Federal Court  Cour fédérale

Date: 20220621

Docket: T-1885-21

Citation: 2022 FC 930

Ottawa, Ontario, June 21, 2022

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

JAMIE CLIFF

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Jamie Cliff is an inmate whose cell was subjected to a lawful search where two jail-made weapons (i.e. shanks) and a key were discovered in the leg of his bed that was not bolted to the floor. Mr. Cliff was charged with a disciplinary offence for being in possession of, or dealing in, contraband, contrary to paragraph 40(i) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*]. See Annex "A" below for this legislative provision.

[2] Mr. Cliff pleaded not guilty to the charge. Following a trial, the Independent Chairperson [ICP] who presided, found Mr. Cliff guilty beyond a reasonable doubt of possessing contraband, and imposed a fine [Decision]. The ICP delivered the Decision orally. The Applicant brings this judicial review application to have the Decision quashed.

[3] I find the sole issue for determination is the reasonableness of the Decision: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], at para 10, 25. None of the situations rebutting this presumptive standard of review is present, in my view.

[4] Having considered the parties' records, their written and oral submissions, and the applicable law, I find that the Decision lacks intelligibility and transparency, and thus warrants this Court's intervention. For the more detailed reasons that follow, I grant the Applicant's judicial review application.

II. Analysis

[5] The ICP was required to justify their conclusion in a transparent and intelligible manner, having regard to the record as a whole, including the admitted evidence, and the applicable legal constraints. This, in my view, the ICP failed to do. As I explain, thus find the Decision unreasonable.

[6] That said, I am not convinced by the Applicant's argument that the Decision was procedurally unfair. The Applicant asserts the ICP did not consider the evidence that there was no log proving Mr. Cliff's cell was searched before he moved into it, and further there was no

notation in the logbook regarding when he moved into it. The transcript of the Decision discloses, however, that the ICP considered the fact there was no record of the log of cell search activity. The ICP found this fact to be "neutral." Rather, in my view, the question is whether this finding is reasonable.

[7] In examining the reasonableness of the Decision, I start with the premise that possession of contraband under the *CCRA* is not a strict liability offence: *Charles v Attorney General of Canada*, 2017 FC 435 at para 6. In other words, an accused's guilt must be proven beyond a reasonable doubt and the onus is on the institution to do so.

[8] In addition, a reasonableness review in the prison disciplinary context is highly deferential: *Sharif v Canada (Attorney General)*, 2018 FCA 205 [*Sharif*] at para 13. This means reviewing a decision of an independent chairperson in light of two "primary objectives" - rendering "fast and efficient" disciplinary proceedings in order to ensure "order and discipline" in the correctional system; and acting fairly in conducting proceedings according to legislative and regulatory requirements: *Perron v Canada (Attorney General)*, 2020 FC 741 at paras 57-58.

[9] I find the reasons here are deficient—so much so that a reviewing court cannot conduct reasonableness review of central aspects of the ICP's decision: *Sharif*, above at para 32.

[10] The applicable legal test for possession of contraband in prison is that it must be proven the accused had knowledge and control of the contraband beyond a reasonable doubt: *Taylor v Canada (Attorney General)*, 2004 FC 1536 [*Taylor*] at para 10, citing *Ryan v William Head*

Institution, [1997] F.C.J. No. 1290 (T.D.); *Lee v Kent Institution*, [1993] F.C.J. No. 1136; *McLarty v Canada*, [1997] FCJ No. 808 [*McLarty*], at para 10. Knowledge may inferred from surrounding facts because there seldom is an admission of actual knowledge: *Taylor*, at para 11. Where the accused is disbelieved, however, the decision-maker must be satisfied that the other evidence establishes guilt beyond a reasonable doubt: *Brennan v Canada (Attorney General)*, 2009 FC 40, at para 19. Further, it must be the only inference that can be drawn from the evidence: *McLarty*, at para 10.

[11] I am satisfied that the ICP has not explained reasonably how the surrounding facts here establish the Applicant's guilt beyond a reasonable doubt. Mr. Cliff moved into a cell for which there is no log to show that it was searched by the institution beforehand, and he occupied the cell for about 30 days before the cell was searched lawfully and the contraband was discovered in the bed legs. In addition, there is no evidence to establish whether Mr. Cliff had the necessary tools or means to remove or add the bolts needed for securing the bed to the floor.

