requiring CSC to:
    i. transfer the Applicant immediately to the Regional Treatment Centre [RTC], or another similar facility within CSC or in the community;
    ii. if the Applicant requires continuous observation, ensure that he is observed by mental health professionals and that he not be isolated or deprived of activities to occupy his mind as a result of observation;
    iii. perform a full psychological and physical assessment of the Applicant;
    iv. provide the applicant with his care plan, and if one does not exist create a care plan for this purpose; and
    v. create a log of meaningful human contact received by the Applicant and share this with the Applicant and his counsel.

[3] A judicial review application pursuant to s. 18 of the *Federal Courts Act* has not been filed.

II. Jurisdiction

[4] The Applicant relies upon *Canada (Human Rights Commission) v Canada Liberty Net*, [1998] 1 SCR 626 [*Canada Liberty Net*], where the Supreme Court of Canada

recognized that the Federal Court has jurisdiction to grant interlocutory relief in relation to complaints made under the *Canadian Human Rights Act* [CHRA]. The Applicant also relies upon *Drennan v Canada (Attorney General)*, 2008 FC 10 at para 23 [*Drennan*].

[5] The Respondent argues that the Applicant is in fact seeking an order compelling specific actions by CSC officials and medical staff and therefore in essence, the Applicant seeks an order of *mandamus*. As such, the Respondent argues, s. 44 of the *Federal Courts Act* is not the proper procedure to bring a request for *mandamus*. The Respondent relies upon *Kellapatha v Canada*, 2017 FC 739, in support of this argument. Alternatively, the Respondent argues that the Applicant cannot meet the tripartite test for injunctive relief.

[6] Although I agree that some of the relief sought by the Applicant could be characterized as "*mandamus* like," that issue is not determinative of this Motion. As in *Madeley* at para 21, "[T]he respondent did not make a compellable argument that a mandatory injunction is prohibited where mandamus could lie." The ambit of the *mandatory* interlocutory injunction remedy, which compels action on the part of the Respondent, can capture what the Applicant seeks in this Motion. Whether the Applicant can meet the test for interlocutory injunctive relief is determinative of this Motion.

[7] In these circumstances, I am satisfied this Court has jurisdiction to consider the Applicant's request for injunctive relief (*Canada Liberty Net*, at para 37; *Drennan*, at paras 25-26; *Canada (Human Rights Commission) v Winnicki*, 2005 FC 1493 at paras 22-23).

III. Injunction Test

[8] To be successful, the Applicant must satisfy each part of the three-part test outlined in *RJR-MacDonald v Canada*, [1994] 1 SCR 311 at 334 [*RJR-MacDonald*], namely: (1) there is a serious issue to be tried; (2) the Applicant would suffer irreparable harm if the interlocutory relief is not granted; and, (3) that the balance of convenience favours granting such relief.

A. *Serious Issue*

[9] The Applicant is a federal inmate with a long history of drug addiction. He is currently incarcerated at Kent because of violent behaviour. While at Kent he claims that there have been a number of changes to his medications which causes him stress and anxiety thereby exacerbating his mental health issues. This is what forms the basis of his alleged human rights complaint. On this Motion he seeks accommodation for his drug dependency and his mental health issues by asking for a transfer to a RTC, a full psychological and physical assessment and other accommodations.

[10] The Applicant did not file a copy of his human rights complaint with the Motion materials and the CHRC was not served with this Motion. Therefore, only the assertions by the Applicant that CSC breached protected human rights under the CHRA are before this Court for consideration.

[11] The Respondent filed the following CSC Commissioner's Directives: Health Services (Number 800); Interventions to Preserve Life and Prevent Serious Bodily Harm (Number 843); and, Inmate Transfer Processes (Number 710-2-3) to demonstrate that the Applicant's treatment at Kent is consistent with these institutional policies. The Applicant does not allege that his treatment was not consistent with these institutional policies.

