Federal Court

Cour fédérale

Date: 20150903

Docket: T-2412-14

Citation: 2015 FC 1045

Ottawa, Ontario, September 3, 2015

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

JOSEPHAKIS CHARALAMBOUS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Acting Senior Deputy Commissioner [Commissioner] of the Correctional Service of Canada [Service] denied on December 5, 2013, the applicant's final level grievance requesting modifications to his correctional plan and a review of the decision denying his voluntary transfer request to a minimum security institution. The sole issue in this judicial review is whether the Commissioner made a reviewable error by failing to make the requested file correction to remove any reference to the "sexual component" of the index offence for which the applicant was convicted.

[2] Subsections 24(1) and (2) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [Act] read as follows:

24. (1) The Service shall take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible.	24. (1) Le Service est tenu de veiller, dans la mesure du possible, à ce que les renseignements qu'il utilise concernant les délinquants soient à jour, exacts et complets.
(2) Where an offender who has been given access to information by the Service pursuant to subsection 23(2) believes that there is an error or omission therein, (a) the offender may request the Service to correct that information; and (b) where the request is refused, the Service shall attach to the information a notation indicating that the offender has requested a correction and setting out the correction requested.	(2) Le délinquant qui croit que les renseignements auxquels il a eu accès en vertu du paragraphe 23(2) sont erronés ou incomplets peut demander que le Service en effectue la correction; lorsque la demande est refusée, le Service doit faire mention des corrections qui ont été demandées mais non effectuées.

[3] The applicant challenges the legality of the impugned decision on the basis that the Commissioner (as well as the Service) erred in law or otherwise acted unreasonably in labelling him as a "sexual offender" and treating allegations of sexual misconduct as proven facts. While the applicant has argued in his memorandum of fact and law that the proper interpretation of section 24 of the Act is subject to the standard of review of correctness (*Tehrankari v Canada (Correctional Service)*, 2000 CanLII 15218 (FC) at para 44 [*Tehrankari #1*]), it became clear at the oral hearing that the case did not turn on a pure question of law. The determination made by the Commissioner raises a mixed question of fact and law, that is, whether it was proper to refuse

the requested correction considering the facts at hand and the applicable legal principles. Accordingly, the standard of review is that of reasonableness (*Tehrankari #1*, above, at para 44; *Kim v Canada (Attorney General)*, 2012 FC 870 at para 33 [*Kim*]).

[4] The relevant facts are not in dispute.

[5] The applicant is serving a life sentence for first degree murder. Prior to his conviction, the applicant was a practicing physician who had his own family medicine practice. In 1991, 19 year old Sian Simmonds and her sister, Katie Simmonds, made complaints to the College of Physicians and Surgeons of British Columbia [College] alleging that the applicant, who had been their family doctor for ten years, had engaged in inappropriate sexual behavior towards them. The applicant was informed that the College had scheduled a disciplinary hearing for March 1993. However, on January 27, 1993, Sian was murdered by a man named David Schlendler. In November 1994, the applicant was convicted of her murder. The trial judge found that the murder was a contract killing that the applicant had arranged through an acquaintance, Brian West, to prevent the Simmonds sisters from testifying before the College. The trial judge also found that his decision to have the victim murdered was based on his hatred for the College and his obsessive concern about his reputation and financial well-being. The applicant had been deeply humiliated by the previous sanction imposed by the College (see the following paragraph). The applicant's appeal against his conviction was dismissed by the Court of Appeal for British Columbia and his application for leave to appeal to the Supreme Court of Canada was dismissed as well.

