Federal Court of Appeal  Cour d'appel fédérale

**Date: 20190424**

**Docket: A-154-19**

**Citation: 2019 FCA 100**

[ENGLISH TRANSLATION]

**PRESENT: PELLETIER J.A.**

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Appellant**

**and**

**JAMIE BOULACHANIS**

**Respondent**

Heard at Ottawa, Ontario, by telephone conference on April 23, 2019.

Order delivered at Ottawa, Ontario, on April 24, 2019.

REASONS FOR ORDER BY: PELLETIER J.A.

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## REASONS FOR ORDER

**PELLETIER J.A.**

[1] This is a motion to stay a mandatory interlocutory injunction that was granted by the Federal Court (cited as 2019 FC 456) at the request of Jamie Boulachanis, an inmate at Donnacona Institution. Ms. Boulachanis is a transgender person who began expressing her female gender identity not long ago. She is at Donnacona Institution, a correctional institution for men, because in December 2016, she was convicted of first-degree murder and sentenced to life imprisonment, with no possibility of parole for 25 years. At the time of her conviction, she had

not told federal prison authorities about her gender dysphoria. It was only after she was convicted that Ms. Boulachanis disclosed her gender dysphoria to a Correctional Service of Canada (Service) psychologist. In August 2018, a psychiatrist diagnosed her with gender dysphoria. Ms. Boulachanis began hormone therapy in January 2019. Even before she started hormone therapy, Ms. Boulachanis had applied for a transfer to a women's institution, namely, Joliette Institution; this application was denied.

[2] Also in January 2019, Ms. Boulachanis filed an application for judicial review from the denial of her application to be transferred to Joliette Institution, a correctional institution for women. The Service dismissed this application on the grounds that management at Joliette Institution considered that it would be unable to manage the escape risk and the risk to public safety posed by Ms. Boulachanis.

[3] It was after she was placed in administrative segregation on account of threats to her safety that Ms. Boulachanis brought a motion for a mandatory interlocutory injunction in order to transfer to a women's institution.

[4] It should be noted that the only evidence filed in support of Ms. Boulachanis is the seven-paragraph affidavit written by her counsel. The relevant paragraphs of this affidavit are the following:

> [TRANSLATION]
> 4- On April 4, 2019, the applicant notified me by telephone that she had been placed in involuntary administrative segregation because her continued placement among the other inmates could jeopardize her safety;
>
> 5- On April 4, 2019, the applicant told me that she felt helpless and hopeless;

> 6- On April 4, 2019, the applicant told me that she was experiencing psychological distress;

[5] The affidavits filed by the Attorney General of Canada supplemented the record so that the Federal Court was in a position to rule on the merits of the motion.

[6] The Federal Court considered the three-part test related to motions for mandatory interlocutory injunctions, which the Supreme Court of Canada recently reiterated in *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 at paragraph 18, [2018] 1 S.C.R. 196 (*CBC*). This test is essentially the same as the test to be satisfied with respect to motions for interlocutory injunctions, except that a higher threshold must be met in the first part. Indeed, the applicant must demonstrate that there is a strong *prima facie* case that she will succeed at trial, and not simply that there is a serious issue to be tried. The other two parts remain the same. The applicant must demonstrate that irreparable harm will result if the relief is not granted. In the third part of the test, the applicant must show that the balance of convenience favours granting the injunction.

[7] Ms. Boulachanis's application for judicial review is based on the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, not on the *Canadian Charter of Rights and Freedoms*.

[8] The Federal Court first assessed whether there was discrimination. It found that Ms. Boulachanis was subject to *prima facie* discrimination "because of her gender identity or expression, given that she was denied a transfer to a women's institution, even though that is

what corresponds to her current gender identity and expression and the designation of sex that now appears on her act of birth": Reasons of the Federal Court (Reasons), at paragraph 36.

[9] The Court then looked at whether there was any justification for the discrimination, as is provided for pursuant to paragraph 15(1)(g) of the *Canadian Human Rights Act*. This provision recognizes that distinction is not a discriminatory practice when it is supported by a "*bona fide* justification". Subsection 15(2) of that Act specifies that a practice is considered to have a *bona fide* justification if "accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost."

[10] The Federal Court recognized that if Ms. Boulachanis were transferred to a women's institution, the Service would have to take special measures to manage the risk that she presents. However, the evidence in the record did not convince the Court that these measures "would cause excessive hardship or impose exorbitant costs": Reasons, at paragraph 52.

