Federal Court  Cour fédérale

Date: 20190111

Docket: 18-T-51

Citation: 2019 FC 33

Ottawa, Ontario, January 11, 2019

PRESENT: The Honourable Madame Justice Simpson

BETWEEN:

MICHAEL MCGUIRE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] This order concerns a motion for an extension of time to bring an application for judicial review. Michael McGuire [the Applicant] seeks leave to apply for judicial review of a decision [the Decision] denying his mother, Beatrice McGuire [Mrs. McGuire], an *ex gratia* payment under the Allan Memorial Institute Depatterned Persons Assistance Plan. The Decision was conveyed in a letter from Marc Gervais [Mr. Gervais], the Manager of the Plan, dated March 17, 1993. As Mrs. McGuire is now deceased, the Applicant also asks to be appointed as the representative of her estate for the purpose of the application for judicial review.

[2] For the reasons below, this motion for an extension of time will be dismissed.

I. Background

[3] This case concerns psychiatric treatment that Mrs. McGuire received as patient of Dr. Ewen Cameron [Dr. Cameron] at the Allan Memorial Institute [AMI] in Montreal in 1955. Dr. Cameron provided treatment to psychiatric patients at the AMI during the 1950s and 1960s, including "depatterning" treatment.

[4] In the 1980s, the Government of Canada retained George Cooper, a lawyer, to investigate Dr. Cameron's work at the AMI, as his research was funded in part by the Federal Government. The impetus for the report was a lawsuit initiated by former AMI patients against the Government of the United States. The plaintiffs in that suit alleged that the Central Intelligence Agency had funded psychiatric experiments which were conducted on patients at the AMI without their consent. The *Opinion of George Cooper, Q.C., Regarding Canadian Government Funding of the Allan Memorial Institute in the 1950's and 1960's* was published in 1986 [the Cooper Report].

[5] The Cooper Report focused on a specific psychiatric technique called "depatterning" which was used by Dr. Cameron on patients at the AMI. Depatterning involved a combination of drug induced prolonged sleep therapy and electroshock therapy [ECT]. The theory behind Dr. Cameron's technique is described in the Cooper Report:

> [Dr. Cameron's] idea was to break up brain pathways through the highly disruptive application of massive electroshocks, many times the number of shocks in a normal ECT treatment – two times a day, as opposed to three times a week, for example – until the patient's brain had been "depatterned"; i.e. (in the case of psychotic patients) until all schizophrenic symptoms were lost, as well as other aspects of memory. After this had occurred, the idea

> was then to "re-pattern" the brain by trying to instill new and "correct" patterns of thinking in the patient's mind. (Cooper Report, p. 15)

[6] Following the Cooper Report, the Federal Government created the AMI Depatterned Persons Assistance Plan [Plan] to compensate persons who had received "substantial or full" depatterning treatment at the AMI. The Plan was established by an Order in Council, titled *The Order Respecting Ex gratia Payments to Persons Depatterned at the Allan Memorial Institute Between 1950 and 1965*, P.C. 1992 -2302 [Order in Council]. The Order in Council authorized the Minister of Justice to make an *ex gratia* payment of $100,000 to persons who had received full or substantial depatterning treatment at the AMI between 1950 and 1965. The Order in Council also provided that the depatterned person had to be alive at the time of the payment.

[7] Several decisions related to the Plan have been made by this Court. In *Kastner v Canada (Attorney General)*, 2004 FC 773, Mr. Justice Beaudry allowed an application for judicial review of a decision denying payment under the Plan. In *Huard v Canada (Attorney General)*, 2007 FC 195, Mr. Justice Martineau made an order allowing an extension of time to bring an application for judicial review of a decision refusing compensation under the Plan. In that case, the person who had been treated by Dr. Cameron was still alive. Finally, in *Pleszekewycz v Canada (Attorney General)*, 2012 FC 106, Madam Justice Bédard dismissed an application for judicial review of a decision which had denied payment under the Plan.

