Federal Court Cour fédérale

Date: 20240501

Docket: T-203-23

Citation: 2024 FC 664

[ENGLISH TRANSLATION REVISED BY THE AUTHOR]

Ottawa, Ontario, May 1, 2024

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

CHRISTOPHER LILL

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Lill, a federal inmate, requested the correction of a security information report [SIR] and submitted a grievance in this regard. His grievance was dismissed, essentially because the procedure for preparing SIRs was followed. In addition, he added allegations of harassment and retaliation to his grievance after after receiving copies of emails between managers at the institution where he was residing. He is now seeking judicial review of the decision to dismiss this grievance.

[2] I am dismissing Mr. Lill's application for judicial review. I agree with him that the decision-maker could not ask another department of Correctional Service Canada [the Service] to determine whether the process for preparing SIRs was adequate. However, given that the institution's staff also observed the facts alleged against Mr. Lill, and given the time elapsed and the other recourses that Mr. Lill has pursued, I will not order any relief in this regard. Moreover, it was reasonable for the decision-maker to reject the allegations of harassment and retaliation based on the emails.

I. Background

[3] Mr. Lill is an inmate who has been serving a life sentence since 2007. He is currently an inmate at Cowansville Institution, a medium-security institution managed by the Service.

[4] This application for judicial review deals with a grievance relating to a series of events that occurred while Mr. Lill was at the Federal Training Centre 600 [FTC], a minimum-security institution, where he was transferred in July 2020. At the time of the transfer, he signed a behaviour contract.

[5] At that time, Mr. Lill was taking part in an escorted temporary absence [ETA] program. In September 2020, FTC management decided to reduce the frequency and duration of Mr. Lill's temporary absences. He then filed a complaint with the Office of the Correctional Investigator of Canada and the Canadian Human Rights Commission.

[6] In the fall of 2020, FTC staff noted on several occasions that Mr. Lill was not following the rules of conduct implemented to fight the COVID-19 pandemic. Relations between Mr. Lill and FTC staff deteriorated during this period. As a result, his case management team met with him on December 3, 2020, to give him a formal warning that his behaviour violated certain aspects of his behaviour contract.

[7] An SIR regarding Mr. Lill was prepared on December 10, 2020. This report was based on three sources, two of whom were completely reliable, while the other was believed reliable. Among other things, it mentions that Mr. Lill encouraged other inmates to make complaints, that his non-compliance with the rules was starting to annoy the other inmates and that his negative attitude was affecting the other inmates' morale. In particular, two sources reported that Mr. Lill was wandering all over Living Unit 2, in violation of the health rules in force at the time.

[8] In the days that followed, his case management team prepared an assessment for decision [A4D], which recommended ending Mr. Lill's ETA program. This A4D was based in part on the SIR dated December 10, 2020. A summary of the SIR, called a gist, appeared in the A4D. The Warden of the FTC endorsed the A4D on December 23, 2020. The decision led to the cancellation of his hearing before the Parole Board of Canada. This decision caused Mr. Lill to become less cooperative. In particular, he told the other inmates that he knew the identity of one of the security intelligence officer's [SIO] sources. Since the FTC found that these statements created a risk to the safety of the inmate in question, Mr. Lill was transferred to Cowansville Institution on an urgent basis on January 12, 2021. A new A4D recommended an increase to his

security classification and an emergency transfer on January 13, 2021. The new A4D included the gist of the abovementioned SIR.

[9] Mr. Lill then applied for *habeas corpus*. The Superior Court of Québec determined that the decision to increase his security classification and transfer him was lawful and that there was no reason to doubt the evidence from a completely reliable source: *Lill c Service correctionnel du Canada (Établissement Cowansville)*, 2021 QCCS 751.

[10] At the same time, Mr. Lill submitted a request to correct the SIR in February 2021, in which he alleges that the information used in the SIR did not comply with section 24 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [the Act], since it was not accurate, up to date and complete. In addition, he claimed that the sources' reliability had not been determined in accordance with Commissioner's Directive [CD] 568-2, *Recording and Sharing of Security Information and Intelligence*. The correction request was denied at the initial complaint and grievance stage on March 4, 2021.