[11] As for irreparable harm, the Federal Court found that this harm arose from two sources: the threats against Ms. Boulachanis and her placement in administrative segregation as a result of those threats. The Court noted that the seriousness of the threats against Ms. Boulachanis was confirmed by the fact that the Service saw fit to place her in administrative segregation in order to ensure her safety. Regarding Ms. Boulachanis's being subjected to administrative segregation, the Federal Court was of the view that "keeping Ms. Boulachanis in administrative segregation is

a form of irreparable harm that can support an application for an interlocutory injunction . . . ": Reasons, at paragraph 66.

[12] With respect to the balance of convenience, the Court stated that it was "sensitive to the security concerns that are at the heart of the [Corrections and Conditional Release Act] (see section 3.1 of that Act) . . . ": Reasons, at paragraph 71. However, it was of the view that:

> . . . even though Ms. Boulachanis's transfer to a women's institution will cause inconvenience for the Service, I am of the opinion that this inconvenience is not sufficient to outweigh the harm that Ms. Boulachanis is suffering as a result of her current situation.
>
> (Reasons, at paragraph 73.)

[13] As a result, the Federal Court ordered that the Service transfer Ms. Boulachanis to a women's institution.

[14] That decision was appealed to this Court, and a motion for an interlocutory stay was brought at the same time.

[15] The three-part test set forth by the Supreme Court in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117 (SCC) applies in this case. As noted above, the test is essentially the same as the test set out in *CBC*, except for the first part of the test.

[16] The Attorney General alleges that there are eight errors in the Federal Court's reasons and argues that each alleged error raises a serious issue to be tried. Ms. Boulachanis, for her part,

contends that none of the errors put forward by the Attorney General raises a serious question given the deference that this Court owes to the trial judge's findings of fact and findings of mixed fact and law. She submits that the appeal is doomed to fail: Memorandum of Fact and Law of the Respondent, at paragraph 11.

[17] As was explained at the hearing, when this Court rules on the merits of the appeal, it applies the standard of palpable and overriding error with respect to questions of fact and questions of mixed fact and law. However, the judge who is disposing of the interlocutory stay motion must simply decide whether the Attorney General has raised an issue that is not frivolous or vexatious and need not consider the final decision on that issue.

[18] Despite the number of errors that the Attorney General claims were made, only one serious issue to be tried must be identified in order to satisfy this part of the test. It appears that the Federal Court's finding that Ms. Boulachanis is suffering irreparable harm because she has been placed in administrative segregation raises a serious issue to be tried.

[19] The Attorney General alleges that the Federal Court erred in considering as facts the findings of the Court of Appeal for Ontario in *Canadian Civil Liberties Association v. Canada*, 2019 ONCA 243 (*Canadian Civil Liberties*). These findings were based on the expert evidence submitted in that case, but there is no expert evidence in Ms. Boulachanis's record.

[20] At paragraph 62 of its reasons, the Federal Court found that administrative segregation itself is harmful. At paragraph 63, it described the trial judge's findings of fact in *Canadian Civil Liberties* regarding the effects of administrative segregation:

> The application judge made findings that administrative segregation:
>
> - amounts to a significant deprivation of liberty – it places the inmate in a prison located within the prison;
> - imposes a psychological stress capable of producing serious permanent observable negative mental health effects;
> - is harmful;
> - causes sensory deprivation and has harmful effects as early as 48 hours after admission;
> - can alter brain activity and result in symptoms within seven days; and
> - poses a serious risk of negative psychological effects when prolonged and is offside responsible medical opinion.

[21] The Federal Court's finding, which is set out at paragraph 66 of its reasons, reads as follows:

> In short, it is undeniable that administrative segregation has considerable and rapid negative psychological effects. I am of the view that keeping Ms. Boulachanis in administrative segregation is a form of irreparable harm that can support an application for an interlocutory injunction, provided, of course, that the other criteria are met.

[22] As noted previously, the only evidence filed in support of Ms. Boulachanis's motion is her counsel's affidavit, which attests to Ms. Boulachanis's feelings of helplessness and hopelessness on the very day that she was placed in administrative segregation. In addition, the affidavit indicates that she verbalized her psychological distress. There is no evidence in the record regarding the conditions in which Ms. Boulachanis is being held in administrative

segregation. Furthermore, there is no evidence in the record regarding the effects of administrative segregation.