II. This motion

[8] The factors to be considered in an application to extend time [the Factors] were set out in *Grewal v Minister of Employment and Immigration*, [1985] 2 FC 263 (FCA). The list is as follows:

1) Whether the applicant intended to bring the judicial review within the period allowed for bringing the application and whether that intention was continuous thereafter;

2) The length of period of the extension;

3) Prejudice to the opposing party;

4) The explanation for the delay; and

5) Whether there is an arguable case for quashing the order the applicant wishes to challenge on judicial review.

[9] It is open to a judge to determine which Factors are to be taken into account based on the facts of a particular case (*Jakutavicius v Canada*, 2004 FCA 289 at para 17).

[10] The Respondent also raises the argument that the Applicant does not have standing to bring this claim on behalf of the estate of Mrs. McGuire.

III. Discussion

[11] In my opinion, the dispositive issue is the absence of an arguable case. As a result, it will not be necessary to address the other Factors or the Applicant's standing.

[12] I have two reasons for concluding that the Applicant does not have an arguable case. First, the evidence indicates that Mrs. McGuire was not a "depatterned person" as defined in the Order in Council. Second, the Order in Council explicitly limits payment to persons who are alive. I will deal with these matters in turn.

A. *The Evidence Indicates that Mrs. McGuire was Not a Depatterned Person under the Act*

[13] A depatterned person is defined in the Order in Council as someone who has received full or substantial depatterning treatment. Depatterning treatment is defined in the Order in Council as "prolonged sleep followed by massive electroshock treatments, reducing the patient's mind to a childlike state" [emphasis added].

[14] The existing case law establishes that the Court can turn to the Cooper Report to provide further context for the meaning of the Order in Council (*Huard*, para 90). The Cooper Report described depatterning treatment as follows:

> In depatterning, the patient would be subjected to massive electroshock treatments – sometimes up to twenty or thirty times as intense as the "normal" course of electro convulsive therapy (ECT) treatments. At the end of up to 30 days of treatment – up to 60 treatments at the rate of two per day – the patient's mind would be more or less in a childlike and unconcerned state.
>
> In preparation for the treatment, the patient would be put into a state of prolonged sleep for a period of about ten days, using various drugs. At that point, the massive electroshock therapy would begin, the patient being maintained on continuous sleep throughout. Somewhere between the thirtieth and sixtieth day of sleep, and after 30 to 60 electroshock treatments, depatterning would be complete. Depatterning was then maintained for about another week, with electroshocks being reduced to three per week.
>
> Gradually the treatments were reduced to one a week. Then followed a period of reorganization, when the patient came back from the "third stage", through the "second stage", up to the "first stage" of depatterning. . . .

[15] The Cooper Report indicates that the drug induced prolonged sleep would be ongoing during the ECT. This is a more precise definition than the one provided in the Order in Council, which simply describes prolonged sleep "followed by" massive electroshock therapy. Regardless of this difference, the Order in Council read in conjunction with the Cooper Report makes it

clear that there must be a connection between the prolonged sleep therapy and the ECT in order to meet the definition of depatterning treatment.

[16] The evidence indicates that although Mrs. McGuire received prolonged sleep therapy at the AMI and electroshock therapy at the AMI, they were delivered as distinct and separate courses of treatment.

[17] Mrs. McGuire was admitted to the AMI on June 15, 1955. She was given prolonged sleep therapy for 30 days between June 26, 1955 and July 26, 1955. There is no evidence that she was given ECT during that period. She was then kept at the AMI for observation until she was discharged on August 9th, 1955 [the Discharge].

[18] A progress note by Dr. Cameron on August 9th, 1955 indicates that her Discharge plan included long-term psychotherapy and daily medications, but does not mention ECT. A letter from Dr. Cameron to another one of Mrs. McGuire's physicians, Dr. Hughes, dated August 23, 1955, indicates that psychotherapy alone is to be the follow up treatment.

[19] There is evidence that Mrs. McGuire's previous symptoms of anxiety and depression returned after her Discharge. Nearly a month later, on September 8th, 1955, Mrs. McGuire began receiving electroshock therapy as an outpatient at the AMI.

[20] The record on this motion demonstrates that the fact Mrs. McGuire received sleep therapy and ECT as distinct courses of treatment was one of the reasons why her claim under the Plan was denied. A letter dated May 6, 1993 from Mr. Gervais to Mrs. McGuire states:

> In all cases of depatterning, the sleep treatment was conducted in conjunction with the ECT treatment.