[6] While the charge of murder laid against the applicant was not of a sexual nature, the Service made a number of administrative decisions based on the fact that the applicant was considered to be a "sexual offender". In doing so, the Service examined past allegations of sexual misconduct involving other patients of the applicant. In 1989, the applicant was found guilty by the College of infamous conduct for his relationship with a former patient. The girl in question had been his patient from the ages of 12 to 14. When she was 15 years old they began to cohabit and became sexually involved. She subsequently became his wife. From 1985 to 1998, the applicant was also charged with eight counts of sexual assault, seven of which were in relation to complaints made by former patients. All of the charges were eventually stayed, including six that were stayed on January 12, 1998, after the applicant had exhausted all appeals in relation to his murder conviction. The Service has acknowledged that the applicant was never found criminally guilty of any sexually related charges. Be that as it may, the *STATIC-99 Coding Rules – Revised (2003)* defines "sexual offence" as a "sexual misbehaviour" that "must result in some form of criminal justice intervention or official sanction". The coding guide provides a list of examples that would be considered "criminal justice interventions". Two of the examples include "arrests" or "charges" for a sexual offence. The Service considered that the applicant's situation fell into that category.

[7] The purpose of section 24 of the Act is to ensure that the Service does not rely on inaccurate information and that any error or omission be corrected. Both parties agree that the Service cannot treat allegations or suspicions as proven facts, and that such treatment would amount to a reviewable error justifying the intervention of the Court. On the other hand, it is reasonable for the Service to rely on an incident report stating facts relating to a dismissed charge

as long as the facts are reliable and as accurate as possible considering the circumstances (*Kim*, above, at para 61). As outlined in the Standard Operating Practices [SOP] 700-4, paragraph 37, the Service conducts a specialized "sex offender assessment" for "[o]ffenders whose current or past offences involved sexual offences, whether or not the latter resulted in conviction." Thus, before going further, the characterization of the applicant as a "sexual offender", which is the subject of debate between the parties in this instance, has to be put into proper carceral context.

[8] The applicant first entered federal custody in 1995 and his correctional plan included the Intensive Treatment Violent Offender Program [ITVOP]. In the psychological report prepared at that time, Doctor Lawson noted "sexual perversion" in the applicant's behaviour. He also addressed the allegations of sexual misconduct that had been made against the applicant and noted that "[h]is histories of sexual preoccupation and perversion rank among the most important of [the] contributing factors". A reading of the psychological report in question makes it clear that the psychologist was able to make the distinction between proven facts and inferences. He notes in this regard that "[the applicant's] sexual perversion is evident in his self-reported involvement with prostitutes, in the complaints of some of his female patients and in his self-report that he began a sexual relationship with a 15 year old former patient who he subsequently married" (page 4), and he further notes that "[a]lthough several of the allegations reported above [in a report to Crown counsel] are either still before the courts or otherwise unsubstantiated, they are nevertheless entirely consistent with the beliefs and attitudes expressed by [the applicant] towards women and sexual behaviour during the course of his interviews with me" (page 5). Despite his characterization of the applicant as a "prototypical, sexual offender" (page 9), Doctor Lawson did not believe it was worthwhile at that time to refer the applicant to a program for

sexual offenders in view of the fact that the applicant would be uncooperative and that "it would have little of [sic] any chance of having a therapeutic benefit and may even enhance his skills at manipulating others" (page 9).

[9] In 2000, the applicant's correctional plan was amended to replace the ITVOP with the Intensive Sex Offender Program, but following a complaint by the applicant, that decision was reversed by a correctional manager and the ITVOP remained in the applicant's correctional plan. In December 2005, the applicant's correctional plan was amended again to refer him to the High Intensity Sex Offender Program. In 2005 and again in 2008, the applicant submitted grievances challenging his referral to sexual offender programming and the use of the term sexual offender. Both grievances were unsuccessful.