[11] Mr. Lill submitted an initial grievance on April 14, 2021, which was denied on May 14, 2021. He then filed a final grievance on June 4, 2021. He filed an addendum on August 14, 2022, which included email exchanges between FTC employees. He claimed that these email exchanges showed that FTC employees had engaged in a campaign of retaliation against him and were therefore biased against him.

[12] The Assistant Commissioner of the Service rendered a decision on the final grievance on November 22, 2022. That decision is the subject of this application for judicial review. The Assistant Commissioner denied the portion of the grievance regarding the SIR correction request, since he determined that Mr. Lill had been provided with sufficient explanations. He partially upheld the component of the grievance that referred to the requirements of section 24 of the Act and CD 701, *Information Sharing*. The Assistant Commissioner denied the portion regarding the analysis of the information sources in accordance with CD 568, CD 568-2 and CD 568-9. He also denied the portion of the grievance regarding the allegations of retaliation, since the emails provided failed to corroborate Mr. Lill's allegations.

II. Analysis

[13] I am dismissing Mr. Lill's application for judicial review. In my view, the grievance analyst could not reasonably rely on the opinion of another department to determine whether the procedure set out in CD 568-2 was complied with. However, given the circumstances, particularly the passage of time and the fact that Mr. Lill had the lawfulness of his transfer to Cowansville Institution reviewed by the Superior Court, I am not awarding any relief in this regard. Moreover, the Assistant Commissioner's findings regarding the allegations of harassment and retaliation were reasonable.

[14] As a preliminary matter, I note that the merits of the Assistant Commissioner's decision must be reviewed according to the standard of reasonableness. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*], the Supreme Court of Canada stated that, with rare exceptions, courts must show deference upon

judicial review and examine whether the administrative decision-maker made a reasonable decision, not whether that decision was correct. Since *Vavilov*, this Court has applied the standard of reasonableness when reviewing decisions made pursuant to the grievance process provided for by the Act.

[15] At the hearing, Mr. Lill argued that the standard of correctness applied because his residual liberty was at stake. However, the correction request does not directly affect residual liberty. In any case, even in a *habeas corpus* proceeding, the decision to transfer an inmate to another institution is reviewed on the standard of reasonableness: *Mission Institution v Khela*, 2014 SCC 24 at paragraph 65, [2014] 1 SCR 502 [*Khela*]. I have difficulty understanding why a different standard would apply on judicial review.

A. *Correction of Information*

[16] Mr. Lill's grievance originally dealt solely with the denial of his correction request. Mr. Lill argued that the information in the SIR was false. In particular, in his correction request, Mr. Lill stated that he had never boasted to others about sending a formal demand letter and that he was not violating the health rules by being on the second floor of Living Unit 2, since he had permission to be there.

[17] Mr. Lill's submissions focused on the procedure followed by the SIO to corroborate the facts set out in the SIR. In fact, CD 568-2 indicates that the information in an SIR must receive a reliability rating based mainly on its corroboration by independent sources. However, Mr. Lill never received an explanation of how the facts that appear in the SIR were corroborated.

[18] Yet it is clear that the disclosure of information regarding the corroboration process could jeopardize the safety of other inmates. Moreover, in this case, the Service cited subsection 27(3) of the Act to disclose only an SIR gist so as not to reveal the sources' identities.

[19] Analyzing a grievance that deals with an information correction request therefore becomes difficult when disclosing this information would jeopardize the safety of other inmates. To rule on the merits of the grievance, the decision-maker must assess the truthfulness of the recorded facts and determine whether the manner in which they were gathered complied with the directives. In particular, the decision-maker must look at how a reliability rating was assigned to the information. However, the decision-maker must not disclose sensitive information, either when creating the file or when drafting the reasons.

