Federal Court  Cour fédérale

Date: 20200309

Docket: T-1036-19

Citation: 2020 FC 345

Ottawa, Ontario, March 9, 2020

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

LANDON KARAS

Applicant

and

THE ATTORNEY GENERAL OF CANADA
(CORRECTIONAL SERVICE CANADA)

Respondents

JUDGMENT AND REASONS

I. Overview

[1] Correctional Services Canada [CSC] undertakes regular reviews and classifies offenders for security purposes assigning an offender security level [OSL] of maximum, medium or minimum. The Applicant, Mr. Landon Karas, is an inmate at the Grand Cache Institution where he is serving a lengthy term of imprisonment, having been convicted of a serious offence under the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

[2] After completing his most recent review, Mr. Karas was advised that the Institutional Head at Grand Cache had maintained his OSL as medium. Mr. Karas now seeks judicial review of that decision pursuant to subsection 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. He seeks an order directing that he be reclassified as a minimum security offender, or, in the alternative, that the Institutional Head immediately reconsider the decision.

[3] The Respondent submits that the Application should be dismissed because Mr. Karas has not exhausted the internal grievance process. I agree; Mr. Karas' failure to exhaust to the internal grievance process is determinative. The Application is dismissed for the reasons that follow.

II. Background

[4] In conducting an OSL review, an Institutional Head is required to consider various factors, including the seriousness of the offence, outstanding charges, behaviour during the sentence, personal history, physical or mental illness or disorder, potential for violence, and continued criminal involvement (*Corrections and Conditional Release Regulations*, SOR/92-620 [*Regulations*] at section 17).

[5] The Institutional Head is the ultimate decision maker in any OSL review. However, others may make recommendations to inform the Institutional Head's decision. Here, the Manager of Assessment Intervention, the Applicant's Parole Officer, and the Deputy Warden all made recommendations to the Institutional Head.

[6] If an inmate is not satisfied with an Institutional Head's OSL decision, then he or she may submit a grievance to the Commissioner of Corrections (*Regulations* at subsection 80(1)).

[7] Mr. Karas had been previously classified as a medium security offender. This was because he presented a low probability of escape, a moderate public safety risk, and a low institutional adjustment risk. In the present Application, the Manager of Assessment Intervention, the Applicant's Parole Officer, and the Deputy Warden all recommended that the Applicant be rated as having a minimum public safety risk and therefore be reclassified as a minimum security offender. Despite these recommendations, the Institutional Head maintained Mr. Karas' classification as a medium security offender.

III. Failure to exhaust the grievance process

A. *Exhaustion of remedies*

[8] Before seeking judicial review of an administrative decision, applicants are expected to exhaust internal processes. In *Canada* (*Border Services Agency) v. C.B. Powell Ltd.*, 2010 FCA 61, the Court of Appeal refers to the expectation that internal processes will be exhausted as "the normal rule," stating that "absent exceptional circumstances, courts should not interfere with ongoing administrative processes until they are completed, or until the available, effective remedies are exhausted" (para 31). The threshold for what constitutes an "exceptional circumstance" is high (para 33). One of the benefits of this rule is that it ensures that a reviewing court will have access to all of an administrative decision maker's findings: findings which "may

be suffused with expertise, legitimate policy judgments and valuable regulatory experience" (para 32).

[9] In *Strickland v. Canada (Attorney General)*, 2015 SCC 37, the Supreme Court of Canada discusses the factors a court should consider in determining whether to exercise its discretion to decline review on the basis that an "adequate alternative remedy" exists. The factors identified by the Supreme Court include, among others, the convenience of the alternative remedy, the alternative decision maker's relative expertise, expeditiousness, and cost. The Court then states:

> [43] The categories of relevant factors are not closed, as it is for courts to identify and balance the relevant factors in the context of a particular case: *Matsqui*, at paras. 36-37, citing *Canada (Auditor General)*, at p. 96. Assessing whether there is an adequate alternative remedy, therefore, is not a matter of following a checklist focused on the similarities and differences between the potentially available remedies. The inquiry is broader than that. The court should consider not only the available alternative, but also the suitability and appropriateness of judicial review in the circumstances. In short, the question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate. Ultimately, this calls for a type of balance of convenience analysis: *Khosa*, at para. 36; *TeleZone*, at para. 56. As Dickson C.J. put it on behalf of the Court: "Inquiring into the adequacy of the alternative remedy is at one and the same time an inquiry into whether discretion to grant the judicial review remedy should be exercised. It is for the courts to isolate and balance the factors which are relevant . . ." (*Canada (Auditor General)*, at p. 96). [Emphasis added.]

[10] This Court has consistently held that the CSC grievance process is an adequate alternative remedy to judicial review (*Reda v. Canada (Attorney General)*, 2012 FC 79 at para 23; *Giesbrecht v. Canada*, 1998 CanLII 7905 (FC) at paras 10 and 14; *Olah v. Canada (Attorney General)*, 2006 FC 1245 at paras 11 – 14; *Nome v. Canada (Attorney General)*, 2018 FC 1054 at para 7; *Thompson v. Canada (Correctional Service)*, 2018 FC 40 at paras 14 – 17; and *Ouellette*

v. Canada (Attorney General), 2012 FC 801 at para 33). In *MacInnes v. Mountain Institution,* 2014 FC 212 [*MacInnes*] Justice Michel Shore states at paragraph 18 that "the Court should not interfere with [the grievance process] except for 'exceptional circumstances' such as cases of emergency, evident inadequacy in the procedure, or where physical or mental harm is caused to an inmate."