> In your case, you received sleep treatment after which you were discharged and commenced receiving ECT treatment on an out-patient basis.

[21] Based on the evidence before me, the Applicant does not have an arguable case that this finding was unreasonable. It is clear that in Mrs. McGuire's case the prolonged sleep therapy and electroshock therapy were distinct and separate courses of treatment. The ECT was not planned at the time of her initial admission or at the time of her Discharge.

[22] Further, these facts are different from other successful cases before this court. In *Kastner*, the Applicant submitted expert psychiatric reports to the Plan's administrators. They concluded that there was "a clear linking of enforced sleep and massive ECT use" in the treatment that she received (para 9). In *Huard*, wherein Mr. Justice Martineau allowed the extension of time, the link was less clear, but there were significant gaps in the hospital's records.

[23] ECT generally was a common psychiatric practice at the time of Dr. Cameron's work at the AMI (Cooper Report, p. 13). However, depatterning treatment involved the application of massive electroshocks, up to twenty or thirty times as intense as the 'normal' course of ECT treatment (Cooper Report, p. 17). As well, depatterning treatment involved more frequent electroshocks, two times a day, as opposed to a normal course of treatment which would have involved three ECT sessions a week (Cooper Report, p. 15).

[24] Mr. Gervais found that Mrs. McGuire had not received "massive electroshock treatments" as defined in the OIC. The letter from Mr. Gervais to Mrs. McGuire dated May 6, 1993 states that "There is no exact definition of massive electroshock treatment as each case is unique. Nevertheless, in the majority of cases this treatment is of the Page Russell type which is more intensive than normal electroshock treatment."

[25] Unfortunately, the evidence in this case does not establish the intensity or type of ECT that Mrs. McGuire received. However, the treatment frequency is known. Between September 8th and December 5th, 1955, she received 17 ECT treatments. She initially received ECT two to three times a week. Over time, the frequency was decreased. This is significantly less than the high number of sessions described in the Cooper Report as part of depatterning treatment.

[26] The third requirement for depatterning treatment as defined in the Order in Council is that the treatment was to reduce the "patient's mind to a childlike state." The Applicant relies heavily on a single progress note from Dr. Cameron made on July 19, 1955 during Mrs. McGuire's prolonged sleep period. Therein Dr. Cameron wrote that "she is still somewhat cheerful and childish." The note shows that Dr. Cameron reached the conclusion that she was still childish because she had expressed great concern that she had missed her birthday. There is no other evidence of child-like behaviour either during the sleep period or during the ECT treatments. The single note in this case can be contrasted with the evidence in *Kastner*. In that case, the Applicant had shown "regression to a child-like state, in that she was talking like a baby, suffering from urinary incontinence, sucking her thumb and demanding to be fed from a bottle" (*Kastner*, para 49).

[27] In this case, Dr. Cameron's single note dated July 19, 1955 is insufficient to establish an arguable case that the Plan administrator's finding that Mrs. McGuire had not been reduced to a childlike state was unreasonable.

B. *Payment can only be made to a living person*

[28] Finally, the Applicant does not have an arguable case because Mrs. McGuire is no longer alive. The wording of the Order in Council is clear: it only authorizes the Minister to make a

payment to an individual who is alive at the time of the payment. Accordingly, even if a reconsideration of the Decision were to be ordered on judicial review, a payment under the Plan could not be made.

IV. Costs

[29] I have noted that, although the Respondent has asked in its written material for costs in the amount of $500.00, this request was not referred to in the hearing. Accordingly, I am unsure about whether a costs award is being pursued. For this reason, the issue of costs remains under reserve and I will deal with it, if the Registry is contacted on or before January 25, 2019 and told that an award is being sought.

ORDER IN 18-T-51

THIS COURT ORDERS that the motion for extension of time is hereby dismissed.

The issues of costs to the Respondent remains under reserve as described above.

"Sandra J. Simpson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	18-T-51
STYLE OF CAUSE:	MICHAEL MCGUIRE v ATTORNEY GENERAL OF CANADA
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