[10] In the response provided by the Service to the third-level grievance filed by the applicant in December 2006, we find the following comments with respect to the characterization of the applicant as a "sexual offender" for the purpose of security and program assessment. Recognizing that the applicant has not been convicted of any offence of a sexual nature, the Service notes:

> You state in your third-level grievance that you have been incorrectly labelled an "untreated sexual offender" by Mission Institution UM, L. Jackson. You also state that her written "erroneous and slanderous comments are spawning more erroneous and slanderous statements of [you]." You explain that Dr. Lopes has since made false statements about you, including the remark that you have a "history of sexual misconducts." You advise that you have never been convicted of a sexual offence and CSC personnel are presenting you "in the worst possible light by taking unproven allegations of inappropriate conduct and dropped or stayed false and fictitious charges" as a way to "justify their wrongdoing." As outlined in Standard Operating Practice (SOP)

700-4, paragraph 37, the Correctional Service of Canada (CSC) conducts "specialized sex offender assessments," for "offenders whose current or past offences involved sexual offences, whether or not the latter resulted in conviction."

The *STATIC-99 Coding Rules – Revised (2003)*, page 13, defines "sexual offence" as a sexual misbehaviour" that "must result in some form of criminal justice intervention or official sanction." The coding guide provides a list of examples that would be considered as "criminal justice interventions." Two of the examples include "arrest" or "charges" for a sexual offence.

While you are correct in your statement that you do not have a conviction for a sexual offence, you do have a demonstrated history of sexually-related charges that have resulted in a Stay of Proceedings in 1986, 1995, and 1998. Furthermore, the instigating events that led to your First Degree Murder conviction was when the victim and her sister filed a complaint with the College of Physicians and Surgeons about your questionable sexual behaviour. During your Intake Assessment, you additionally admitted to having a relationship with a 15-year old female patient, whom you subsequently married.

Congruent with SOP 700-4, paragraph 37, a comprehensive Psychological Assessment was completed on your case on 1995/04/21. You were assessed as a "prototypical sexual offender" with the following contributing factors associated to your current offence cycle:

> …histories of preoccupation with sex and sexual perversion, his attitudes towards women and sexual behaviour, his use of power and control for the sexual domination of women, his very high needs for stimulation and excitement and his anti-social beliefs and attitudes.

The expression of "sexual offender" in the context of the management of your case is not considered erroneous. The series of events that are contained in your file and the incident leading up to your offence for which you are presently serving your sentence for has clear attributes of sexual behaviour problems. The use of the term "sexual offender" while you are under sentence is relevant for the type of interventions that are required in your case as prescribed in your CTP and in the assessment of risk.

Given the above noted information, the comments by UM L. Jackson and Dr. Lopes are considered appropriate in your case.

> The UM was using the description to highlight your demonstrated risk factors, the sexual overtones that are involved in your current conviction, your historical behaviour patterns and the lack of programming you have completed to date to address your dynamic risk factors. Furthermore, as a result of your sexually-related charges, Dr. Lopes' statement that you have a history of "sexual misconducts" is consistent with the previously noted *STATIC-99 Coding Rules – Revised (2003)* definition of "sexual offence."
>
> This part of your grievance is denied.
>
> [Emphasis added].

[11] The latter decision on that part of the applicant's grievance respecting his qualification as an "untreated sexual offender" was not challenged by the applicant on judicial review. Instead, the applicant challenged, on grounds of procedural fairness, the legality of the decision to refer him to the ITVOP program. The Court dismissed the application (*Charalambous v Canada (Attorney General)*, 2009 FC 1082).

[12] Despite his objections, the applicant subsequently attended and completed the High Intensity Sex Offender Program in April of 2011. Following the completion of the program, the applicant made an application to transfer from a medium security institution to a minimum security institution. His case management team, however, did not support the proposed transfer and recommended that his application be denied, in part, on the basis of their assertion that Mr. Charalambous remained an "untreated sex offender". The Warden ultimately denied the transfer application by agreeing with the recommendations of the case management team. He found that there was a "sexual component to [his] offending" and that the applicant had failed to address it. In a later security classification decision dated August 22, 2012, the case management team was directed to delete the phrase "untreated sex offender" from their previous reports. This was

because the applicant had taken a program for sex offenders. In the new decision, while noting that he had completed the High Intensity Sex Offender Program, the case management team stated that the applicant had made limited gains toward addressing the sexual component of his offences, as he denied sexual offending. The case management team therefore remained unsupportive of the transfer application.