B. *The CSC grievance process*

[11] Section 90 of the *Corrections and Conditional Release Act,* SC 1992, c 20 [*CCRA*] provides that there shall be a fair and expeditious grievance process to resolve issues that fall within the Commissioner's jurisdiction. The *Regulations* set out a two-level grievance process (*Regulations* at sections 74 – 82). The process is expanded upon in directives and guidelines (*Commissioners Directive* 081 [*Directive*]).

[12] The *Regulations* recognize that grievance decisions are subject to judicial review. However, the *Regulations* also provide that where an offender pursues judicial review before exhausting the grievance process, the processing of the grievance is deferred pending completion of the judicial process (*Regulations* at subsection 81(1)).

C. *Circumstances are not exceptional*

[13] Mr. Karas initiated a grievance upon receiving the Institutional Head's decision maintaining his classification as a medium security offender. CSC acknowledged receipt of the grievance for final level adjudication and he was advised that a response would be provided by

May 2019. Mr. Karas was advised in April 2019 that the grievance due date had been revised and a response was to be provided by November 2019. In June 2019 as a result of the initiation of this Application, CSC deferred the processing of the grievance in accordance with the *Regulations*.

[14] Mr. Karas acknowledges that the obligation to exhaust the CSC grievance process would normally preclude judicial review. However, he submits that the principle of exhaustion is flexible. He relies on *Boulachanis v. Canada (Attorney General)*, 2019 FC 456 [*Boulachanis*] and *MacInnes* in arguing that the principle should not preclude his Application.

[15] Mr. Karas submits that the grievance process is inadequate due to lengthy delay. The evidence of the delay is Mr. Karas' personal experience in two prior grievances. The circumstances are disclosed in a single paragraph in Mr. Karas' affidavit and, attached to the affidavit, a final grievance decision rendered following a prior OSL grievance submitted by Mr. Karas. This evidence does not establish that the process itself is inadequate due to delay.

[16] In *Ewert v. Canada (Attorney General)*, 2009 FC 971 [*Ewert*], Justice François Lemieux recognized that delay, even undue delay, cannot by itself lead to the conclusion that the process is presumptively flawed (para 39). In *Rose v. Canada (Attorney General)*, 2011 FC 1459 [*Rose*], Justice Luc Martineau, having considered a limited but more detailed evidentiary record than is now before me, reaches the same conclusion:

> [34] … Although the evidentiary record shows that some cases have clearly been subject to excessive delays, in the Court's view, such statistical and anecdotal evidence is simply insufficient to support a general all inclusive declaration that the grievance

> process is wrought with delay and thus not an adequate alternative to judicial review.

[17] Mr. Karas has not demonstrated that the grievance process is an inadequate alternative to judicial review because of delay.

[18] This however does not end the inquiry. Mr. Karas argues that the issue of delay must be considered in light of facts and circumstances relevant to his case (*Ewert* at para 39). In particular, he submits that a delayed response to his grievance will prejudice him in another proceeding: an application he has commenced, under section 745.6 of the *Criminal Code*, to have his parole ineligibility period reduced. He anticipates that this application will soon proceed in the Alberta Court of Queen's Bench.

[19] Counsel has advised Mr. Karas that his OSL classification is a very important factor in the 745.6 application. It is unlikely he will be successful if he continues to be classified as a medium risk offender. Because his medium security designation will prejudice his chances of success on the 745.6 application, he submits the Court should conclude his circumstances are exceptional and allow him to bypass the CSC grievance process.

[20] In oral submissions, counsel for Mr. Karas also submitted that the final decision in respect of Mr. Karas' prior OSL grievance did not adequately address the issues raised at that time. He submits the response in this instance will be similarly inadequate. A fresh negative decision, he argues, will simply repeat the process, providing no meaningful check on the decision of the Institutional Head. I am unpersuaded.

[21] The exceptional circumstances that warrant a Court proceeding with a judicial review application where an adequate alternative remedy exists include situations of emergency, evident inadequacy in the procedure, or circumstances where physical or mental harm arises (*Rose* at para 35; *Boulachanis* at para 56; *Gates v. Canada (Attorney General)*, 2007 FC 1058 at para 26; and *Marachelian v. Canada (Attorney General)*, [2001] 1 FC 17 at paras 9 – 10).

[22] Here, Mr. Karas has provided some evidence that his position may be weakened in another proceeding, should that proceeding happen before the Commissioner renders a final grievance decision. The evidence of prejudice is limited and the projected outcome of success on the 745.6 application is speculative. Concerns relating to the adequacy of a prior decision might have been addressed by way of judicial review of the prior decision; however, these concerns cannot support a finding of exceptional circumstances in this instance.

[23] Having considered all of the circumstances, I am satisfied that the CSC internal grievance process provides an adequate alternative remedy to Mr. Karas' concerns with the Institutional Head's decision to maintain his medium OSL. Judicial review is not appropriate.

IV. Conclusion

[24] The Application is dismissed. The Respondent has sought costs. Having considered the circumstances of the Applicant and the straightforward nature of the issues raised, no costs are awarded.

JUDGMENT IN T-1036-19

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.

2. Costs are not awarded.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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