[12] With these facts, the ICP finds the Applicant to be an uncredible witness. Despite acknowledging that Mr. Cliff is presumed innocent, the presumption does not leave at any time in the process, and the burden rests with the institution to prove guilt beyond a reasonable doubt, I find the ICP unreasonably focusses on Mr. Cliffs "self-serving statements" that lack an "air of reality," and prefers the institution's evidence of how the contraband was located that "has the ring of truth," thus effectively transferring the burden of proof to Mr. Cliff.

[13] The ICP concludes that the bed legs were a very good hiding spot and that the ICP "would be basically condoning somebody for finding a very good hiding spot." While this may be the case, I find it does not explain in any meaningful, let alone reasonable manner, the ICP's determination of guilt beyond a reasonable doubt. In other words, while deterrence may be in the institution's interests, it does not explain intelligibly the Applicant's guilt beyond a reasonable doubt.

[14] Finding that the bed legs were tampered with and that they should have been bolted to the floor, the ICP further concludes, "Mr. Cliff had a reasonable opportunity to do that." In my view, it is unclear what the ICP meant, i.e. that he had an opportunity to tamper with the bed, or that he had an opportunity to bolt it to the floor himself or to detect the state of the bed and bring it to the institution's attention so that it could be fixed. Although the ICP's reasons are not to be reviewed against a standard of perfection (*Vavilov*, above at para 95), I find the lack of clarity in this particular instance makes it difficult for the Court to review the Decision.

[15] For example, in the absence of a log or some other evidence showing the cell was searched prior to Mr. Cliff's occupancy of it, the fact that Mr. Cliff may have had an opportunity to tamper with the bed does not explain reasonably or at all, in my view, his guilt beyond a reasonable doubt. I also find the lack of reasons why the ICP determined the absence of a record of the cell search was neutral is not transparent in the circumstances, and hence, is unreasonable.

[16] The Respondent argues that the Applicant's knowledge and control can be assumed or inferred from his "willful blindness" to the presence of the contraband in the cell. In my view,

this argument is an attempt to bolster otherwise deficient reasons that make no mention of the concept of willful blindness, nor can it reasonably be inferred from the unclear statement that "Mr. Cliff had a reasonable opportunity to do that."

[17] Apart from preferring the institution's evidence regarding how the contraband was located, I find that the ICP otherwise provides no insight how the standard of proof was met in this case. In my view, the ICP's reasons fail to "connect the dots," that is, they fail to demonstrate how the facts surrounding Mr. Cliff's occupancy of the cell, individually or cumulatively, establish beyond a reasonable doubt that Mr. Cliff had possession (i.e. knowledge and control) of the contraband: *Taylor,* above at para 13. The ICP simply does not consider whether Mr. Cliff had exclusive use of or access to his cell or whether he was the only person who could have placed the contraband in the bed legs. I echo recently retired Justice Phelan's sentiment in *Taylor* (above at para 14) that the surrounding facts do not establish that the only rational conclusion is Mr. Cliff had knowing possession of the contraband.

III. Conclusion

[18] For the above reasons, the Applicant's judicial review application is granted and the Decision is quashed.

JUDGMENT in T-1885-21

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is granted; and
2. The Decision of the Independent Chairperson delivered orally on July 13, 2021 is quashed.

"Janet M. Fuhrer"
Judge

Annex "A" – Relevant Provisions

Corrections and Conditional Release Act **(S.C. 1992, c. 20)**
Loi sur le système correctionnel et la mise en liberté sous condition **(L.C. 1992, ch. 20)**

Discipline **Disciplinary offences**	**Régime disciplinaire** **Infractions disciplinaires**
40 An inmate commits a disciplinary offence who	40 Est coupable d'une infraction disciplinaire le détenu qui :
… **(i)** is in possession of, or deals in, contraband; …	… **i)** est en possession d'un objet interdit ou en fait le trafic; …

FEDERAL COURT

SOLICITORS OF RECORD

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