Federal Court  Cour fédérale

Date: 20210108

Docket: T-1823-18

Citation: 2021 FC 31

Ottawa, Ontario, January 8, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

MARLON HENRY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application for judicial review concerns the decision of Mr. Peter Linklater, a Special Advisor to the Commissioner of Corrections (the "Special Advisor"), acting on behalf of the Correctional Services Canada ("CSC"), to deny the Applicant's grievance, which claimed that information contained in his Intake Assessment Report ("IAR") is incorrect (the "Final Grievance Decision").

[2] The Applicant submits that the Final Grievance Decision is unreasonable on two grounds. First, the Special Advisor unreasonably found that the Applicant's IAR does not require correction pursuant to section 24 of the *Corrections and Conditional Release Act*, SC 1992, c 20 ("*CCRA*") and Commissioner's Directive ("CD") 701, *Information Sharing.* Second, the Special Advisor unreasonably found that the IAR was authored in compliance with CD 705-6, *Correctional Planning and Criminal Profile*. The Applicant further argues that he is entitled to the disclosure of the evidence that was relied upon in authoring the IAR pursuant to section 27 of the *CCRA*.

[3] For the reasons that follow, I find that the Final Grievance Decision is unreasonable. This application for judicial review is therefore allowed.

II. Facts

A. *The Applicant*

[4] The Applicant is an inmate at Warkworth Institution ("Warkworth"), a federal prison operated by the CSC. The Applicant is currently serving his second lengthy sentence, which he was taken into custody for in January 2004. Both of the Applicant's sentences flow from a string of offences concerning sex workers that were mostly minors, who the Applicant financially exploited and/or physically and sexually assaulted. Since arriving at Warkworth, the Applicant has acted in a relatively constructive and peaceful manner: he has received no institutional charges, organized charitable events, and engaged in public art projects.

[5] In July and August of 2016, the Applicant submitted both a request that the CSC correct certain information in his IAR as well as a complaint to that effect. Mr. Peter Nahorny, the Applicant's institutional parole officer ("IPO") at the time, authored the Applicant's IAR on November 21, 2006. The Correctional Service of Canada ("CSC") uses IARs in determining whether to recommend to the Parole Board of Canada that an inmate be placed on parole.

[6] On October 11, 2016, the CSC denied the Applicant's request for correction (the "Memo to File"). Specifically, it stated that:

> This Memo to File is to inform Mr. Henry that his request for File Correction has been denied. As a result, the [IAR] has been unlocked and amended to reflect the presence of this Memo to File.
>
> […]
>
> The information that Mr. Henry is now objecting to is approximately 10 years old and is the professional assessment and analysis of his case at that time by the IPO who authored the report. The file corrections Mr. Henry is requesting are not viewed as errors but rather born from the differences between his memory of his statements and the content of the 2006 Intake Assessment report, as well as not understanding that court documents are not the only source of information used by CSC. The intake Parole Officer would also have considered in his analysis of Mr. Henry's case all available official sources of information, and Mr. Henry's comments and criminal history/pattern of offending.

[7] In a decision dated October 21, 2016, the CSC dismissed the Applicant's complaint and affirmed the findings in the Memo to File (the "Complaint Response"). The Applicant grieved the Complaint Response on November 6, 2016, and the CSC denied that grievance on December 29, 2016 (the "First Grievance Decision"). The Applicant escalated his grievance on or about September 21, 2017. In the Final Grievance Decision, dated August 2, 2018, the Special Advisor

denied the Applicant's grievance. The Final Grievance Decision is the decision at issue in this application for judicial review.

B. *Decision Under Review*

[8] The Special Advisor denied the component of the Applicant's grievance that claimed the CSC breached its obligations under CD 701 and the *CCRA* by refusing to correct the Applicant's IAR. The Special Advisor affirmed the findings in the Memo to File and the Complaint Response that the impugned information does not constitute errors or omissions, but is rather "the professional assessment and analysis of the IPO." The Special Advisor reiterated that court documents are not the only sources of information relied upon in an IAR, and that Mr. Nahorny was no longer available for comment.

[9] The Final Grievance Decision upheld the Applicant's grievance in part, however, on the basis that the CSC failed to amend the Applicant's Offender Management System ("OMS") record to include the Memo to File, pursuant to paragraph 15 of CD 701, Annex B. The Final Grievance Decision required the CSC to amend the Applicant's OMS record to reflect this finding.

C. *Relevant Legislation*

[10] Section 24 of the *CCRA* creates an obligation for the CSC to maintain accurate information on inmates' OMS records. It states that:

(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.

(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.

(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) 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.

[11] Section 27 of the *CCRA* provides inmates with the right to disclosure for certain decisions. It states that:

(1) Where an offender is entitled by this Part or the regulations to make representations in relation to a decision to be taken by the Service about the offender, the person or body that is to take the decision shall, subject to subsection (3), give the offender, a reasonable period before the decision is to be taken, all the information to be considered in the taking of the decision or a summary of that information.

(2) Where an offender is entitled by this Part or the regulations to be given reasons for a decision taken by the Service about the offender, the person or body that takes the decision shall, subject to subsection (3), give the offender, forthwith after the decision is taken, all the information that was considered in the taking of the decision or a summary of that information.

(1) Sous réserve du paragraphe (3), la personne ou l'organisme chargé de rendre, au nom du Service, une décision au sujet d'un délinquant doit, lorsque celui-ci a le droit en vertu de la présente partie ou des règlements de présenter des observations, lui communiquer, dans un délai raisonnable avant la prise de décision, tous les renseignements entrant en ligne de compte dans celle-ci, ou un sommaire de ceux-ci.

(2) Sous réserve du paragraphe (3), cette personne ou cet organisme doit, dès que sa décision est rendue, faire connaître au délinquant qui y a droit au titre de la présente partie ou des règlements les renseignements pris en compte dans la décision, ou un sommaire de ceux-ci.

[12] Annex B of CD 701 codifies the procedure that the CSC must follow to meet its obligations under section 24 of the *CCRA*. When an inmate believes that there is an error or omission in information collected by the CSC, they may request that the information be corrected pursuant to subsection 24(2)(a) of the *CCRA*: CD 701, Annex B, paragraphs 1-2. The inmate's request must then be reviewed to determine whether the information is in fact inaccurate, erroneous or omitted: CD 701, Annex B, paragraph 6. If an inaccuracy, error or omission is confirmed, the CSC must correct the inmate's files, including the OMS records: CD 701, Annex B, paragraph 7. If an inaccuracy, error or omission is not confirmed, the details of the inmate's request and the reason(s) for the denial will be included in a Memo to File, and the OMS report should be unlocked and amended to reflect the presence of, and direct the reader to, that Memo to File: CD 701, Annex B, paragraph 15.

[13] Annex E of CD 705-6 stipulates how the "dynamic factors" under the IAR are to be assessed. Dynamic factors assess a number of sections pertaining to an inmate's livelihood, such as: "Employment / Education," "Marital / Family," and "Associates". By asking interview questions and reviewing the documentary evidence, the IPO determines whether an inmate meets certain "indicators" under each section, such as: "Associates with substance abusers?" or "Has many criminal acquaintances?" CD 705-6 provides "help messages" for IPOs to determine whether an inmate meets a certain indicator. For example, the help message for "Associates with substance abusers?" states: "Rate Yes if there is evidence that the offender socializes with friends, family or acquaintances who abuse drugs or alcohol." If an inmate meets an indicator under a dynamic factor, then that indicator is listed on the inmate's IAR.

III. Preliminary Issue

[14] The Respondent requests that this Court disregard the Applicant's affidavit, affirmed on June 28, 2019, because it contains evidence that was not before the Special Advisor.

[15] It is well established that judicial review is to proceed based on the evidence that was before the original decision maker (*Henri v Canada (Attorney General)*, 2016 FCA 38 at para 39, citing *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at para 19). There are three recognized exceptions to this rule: general evidence of a background nature that is of assistance to the Court; evidence that is relevant to an alleged denial of procedural fairness by the decision maker that is not evident in the record before the decision maker; or evidence that demonstrates the complete lack of evidence before a decision maker for an impugned finding (*Love v Canada (Privacy Commissioner)*, 2015 FCA 198 at para 17, citing *Access Copyright* at para 20).

[16] I find that the majority of the evidence contained in the Applicant's affidavit was not before the Special Advisor and does not meet the exceptions enumerated in *Access Copyright*. Such evidence shall therefore be disregarded. It includes, but is not limited to, the transcripts of the Applicant's criminal proceedings, the supporting letter of Ms. Catherine McCoy, and the supporting letters of the Applicant's family.

[17] I allow, however, the Applicant's "Security Reclassification Scale" form, dated October 2, 2017, which states that the Applicant was not charged with any offences while serving his

current sentence. Counsel for the Respondent stated that the Special Advisor likely had this form before him, or that he could have readily accessed it. In my view, this evidence also provides general background information that assists this Court and that is not relevant to the merits of the matter decided by the Special Advisor (*Access Copyright* at para 20).

IV. Issue & Standard of Review

[18] The sole issue on this application for judicial review is whether the Final Grievance Decision is reasonable.

[19] It is common ground between the parties that the applicable standard of review for the CSC's grievance procedure is reasonableness. I agree (*Creelman v Canada (Attorney General)*, 2020 FC 936 at paras 20-22, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 17).

[20] Reasonableness review is concerned with both the outcome of the decision and the reasoning process that led to that outcome (*Vavilov* at para 87). A reasonable decision is one that is justified, transparent, and intelligible — it must be based on an internally coherent and rational chain of analysis that is justified in relation to the relevant facts and law (*Vavilov* at paras 85, 99). A decision will generally be unreasonable if a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record (*Vavilov* at para 98). While a decision maker is not required to respond to every line of argument or to make explicit findings on every point leading to a conclusion, a decision may be

unreasonable if it "fail[s] to meaningfully grapple with key issues or central arguments raised by the parties" (*Vavilov* at para 128).

[21] That being said, reasonableness review is not a "line-by-line treasure hunt for error" (*Vavilov* at para 102). The party challenging a decision must establish that the decision contains flaws that are more than superficial or peripheral to its merits; a decision's flaws must be sufficiently central or significant to render it unreasonable (*Vavilov* at para 100). A reviewing court should refrain from reweighing or reassessing evidence before the decision maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125).

[22] Finally, reasonableness review is concerned with context: what constitutes a reasonable decision "will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov* at para 90).

V. Analysis

(1) Applicant's submissions

[23] The Applicant is a self-represented litigant, and his submissions may therefore not provide the type of legal analysis normally provided by counsel. As such, I have attempted to distill his arguments into a framework that is helpful in determining this application for judicial review.

[24] The Applicant submits that it was unreasonable for the Special Advisor to find that the CSC's refusal to correct the Applicant's IAR was in accordance with its obligations under section 24 of the *CCRA* and CD 701. The Applicant further submits that Mr. Nahorny did not reasonably apply CD 705-6 in determining the Applicant's "dynamic factors" under the IAR.

[25] The Applicant notes the following findings in the IAR. The Applicant claims these findings constitute errors or omissions that the CSC was obligated to correct pursuant to CD 701, and that Mr. Nahorny made in contravention of CD 705-6.

[26] The Applicant submits that Mr. Nahorny erroneously made the following findings about the Applicant under the "Attitude" section of the IAR: the Applicant is negative towards the law, police, and the courts; he does not value employment; he does not treat men and women as equal; he is disrespectful of personal belongings; he is supportive of domestic and instrumental violence; and he is non-conforming. The Applicant submits that these findings differ from the IAR of his previous sentence in 1997, and are not based on statements that the Applicant made to Mr. Nahorny during his IAR interview in 2006.

[27] The Applicant submits that Mr. Nahorny erroneously made the following findings about the Applicant under the "Personal / Emotional Orientation" section of the IAR: the Applicant is unable to recognize problem areas; he is incapable of understanding the feelings of others; he is not reflective or conscientious of others; he is socially unaware and unaware of consequences; and he has difficulty solving interpersonal problems. The Applicant further submits that Mr.

Nahorny erroneously found that the Applicant tends to blame the victims of his offences to rationalize his criminal behaviour.

[28] Under the "Marital/Family" section of the IAR, the Applicant submits that Mr. Nahorny erroneously found that the Applicant had negative parental relations as a child, and that his parents' relationship was dysfunctional as a child. The Applicant further submits that Mr. Nahorny erroneously found that one of the Applicant's victims was his common law partner, and that the Applicant was therefore a suspected perpetrator of family violence. The Applicant asserts that he had a healthy relationship with his parents as a child, and that his previous common law partner, Ms. McCoy, was not a victim of his offences.

[29] The Applicant submits that Mr. Nahorny erroneously made the following findings about the Applicant under the "Associates / Social Interaction" section of the IAR: the Applicant has many criminal acquaintances; he has difficulty communicating with others; and he minimizes the influence that negative peers have had on his life. The Applicant asserts that he never stated to Mr. Nahorny that he had negative peers in his life.

(2) Respondent's submissions

[30] The Respondent notes that the CSC, when deciding whether to recommend an inmate to the Parole Board of Canada, must uphold its obligation under section 24 of the *CCRA* by basing its decision on "sound information" (*Ewert v Canada*, 2018 SCC 30 [*Ewert*] at paras 2-3). This obligation encourages the CSC to have their reports contain the "best information possible"

(*Tehrankari v Canada (Correctional Service)*, [2000] FCJ No 495, 188 FTR 206 (FC) [*Tehrankari*] at para 41).

[31] The Respondent submits that it was reasonable for the Special Advisor to find that Mr. Nahorny's findings in the IAR are not "errors" for the purposes of section 24 of the *CCRA*, but rather statements of opinion. The Respondent asserts that the IAR is similar to a professional assessment conducted by a social worker or psychologist. Given this context, the Respondent argues that it was reasonable for the Special Advisor to find that the CSC followed the correct procedure under CD 701 by amending the Applicant's OMS record to include the Memo to File, as opposed to correcting the IAR.

[32] The Respondent submits that Mr. Nahorny properly followed CD 705-6 because the IAR is his professional opinion based on the intake interview. The Respondent further submits that Mr. Nahorny was not required to make specific references to the material that he relied upon in authoring the IAR.

(3) Discussion

[33] In my view, it was reasonable for the Special Advisor to find that the CSC followed the correct procedure under CD 701 and section 24 of the *CCRA*. The "reasonable steps" required of the CSC by subsection 24(1) of the *CCRA* vary depending on the context (*Ewert* at para 43). I agree with the Respondent that an IAR is a professional opinion similar to that of a social worker or psychologist, in that it is an IPO's individual assessment of an inmate based on their interview together and the relevant evidence. An IAR is, in other words, not a statement of fact. The

Special Advisor's finding that the Applicant's objections are not errors but rather the "the professional assessment and analysis of the IPO" is therefore justified, transparent, and intelligible in light of the relevant legal and factual context (*Vavilov* at paras 90, 99).

[34] Information on an inmate's OMS record may contravene section 24 of the *CCRA* if it contains allegations that are stated as facts (*Brown v Canada (Attorney General)*, 2006 FC 463 [*Brown*] at paras 33-35; *Tehrankari* at paras 55-60). Conversely, allegations made against an inmate may reasonably remain on their OMS record — even if they are "totally spurious" — so long as those allegations are not treated as more than mere assertions (*Brown* at paras 29, 34).

[35] Given that the information contained in the Applicant's IAR is not construed or treated as fact, I find that the Special Advisor's decision not to correct the IAR is based on an internally coherent and rational chain of analysis that is justified in relation to the binding facts and law (*Vavilov* at para 85). Should the information in the IAR ever be relied upon as fact, such as by the Parole Board of Canada to determine information about the Applicant's history, it would be open to the Applicant to seek judicial review of any negative decision that he might receive (*Brown* at para 36).

[36] The Applicant submitted addendums to his final grievance submissions, first on or about March 27, 2018, and again on August 1, 2018. In his addendums, the Applicant claimed that Mr. Nahorny did not author the IAR in accordance with CD 705-6. Relevant segments of CD 705-6 are contained in the certified tribunal record, but the Special Advisor made no explicit findings regarding that policy.

[37] Although the Applicant only cites CD 705-6 in his addendums, the Applicant's central argument throughout the entirety of his submissions is that the IAR was authored incorrectly. In my view, analyzing whether the IAR was correctly authored requires analyzing whether Mr. Nahorny correctly followed CD 705-6, as that policy outlines the procedure by which IARs are to be authored. The Special Advisor's failure to meaningfully grapple with this key issue raised by the Applicant renders the Final Grievance Decision unreasonable (*Vavilov* at para 128). Furthermore, because the Special Advisor's rationale for finding that the IAR was made in compliance with CD 705-6 is not addressed in the reasons and cannot be inferred from the record, I find that the Final Grievance Decision fails to meet the requisite standard of justification, transparency and intelligibility (*Vavilov* at para 98).

[38] Paragraph 2 of CD 081, *Offender Complaints and Grievances*, requires that grievors be provided with complete responses "to all issues raised" in their grievances. Although related in part, the issue of whether Mr. Nahorny complied with CD 705-6 is distinct from whether the CSC was obliged to correct the IAR pursuant to section 24 of the *CCRA* and CD 701. The former issue involves assessing the process used by Mr. Nahorny to author the IAR, whereas the latter issue involves assessing whether the information contained in the IAR is correct. The former issue is not, in other words, one that the Special Advisor was not obliged to address because it is "redundant and repetitive" (*Timm v Canada (Attorney General)*, 2011 FC 576 at para 6).

VI. Costs

[39] In my view, this application for judicial review does not warrant an award for costs.

VII. Conclusion

[40] I find that the Final Grievance Decision is unreasonable. This application for judicial review is therefore allowed.

JUDGMENT IN T-1823-18

THIS COURT'S JUDGMENT is that:

1. The decision under review is set aside and the matter returned back for redetermination in accordance with these reasons for judgment.

2. No costs are awarded.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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