[23] The Attorney General's record indicates that Ms. Boulachanis [TRANSLATION] "told" staff at Donnacona Institution that she would want to take her own life [TRANSLATION] "if she were ever transferred to another institution". While this ambiguous statement cannot be ignored, it does not appear to be about administrative segregation, but rather about a transfer to another institution.

[24] Whether the Federal Court was in a position to find, on the basis of the limited information in the record, that Ms. Boulachanis was suffering irreparable harm is a serious question to be tried. The first part of the test is therefore satisfied.

[25] The second part is to demonstrate that there will be irreparable harm if the motion for a stay is not granted. The Attorney General contends that there is irreparable harm to the public interest when a public body is prevented from exercising its statutory powers. Section 3.1 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, sets out the following: "The protection of society is the paramount consideration for the Service in the corrections process."

[26] The evidence in the record shows that the Service would not be able to manage the escape risk posed by Ms. Boulachanis if she were to be transferred to a women's institution. This is because Ms. Boulachanis presents a high risk of escape on account of several factors, including:

- her escape from a prison van in which she was alone and the subsequent discovery of two saw parts in the cell of that van;
- the fact that, following a search with a metal detector the day after her escape, she handed over to the authorities four saw blades, three handcuff keys and part of a screwdriver that had been hidden in her body cavities;
- the fact that, during a search of her cell at a provincial detention centre, officers found that the window frame was missing. In addition, officers found braided ropes made from sheets and bedding bags, handmade handcuffs, several metal bars, and tools; and
- Ms. Boulachanis lived on the run for 14 years, during which time she was able to obtain false identities.

[27] It is important to keep in mind that a maximum-security institution for women is equivalent to a medium-security institution for men. However, on the basis of the Service's assessment, the escape risk and the risk to public safety posed by Ms. Boulachanis can only be managed in a maximum-security institution.

[28] Ms. Boulachanis argues that the Attorney General does not have a monopoly on the public interest and that the escape risk and risk to public safety are hypothetical. In light of the evidence in the record, Ms. Boulachanis's risk of escape cannot be said to be hypothetical. It is true, in a sense, that this risk is hypothetical until an escape occurs. However, from a practical standpoint, Ms. Boulachanis's history is such that the risk is real and not hypothetical.

[29] The second part of the test is satisfied.

[30] The third part of the test is the balance of convenience. Counsel for Ms. Boulachanis brought her client's talk of suicide to the attention of this Court. While this talk is an important indication, the Service took it seriously and activated its high watch protocol for possible suicide.

[31] Ultimately, the issue is not whether Ms. Boulachanis's personal interests should be sacrificed on account of the Service's institutional requirements. There is no doubt that Ms. Boulachanis has her own personal needs and interests. The Federal Court recognized that the Service "made sincere and considerable efforts to accommodate Ms. Boulachanis in terms of pronoun use, searches, showers and clothing": Reasons, at paragraph 21. In addition, the Service made a number of proposals in order to provide further accommodations with respect to Ms. Boulachanis's concerns, but she did not accept them. Ms. Boulachanis, for her part, proposed a number of options to the Service, but these suggestions were not considered reasonable: Motion Record, at 201–202, paragraphs 24–29. All this to say that the Service is aware of its responsibilities and is making significant efforts to fulfill them. The Service is not obstinately denying Ms. Boulachanis's request for accommodation without attempting to arrive at a solution that meets her needs while discharging its public policy responsibilities. At this point, the balance of convenience favours the Attorney General.

[32] The motion for an interlocutory stay of the Federal Court's decision rendered on April 15, 2019, is granted, without costs. The Federal Court order will be stayed until the Federal Court's final judgment on the application for judicial review filed by Ms. Boulachanis is issued.

"J.D. Denis Pelletier"
J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-154-19 |
| **STYLE OF CAUSE:** | THE ATTORNEY GENERAL OF CANADA v. JAMIE BOULACHANIS |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | APRIL 23, 2019 |
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| **DATED:** | APRIL 24, 2019 |

**APPEARANCES**:

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|---|---|
| Dominique Guimond<br>Guillaume Bigaouette | FOR THE APPELLANT |
| Alexandra Paquette | FOR THE RESPONDENT |

**SOLICITORS OF RECORD**:

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|---|---|
| Nathalie G. Drouin<br>Deputy Attorney General of Canada<br>Ottawa, Ontario | FOR THE APPELLANT |
| Surprenant Magloé, Avocats<br>Montreal, Quebec | FOR THE RESPONDENT |