[20] In this case, the analyst tried to get around this difficulty by relying on section 40 of Guidelines [GL] 081-1, *Offender Complaint and Grievance Process*, which allows the analyst to contact an expert for an opinion on certain issues within the grievance. In this case, the expert was the Preventive Security and Intelligence Department at the Service's national headquarters. After considering the possibility of conducting her own analysis of the manner in which the reliability rating was assigned, the analyst decided to send a consultation request to the Department for its opinion on the matter. After conducting its own verifications, the Department concluded that the process set out in CD 568-2 for assigning a reliability rating had been followed. The analyst then relied on this opinion to recommend that the grievance be denied. The Assistant Commissioner endorsed this recommendation.

[21] This process circumvented the provisions of GL 081-1, which allow the analyst to consult an expert. In legal parlance, an expert is a person who is authorized to give opinion evidence because their knowledge in a particular field exceeds that of the decision-maker: see, for example, *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23, [2015] 2 SCR 182. However, an expert witness is not normally authorized to express an opinion on the ultimate issue before the decision-maker: *R v Mohan*, [1994] 2 SCR 9 at 24–25. In this case, the decision-maker is tasked with enforcing the Act, the CDs and the GLs. Compliance with these provisions is not a matter of expertise outside her jurisdiction. For example, this is not an issue that involves medicine or psychology.

[22] The analyst should have determined whether the information regarding Mr. Lill had been handled in compliance with the procedure set out in CD 568-2 herself. She should have reviewed the information at issue herself and considered how that information, including the corroborating sources, was assigned a reliability rating. It was unreasonable to delegate this crucial aspect of decision-making to a so-called “expert”.

[23] If the analyst had consulted the SIR herself and considered whether the information had been handled in compliance with CD 568-2, measures would certainly have been taken to prevent the disclosure of this information to Mr. Lill at the judicial review stage. These measures might be similar to the process established by the Supreme Court for dealing with applications for *habeas corpus*: *Khela* at paragraphs 87–88.

[24] In this case, the Attorney General proposed filing a confidential affidavit describing how a reliability rating was assigned to the information in the SIR at the hearing before this Court. From the bench, I refused to allow this affidavit to be filed since it was not part of the decision-maker's record and therefore not admissible on judicial review. In effect, the Attorney General would have wanted me to conduct the review that the administrative decision-maker failed to do. Proceeding in such a manner is inconsistent with the principles governing judicial review.

[25] It is therefore unreasonable to conclude, on the basis of the report prepared by the Preventive Security and Information Department, that the procedure set out in CD 568-2 had been followed.

[26] When an administrative decision is unreasonable, the matter must normally be remitted to the decision-maker for redetermination. However, when the Court is dealing with a judicial review, it has discretion regarding relief: *Vavilov*, at paragraphs 139 and 142; *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2 at paragraphs 43–52, [2010] 1 SCR 6. In the particular circumstances of this case, I am of the view that remitting the matter would not be appropriate.

[27] Indeed, the SIR that Mr. Lill tried to have corrected is not the only information source on which the Service relied to end his ETAs, transfer him to Cowansville Institution and increase his security classification. FTC staff observed several incidents that were similar to those mentioned in the SIR. The A4Ds describe them extensively. Moreover, Mr. Lill himself admitted to the facts underlying some of the incidents mentioned in the SIRs but claims that his conduct

was justified. In that regard, even though it was refused, Mr. Lill's correction request was entered into the Offender Management System. Anyone who wants to rely on the SIR will therefore be made aware of Mr. Lill's version of the facts and what, in his view, justified his conduct.

[28] In addition, the events recorded in the SIR took place nearly four years ago. The main measures taken on the basis of this information were the increase in Mr. Lill's security classification and his transfer to Cowansville Institution. Mr. Lill had the opportunity to challenge these measures through an application for *habeas corpus*. In these circumstances, remitting the grievance for redetermination would serve no practical purpose. Accordingly, I will not order any relief, even though I am of the view that an aspect of the Assistant Commissioner's decision was unreasonable.