[13] In 2011, the applicant submitted a request for a file correction requesting that all references to "concerns regarding sexually inappropriate behaviour, sexual component of index offence or untreated sex offender or sex offender" be corrected. The applicant also challenged his security classification and the refusal to transfer him to a lower security institution. His first level grievance was denied in September 2011 and his second level grievance was denied in July 2012. The applicant brought his grievance to the third and final level, where he requested that his record be corrected to reflect that he was not a sexual offender, that he had never engaged in sexual misconduct or sexually inappropriate behaviour and that there were no sexual components to his index offence or any offence he had even been convicted of. On December 5, 2013, the impugned decision was rendered and the applicant's grievance was denied, leading to the present judicial review application.

[14] The applicant readily concedes that the Service can rely on allegations or suspicions in making case management decisions about an offender, but argues that this does not mean the Service can treat allegations as proven facts. The applicant submits that there was no sexual component in the crime of first degree murder for which he was convicted, making his case distinguishable from cases where death is caused to the victim by a person while committing or

attempting to commit sexual assault. This is what happened in the *Tehrankari* case (see in particular the judgment of Justice McKinnon in *R v Tehrankari*, 2009 CanLII 11216 (Ont SC) [*Tehrankari #3*]; and *R v Tehrankari*, 2012 ONCA 718 [*Tehrankari #4*]). The applicant argues that the Service misconstrued allegations of sexual offending as proven facts, which is evident from the fact that the Service refers to the applicant as a "sex offender" while he has never been convicted of any sexual offence. Consequently, the Commissioner ought to have made the requested file correction under subsection 24(2) of the Act and his decision is unreasonable (see *Brown v Canada (Attorney General)*, 2006 FC 463; *Russell v Canada (Attorney General)*, 2006 FC 1209).

[15] The grounds of attack made by the applicant cannot succeed. I am in agreement with the respondent's reasoning and arguments made in his memorandum of fact and argument, which I wholly endorse. In particular, I am satisfied that the impugned decision to dismiss the grievance is based on the evidence and constitutes a reasonable outcome considering various relevant factors, including the circumstances leading to the index offence, the stayed sexual assault charges, the applicant's previous sanction by the College for infamous conduct and a 1995 psychological report assessing the applicant as a prototypical sexual offender. It is also apparent from a review of the impugned decision and documentary evidence on file that the Service has accurately reported the primary facts, acknowledging that none of the charges of a sexual nature have led to a conviction, and that the applicant takes issue not with the Service's statement of the primary facts but rather with the Service's inferences that he is a sexual offender and that there was a sexual component to his offending.

[16] I find that the Commissioner did not act unreasonably in noting that information drawn from the trial judge's comments, Royal Canadian Mounted Police reports and stayed charges were relevant pieces of information that should be considered in the administration of the applicant's sentence, and that references to his sexual misconduct were relevant and would not be altered. The Commissioner did not rely on inaccurate information in so doing and the Service did not make any undue reference in characterizing the applicant as a "sexual offender" for the purposes of placement decisions or transfer requests. It is important to remember that these types of administrative decisions are different in nature from criminal or disciplinary proceedings commanding a higher burden of proof. While subsection 24(1) of the Act does oblige the Service to "take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible", as stated by Justice Mosley in *Tehrankari v Canada (Attorney General)*, 2012 FC 332 at para 35 [*Tehrankari #2*], "that does not mean that CSC must reinvestigate information obtained from reliable sources such as provincial ministries, police forces and the Courts".

[17] Consequently, the application for judicial review is dismissed. While costs would normally follow the result, I see no point in awarding them in this instance.

JUDGMENT

THIS COURT'S JUDGMENT is that the present judicial review application be dismissed without costs.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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