[12] Furthermore, some of the relief sought by the Applicant, including a transfer to a RTC and various medical interventions, are subject to consideration under the CSC Directives and involve assessments and decision-making by various individuals including medical experts. This Court is not in any position to substitute its decision for that of medical experts who have assessed the Applicant.

[13] The Applicant argues that the applicable threshold to establish a serious issue is lowered when issues under the *Charter of Rights and Freedoms* [the *Charter*] are asserted. However, the Applicant does not make *Charter* arguments here.

[14] Contrary to the Applicant's assertion, there is authority which provides that where an Applicant seeks a mandatory injunction which compels action, as here, the threshold is *higher* on the serious issue branch: *Madeley*, at paras 27-29; further, see Robert Sharpe, *Injunctions and Specific Performance* (4th Ed Canada Law Book) at 2.650. The Court should engage in a more extensive review of the merits where, as here, the relief sought by the Applicant on this Motion would essentially grant the relief the Applicant seeks in the underlying application (*RJR-MacDonald*, at 338-339).

[15] Based on this review, and even accepting the Applicant's analogy to *Charter* issues, I am not satisfied that the Applicant has a strong enough case on the merits to demonstrate a serious issue under the *RJR-MacDonald* test, regardless of the threshold applied. It is clear that the Applicant has a stated desire to have a particular type of medication, which is likely related to his drug dependency illness. However, that desire does not rise to the level of serious issue.

[16] Although this is sufficient to dispose of the request for an injunction, I will nonetheless consider the balance of the tripartite test.

B. *Irreparable Harm*

[17] To demonstrate irreparable harm, the Applicant must lead "clear and non-speculative" evidence which goes beyond mere assertions (U*nited States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 at para 7).

[18] The Applicant seeks a transfer to a less stressful environment and a facility designed to accommodate his addiction issues. He argues that his condition is worsening at Kent especially with the medication changes which are imposed upon him. He also argues that the lack of communication about his treatment is problematic. He complains that he is not seen regularly by medical staff.

[19] However, the evidence shows that the Applicant has regularly been seen by various medical professionals. Specifically, I note that he was seen by a physician on

September 11, 2017 and a psychiatrist on August 15, 2017. While the Applicant clearly disagrees with the medical treatments he has received, there is no evidence to suggest that those treatments are inappropriate or below the applicable professional standard of care. A disagreement with the course of treatment or medication is not sufficient to satisfy the irreparable harm part of the test.

[20] Furthermore, with respect to the risk that the Applicant will attempt suicide, I note that he has already attempted to do so on two occasions. I also note CSC Commissioner's Directive: Interventions to Preserve Life and Prevent Serious Bodily Harm (Number 843) which outlines the procedure to be followed in this event.

[21] Accordingly, I am satisfied that Kent has appropriate measures in place to protect the Applicant from himself if he attempts self-harm. The fact that the Applicant does not like the conditions that are imposed upon him as a result of these attempts does not constitute irreparable harm.

C. *Balance of Convenience*

[22] The Applicant argues that upholding the rights of prisoners who are a vulnerable sector of society weighs in his favour.

[23] However, the "higher risk of injustice" in this case lies with the Minister, who would be compelled to provide the extensive relief sought despite the fact that the Applicant's case is facially weak on the merits (*RJR-MacDonald*, at 338). As such, in the

circumstances, I conclude that the balance of convenience favours the Minister and the statutory obligations.

IV. Conclusion

[24] For the above reasons, the Applicant's Motion is dismissed.

[25] In the circumstances, I decline to award costs.

ORDER in T-1550-17

THIS COURT ORDERS that the Applicant's Motion is dismissed. No costs are awarded.

"Ann Marie McDonald"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1550-17
STYLE OF CAUSE:	FRANK COLASIMONE v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	OCTOBER 17, 2017
ORDER AND REASONS:	MCDONALD J.
DATED:	OCTOBER 25, 2017

APPEARANCES:

Vibert Jack	FOR THE APPLICANT
Allison Brown	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Prisoners' Legal Services Burnaby, British Columbia	FOR THE APPLICANT
Nathalie G. Drouin Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT