Federal Court  Cour fédérale

Date: 20210326

Docket: T-630-20

Citation: 2021 FC 270

Ottawa, Ontario, March 26, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

CLIFTON GOFFE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Clifton Goffe, seeks judicial review of a decision by an Independent Chairperson of the disciplinary court at Warkworth Institution ("Warkworth"), a federal penitentiary operated by the Correctional Service of Canada ("CSC"). The Independent Chairperson found the Applicant guilty of at least one disciplinary offence contrary to section 40 of the *Corrections and Conditional Release Act*, SC 1992, c 20 ("*CCRA*").

[2] The Applicant argues that it was unreasonable for the Independent Chairperson not to inquire into the reasons for the Applicant's absence from his disciplinary hearing, consider the possibility of self-defence, and identify the disciplinary offence for which the Applicant was convicted.

[3] As discussed in detail below, I find that the Independent Chairperson's decision is unreasonable. I therefore grant this application for judicial review.

II. Facts

A. *The Applicant*

[4] The Applicant is a federal inmate whose mobility is compromised. He uses a cane or a walker and walks slowly.

[5] On April 8, 2019, while incarcerated at Warkworth, the Applicant entered into an altercation with a fellow inmate, Mr. Nelson De Jesus, who was distributing food at the time. The Applicant became angry and yelled at Mr. De Jesus after Mr. De Jesus allegedly stole a portion of the Applicant's meal. In response, Mr. De Jesus threw a loaf of bread and a container of butter at the Applicant. The Applicant then took his cane and began swinging it in the direction of Mr. De Jesus. CSC officers ordered the Applicant to back up and put his cane down, but the Applicant refused to do so and struck Mr. De Jesus several times with his cane. CSC officers ultimately intervened and ceased the altercation.

[6] On or about June 18, 2019, a hearing was held to adjudicate the Applicant's disciplinary offence charges resulting from the above incident. The Applicant did not attend his hearing. The parties dispute the reasons for the Applicant's absence: the Applicant contends that he slowly proceeded to his hearing but did not arrive in time, whereas the Respondent contends that Ms. Jennifer McCarthy, a CSC officer, attempted to escort the Applicant to the hearing but he refused to attend. It is undisputed that Ms. McCarthy attended the Applicant's disciplinary hearing and informed the Independent Chairperson that the Applicant refused to attend, upon which the Independent Chairperson proceeded with the hearing *in abstentia*.

[7] As counsel for the Applicant fairly conceded, this Court upon judicial review cannot determine the disputed facts based on two affidavits that are equally credible, but divergent. If anything, the Respondent's version of the facts is to be preferred, as the Applicant bears the burden of proof (*Njagi v Canada (Attorney General)*, 2020 FC 998 at para 24). I shall therefore focus solely upon the decision of the Independent Chairperson and not the procedural irregularities that allegedly surrounded it.

B. *Decision Under Review*

[8] The reasons for the Independent Chairperson's decision are brief and contained in a transcript of the Applicant's disciplinary hearing. The Independent Chairperson outlined the Applicant's charges: disobeying a justifiable order of a staff member under subsection 40(a) of the *CCRA*, and fights with, assaults or threatens to assault another person under subsection 40(h). The Independent Chairperson then asked Ms. McCarthy to state her name for the record. After doing so, the Independent Chairperson provided the following reasons:

> Officer McCarthy has advised that Mr. Goffe has refused to attend as there is a matter scheduled for trial. The officer is available. This matter will proceed in abstentia.
>
> The evidence I have before me is that Mr. Goffe, based on the observation report, was ordered to lock up. He had — ran to the bridge. An altercation observed between Goffe and offender De Jesus. Observation was that De Jesus was told to sit on the stairs and Goffe was handcuffed and brought to segregation for decontamination following a spray of OC. There will be a finding of guilt.

[9] The Independent Chairperson concluded the hearing by determining the fine for the Applicant's sanction.