[29] To challenge the application for judicial review, the Attorney General raised a wide range of grounds to show that Mr. Lill's correction request was inadmissible. However, the Assistant Commissioner found the request to be admissible and did not rely on the grounds that the Attorney General is now raising. On judicial review, the Court cannot find that an administrative decision is reasonable by relying on reasons that differ from those on which the decision-maker relied: *Vavilov* at paragraph 96. In addition, I have serious doubts as to the merits of the arguments made by the Attorney General. Given the manner in which I am disposing of the matter, it is not necessary to say anything further.

B. *Allegations of Retaliation*

[30] Mr. Lill is also challenging the denial of the portion of his grievance that deals with the retaliation or harassment that he allegedly suffered from FTC management. These allegations are based on a series of emails regarding his file, which were disclosed in 2022 further to an access to information request. After reading these emails, Mr. Lill presented an addendum to his final grievance.

[31] The Deputy Commissioner dismissed these allegations, essentially for the following reasons:

> [TRANSLATION]
>
> Considering that you were incarcerated at the FTC and had initiated procedures that required staff members' collaboration, they had to communicate together to deal with your file diligently. The review of the addendum of emails that you obtained following an access to information request did not corroborate your allegations, and as a result, this part of your grievance is denied.

[32] Mr. Lill argues that the denial of his grievance was unreasonable. He argues that, owing to the content of the emails filed in support of the grievance, no reasonable decision-maker could have reached the conclusion that he had not been subjected to retaliation or harassment. He also states that the reasons given by the Assistant Commissioner are insufficient.

[33] To properly understand Mr. Lill's allegations, it is important to specify the context in which the emails in question were written. In the fall of 2020, FTC management decided to limit Mr. Lill's ETAs. He then filed complaints with the Canadian Human Rights Commission and the

Office of the Correctional Investigator. FTC management was asked to respond to these complaints. Shortly thereafter, they decided to end Mr. Lill's ETAs and then, one month later, to transfer him on an emergency basis to a medium-security institution.

[34] In light of this context, Mr. Lill argues that the excerpts from the emails he submitted in support of his grievance should necessarily lead to the conclusion that FTC management had decided to harass him or retaliate against him.

[35] I do not agree with Mr. Lill's interpretation of these emails. In my view, the Assistant Commissioner could reasonably conclude that the allegations of harassment or retaliation were not substantiated. I have reached this conclusion by reviewing the various categories of statements highlighted by Mr. Lill.

[36] Mr. Lill first attacks three emails dated December 8, 2020, in which FTC managers discuss the response to be given to the complaint to the Canadian Human Rights Commission and an A4D seeking to end Mr. Lill's ETAs. These emails contain the following remarks:

> [TRANSLATION]
>
> I'm not sure there's any point in responding. I believe that the committee [*sic*, the Commission] will maintain their position and if it ever revises it, we will have the opportunity to give clarifications.
>
> In addition, she [counsel] is mixing up so many things. We are a long way from *habeas corpus* in this case.
>
> …
>
> I would add that if we ever go ahead with not authorizing ETAs, the issue of the number of temporary absences would no longer matter.

> Ms. Chenier [counsel for Mr. Lill] will no longer have a case in this regard.
>
> …
>
> We will make the corrections, but we haven't got to the risk level for the time being, since that would give too much weight to his counsel versus the fact that we are keeping the public safety risk low. In fact, the context of the ETAs does not really lend itself to reoffending.

[37] By themselves, these email excerpts do not show that the contemplated measures were motivated by a desire to punish Mr. Lill. These excerpts only provide a very partial overview of the thought process behind the decisions. At the very most, they allow us to conclude that the managers were aware that the reasons for the A4D were likely to be closely scrutinized and that they should take the required precautions when drafting them. It was not unreasonable to conclude that these emails do not support an allegation of harassment or retaliation.

[38] Mr. Lill heavily emphasizes the email from December 21, 2020, in which a manager tells the Warden of FTC that [TRANSLATION] "[t]his is only the beginning. The war has truly begun…." Mr. Lill concludes that FTC's management declared war on him. However, this interpretation ignores the context. In fact, the email at issue was immediately preceded by an email from the Warden to this manager that reads, [TRANSLATION] "No, I had not received. She is intense!" Mr. Lill states that this email refers to the comments sent by his counsel regarding the A4D dated December 16, 2020, which ended his ETAs. Thus, when the manager states, two minutes later, that [TRANSLATION] "[t]he war has truly begun," this is her perception of the arguments that Mr. Lill asserted through his counsel. Therefore, one cannot conclude that FTC management started a war against Mr. Lill.

[39] Lastly, Mr. Lill emphasizes emails from January 11 and 12, 2021. At that time, FTC's staff were in the process of drafting an A4D to transfer Mr. Lill to a medium-security institution. The excerpts provided by Mr. Lill suggest that the managers were trying to draft a justification that could withstand any challenge. In particular, we can see the following:

> [TRANSLATION]
>
> ... [T]he rundown needs to be reworked. There is still too much focus on the recourses he is using (although we note that he is entitled, this seems to take on more importance in our decision, which must be avoided at all costs).
>
> …
>
> It's weak...
>
> I have highlighted in yellow the real events or information that in my view can be considered in the assessment to increase his classification.
>
> Anything dealing with his complaints and correction requests that we cannot use is in red. In fact, the only thing that we can establish is that he is not cooperating. This attitude certainly can be troubling in a minimum-security institution, but we need to clearly show how the risk has increased, which has not been done here.

[40] These notes plainly show that FTC managers clearly had in mind the various complaints submitted by Mr. Lill. However, that does not mean that these complaints motivated FTC management to increase Mr. Lill's security classification. In reality, these emails instead show that the managers wanted to follow the relevant rules and policies to the letter. One cannot infer that the increase in Mr. Lill's security classification is a form of retaliation.

[41] These last exchanges are directly linked to Mr. Lill's emergency transfer to a medium-security institution. Mr. Lill argues that if his transfer had really been urgent, FTC staff would

not have taken all this time developing a rationale. However, it is worth reiterating that it was on January 6, 2021, that FTC management learned that Mr. Lill had told his fellow inmates that another inmate was an information source for FTC management. The efforts to have Mr. Lill transferred, as detailed in the emails dated January 11 and 12, 2021, therefore took place in the following days. In fact, he was transferred on January 12, 2021. In any case, Mr. Lill challenged the validity of his transfer and the increase in his security classification through an application for *habeas corpus*. The Superior Court dismissed that application. In light of the sequence of these events, it was reasonable for the Assistant Commissioner to conclude that Mr. Lill had not demonstrated that FTC management had retaliated against him.

[42] In summary, although certain excerpts of these emails may raise questions when read out of context, it was reasonable to conclude that they do not show that Mr. Lill had been subject to retaliation or harassment.

C. *Procedural Fairness*

[43] In his memorandum, Mr. Lill also argues that the manner in which his grievance was analyzed breached procedural fairness. Given that I am addressing this issue from the perspective of the decision's reasonableness, it is not necessary to deal with it from a procedural fairness perspective.

III. Conclusion

[44] For these reasons, I am dismissing Mr. Lill's application for judicial review.

[45] Although the unsuccessful party is typically ordered to pay costs, I will not award costs in this case. I am concurrently deciding another application for judicial review brought by Mr. Lill: *Lill v Canada (Attorney General)*, 2024 FC 663. Since this other application is allowed in part and some of the arguments that Mr. Lill asserts in the present application have merit, but the applications are dismissed with regard to the rest, I am of the view that no costs should be awarded.

JUDGMENT in T-203-23

THIS COURT ORDERS as follows:

1. The application for judicial review is dismissed.

2. No costs are awarded.

"Sébastien Grammond"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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