[10] The Independent Chairperson considered four observation reports, authored by CSC officers who witnessed the altercation between the Applicant and Mr. De Jesus or its aftermath. The observation reports reflect the facts described in paragraph 5 of this judgment.

III. Issue and Standard of Review

[11] The sole issue upon this application for judicial review is whether the Independent Chairperson's decision is reasonable.

[12] It is common ground between the parties that reasonableness is the applicable standard of review for the Independent Chairperson's decision. I agree (*Perron v Canada (Attorney General)*, 2020 FC 741 ("*Perron*") at para 45, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at para 23; see also *Schmit v Canada (Attorney General)*, 2016 FC 1293 at paras 19-20, and the cases cited therein).

[13] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible, and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[14] Where a decision provides reasons, those reasons are the starting point for review (*Vavilov* at para 84). A decision's reasons need not be perfect; as long as the reasons allow the reviewing court to understand why the decision-maker made its decision and determine whether the conclusion falls within the range of acceptable outcomes, the decision will normally be reasonable (*Beddows v Canada (Attorney General)*, 2020 FCA 166 at para 25, citing *Vavilov* at para 91). However, where 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, the decision will normally be unreasonable (*Vavilov* at para 98).

[15] For a decision to be unreasonable, an applicant must establish that the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing or reassessing evidence before the decision-maker, and it should not interfere with findings of fact absent exceptional circumstances (*Vavilov* at para 125).

IV. Analysis

[16] Under subsection 43(2)(a) of the *CCRA*, a disciplinary hearing may be conducted without the accused inmate present if that inmate is voluntarily absent. The Independent Chairperson followed this provision when he proceeded with the Applicant's hearing *in abstentia*. The question is whether in doing so it was reasonable for the Independent Chairperson to find that the Applicant was voluntarily absent. In my view, it was not.

[17] The Independent Chairperson's finding that the Applicant was voluntarily absent was not made in accordance with the Independent Chairperson's inquisitorial obligations. The evidence on record indicates that Ms. McCarthy informed the Independent Chairperson that the Applicant refused to attend his hearing, and that the Independent Chairperson accepted this statement without any further inquiry. The Independent Chairperson did not ask Ms. McCarthy why the Applicant refused to attend, or attempt to examine the Applicant's side of the matter. It is unclear whether the Independent Chairperson was aware of the reasons for the Applicant's absence at all — the Applicant may have refused to attend because of a medical emergency, in which it would be questionable whether his absence was voluntary, or simply because he did not wish to engage in the proceedings.

[18] Disciplinary hearings are inquisitorial proceedings, not adversarial ones: the Independent Chairperson has a duty to "conduct a full and fair inquiry or, in other words, examine both sides of the question" (*Perron* at para 52, citing *Hendrickson v Kent Institution*, [1990] FCJ No 19, 32 FTR 296 (FC TD) ("*Hendrickson*") at para 10). The inquisitorial nature of disciplinary

proceedings can give rise to an obligation on the Independent Chairperson to question witnesses (*Perron* at para 55, citing *Ayotte v Canada (Attorney General)*, 2003 FCA 429 ("*Ayotte*") at para 10).

[19] I find that the Independent Chairperson's approach, as outlined above, is incongruous with the inquisitorial nature of a disciplinary hearing. In accepting Ms. McCarthy's statement without question or making the slightest inquiry into the Applicant's position, the Independent Chairperson treated the disciplinary hearing as an adversarial procedure, wherein the Applicant's failure to make submissions was fatal to having his position considered. This approach is not justified in relation to the relevant law, which requires the Independent Chairperson to examine both sides of the question (*Vavilov* at para 85; *Perron at para 52*).

[20] It is important to note that in making the above determination, I do not find that Ms. McCarthy was an untruthful witness. It was reasonable for the Independent Chairperson to conclude that Ms. McCarthy was credible, as there was no reason to believe otherwise. Rather, it is the rationale behind the Independent Chairperson's conclusion that I find to be unreasonable (*Vavilov* at para 15).

[21] As noted by the Applicant, there is a serious danger in accepting the uncontested testimony of CSC officers without any inquiry. Not only does this approach go against the principles enumerated in Hendrickson and echoed throughout the jurisprudence, it allows CSC officers — individuals who possess a great deal of control over the lives of inmates — to operate with impunity. Such an approach increases the possibility, albeit an unlikely one, of an officer

thwarting an inmate's opportunity to defend themselves at their disciplinary hearing by falsely testifying that the inmate is voluntarily absent. One of the key mechanisms in preventing such circumstances is, in my view, the Independent Chairperson's inquisitorial duties. The failure of the Independent Chairperson to actualize this duty, and the repercussions of a precedent that would find it reasonable for him to do so, is a "serious injustice" that warrants this Court's intervention (*Perron* at para 52, citing *Hendrickson* at para 10).

[22] While the Independent Chairperson is not required to address "every conceivable means of defence," he is required to analyze all of the evidence and consider any defence that, if accepted, would likely raise a reasonable doubt and influence the assessment of the Applicant's possible guilt (*Alix v Canada (Attorney General)*, 2014 FC 1051 ("*Alix*") at paras 30, 32, citing *Ayotte* at paras 19-20). Although the jurisprudence on this duty largely concerns instances where an inmate is present at a disciplinary hearing and presents a defence, such as in *Alix* and *Ayotte*, I nonetheless find that it was unreasonable for the Independent Chairperson not to address the possibility of self-defence on behalf of the Applicant. Given the inquisitorial nature of disciplinary proceedings, the Applicant's failure to forward a defence does not entail that no defence was available to him. To find otherwise would be to construe the proceedings as adversarial.

[23] In this case, the possibility that the Applicant was acting in self-defence is written upon the chronology of the altercation with Mr. De Jesus, yet the Independent Chairperson does not consider this possibility. The observation reports before the Independent Chairperson displayed that Mr. De Jesus was the first individual to use physical force: it is undisputed that Mr. De Jesus

threw the foodstuffs at the Applicant *before* the Applicant began swinging his cane at Mr. De Jesus. While the Independent Chairperson is not required to provide reasons for every facet of his decision, I nonetheless find that it was unreasonable for the Independent Chairperson not to address the possibility of self-defence in his reasons, as his rationale for discounting this essential element of the decision cannot be inferred from the record (*Vavilov* at para 98).

[24] Finally, I also find that it was unreasonable for the Independent Chairperson to omit in his decision the offence(s) that resulted in the Applicant's conviction(s). At the beginning of his decision, the Independent Chairperson outlines the offences for which the Applicant was charged. However, nowhere in his decision does the Independent Chairperson specify which of those charges resulted in a finding of guilt. While the Independent Chairperson concludes the hearing by stating, "I'm sure this will be sent in the institutional mail," it is unclear what documents the Applicant received after his hearing, if any. As I am left in the dark regarding which of the Applicant's charges resulted in a conviction, I find that the Independent Chairperson's decision is not sufficiently transparent or intelligible (*Vavilov* at para 99).

V. Costs

[25] While costs are ultimately in the discretion of the Court, I find the figure that counsel have agreed upon is appropriate. Having determined the Applicant to be successful in this application, I award the Applicant costs in the amount of $2,100, inclusive of disbursements.

VI. Conclusion

[26] I find that the Independent Chairperson's decision is unreasonable. I therefore grant this application for judicial review with costs.

JUDGMENT IN T-630-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed.

2. Costs are awarded to the Applicant in the amount of $2,100.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-630-20
STYLE OF CAUSE:	CLIFTON GOFFE v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN OTTAWA AND KINGSTON, ONTARIO
DATE OF HEARING:	JANUARY 27, 2021
JUDGMENT AND REASONS:	AHMED J.
DATED:	MARCH 26, 2021

APPEARANCES:

John Dillon	FOR THE APPLICANT
Yusuf Khan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister and Solicitor Kingston, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT