Federal Court Cour fédérale

Date: 20240521

Docket: T-1857-23

Citation: 2024 FC 763

Toronto, Ontario, May 21, 2024

PRESENT: Madam Justice Whyte Nowak

BETWEEN:

CHRISTOPHER ELDER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Christopher Elder [the Applicant], is an inmate currently serving a life sentence at a minimum-security prison in Alberta. The events at issue on this application relate to a time when the Applicant was in custody at Bowden Institution. The Applicant filed a grievance under the *Corrections and Conditional Release Act*, SC 1992, c. 20 [*CCRA*] after his escorted temporary absences [ETAs] were cancelled. The Institutional Head of the prison [the

Warden] had cancelled the Applicant’s existing and pending ETAs after it was learned that the Applicant had violated the terms of his ETAs on multiple occasions. The Applicant appealed the Warden’s decisions using the grievance process provided for in the *CCRA*. The Warden’s decisions were reviewed by the Special Advisor to the Commissioner of the Correctional Service of Canada [CSC] who denied the Applicant’s final grievance response [the Special Advisor’s Decision or the Decision]. The Applicant seeks judicial review of the Special Advisor’s Decision.

[2] The Applicant argues that the Special Advisor’s Decision is unreasonable as the available evidence did not support the conclusion that the Applicant was responsible for the violations of the terms of his ETAs. He argues that the Special Advisor also ignored evidence that showed that the breaches were the responsibility of the various CSC staff who were aware of the Applicant’s deviations from the terms of the ETAs, and who not only condoned, but aided him in these breaches. The Applicant further argues that there were a number of breaches of procedural fairness related to the application for and approval of the ETAs. The Applicant seeks an order setting aside the Decision and returning the matter to the Special Advisor for redetermination in accordance with the reasons of this Court.

[3] Based on my review of the record and after considering the parties’ written and oral submissions, I am of the view that the Special Advisor's Decision was reasonable and there was nothing procedurally unfair about the manner in which the Special Advisor arrived at his Decision. Accordingly, this application for judicial review is dismissed.

II. The Legal Framework

A. *Temporary Absences*

[4] Section 9 of the *Corrections and Conditional Release Regulation*, SOR 92/620 [*CCRR*], sets out the purposes for which an ETA may be authorized, including for family contact purposes to assist an inmate in maintaining and strengthening family ties as a support to the inmate while in custody and as a potential community resource on the inmate's release.

[5] Section 17 of the *CCRA* gives the Warden authority to not only authorize an ETA, but set the conditions that must be met prior to authorizing an ETA as well as refuse or cancel an ETA temporarily. The terms and conditions of an ETA are set out in a structured plan that is contained within the ETA approval document, referred to as an Assessment for Decision [A4D]. The preparation of a structured plan is a statutorily mandated requirement for the authorization of an ETA pursuant subsection 17(1)(d) of the *CCRA*.

[6] According to subsection 4(h) of the *CCRA*, offenders are expected to obey penitentiary rules and conditions governing temporary absences and to actively participate in meeting the objectives of their correctional plans.

B. *Offender Grievances*

[7] Under section 91 of the *CCRA*, every inmate is entitled access to the offender grievance procedure without negative consequences. According to section 6 of the *Commissioner's*

directive 081: Offender Complaints and Grievances, the grievance process provides a means of redress for offenders who believe they have been treated unfairly by a staff member, or in a manner that is not consistent with legislation or policy on matters within the jurisdiction of the Commissioner.

III. Facts

[8] The Applicant is a 48-year-old federal inmate serving a life sentence for crimes including second degree murder.

A. *The Applicant's first ETA application*

[9] On June 13, 2022, the Applicant applied for one ETA per month for a year to visit his mother [Ms. Elder] at her residence. A community assessment of Ms. Elder and her other son who lives with her at her residence was completed on June 21, 2022. The ETA Application for family contact was approved based on that assessment on August 18, 2022 [First ETA].

[10] The First ETA included a structured plan that governed the approved ETA. It addressed various aspects of the permitted visits including the proposed ETA destination. That destination referred specifically to Ms. Elder's residential address.

B. *The Applicant applied for extended ETAs*

[11] In December 2022, the Applicant made an application for: (i) one additional ETA per month in connection with his visits to Ms. Elder's residence; and (ii) two ETAs per month to

visit his girlfriend, Ms. Daina Conners [Ms. Conners], and her minor children (including a child of theirs) at her residence [Application for Extended ETAs].

[12] An A4D was prepared in response to the Applicant's Application for Extended ETAs.

C. *Communication of the status of the Extended ETA approvals on January 27, 2023*

[13] The Applicant's Correctional Manager, Mr. Gareau [the Correctional Manager], presented the Application for Extended ETAs to the Warden, who verbally approved only the additional visits to Ms. Elder's residence.

[14] The facts involving the discussion between the Correctional Manager and the Applicant on January 27, 2023 relaying this decision are in dispute. The Applicant recalls the Correctional Manager explaining to the Applicant that the Warden verbally approved *both* his Application for Extended ETAs though he candidly acknowledges that his "excitement may have caused him to misinterpret" what he heard.

[15] The Respondent alleges that the Correctional Manager informed the Applicant that his application for one additional ETA per month to visit Ms. Elder at her residence was approved, but that he was not aware of the ETA application to visit Ms. Conners and so it had not been presented to the Warden for decision. The Respondent further alleges that during the meeting, the Correctional Manager reiterated three or four times to the Applicant that he could not go to Ms. Conners' residence based on his approved ETAs.

D. *The January 31, 2023 ETA visit*

[16] On January 31, 2023, the Applicant left Bowden Institution on an ETA with Mr. Ted Dreeshen [Mr. Dreeshen], a CSC escort. The Applicant says that he was under the impression at that time that his Extended ETA Application had been granted and that his ETA was to Ms. Conners' residence. Upon being informed by Mr. Dreeshen that the permit did not contain Ms. Conners' address, the Applicant said he was surprised and stated that there was a mistake. Neither Mr. Dreeshen nor the Applicant elected to call Bowden Institution to clear up the confusion. At the Applicant's request, Mr. Dreeshen drove the Applicant first to his mother's place of business and then to the address of Ms. Conners' residence.

[17] On February 2, 2023, the Applicant expressed to CSC staff that he enjoyed his visit with Ms. Conners and the children. The Applicant argues that this was when he learned he had not in fact been authorized to visit Ms. Conners on January 31, 2023 as only the extended ETA to his mother's residence had been approved.

E. *The fallout from the January 31, 2023 ETA*

[18] The Applicant was interviewed about the circumstances of the January 31, 2023 ETA. The Warden later learned that the Applicant had in fact visited with Ms. Conners and her children on three other ETAs at Ms. Elder's residence with the approval of various CSC staff.

[19] The Applicant was informed that his ETAs to visit Ms. Elder's residence were suspended and that the Applicant's case management team recommended cancellation of all ETAs. An

A4D and an addendum to the A4D prepared in February and March 2023 respectively, recommended the cancellation of the Applicant's ETAs.

[20] The Applicant provided a written and verbal rebuttal to the application to cancel his ETAs. In his written rebuttal, the Applicant indicated that he believed he was told by the Correctional Manager during their meeting on January 27, 2023 that his application for ETAs with Ms. Conners had been approved. As for his previous visits, he claimed that he believed that his family contact ETAs to Ms. Elder's residence included Ms. Conners because she is "family". His explanation for his deviation from the structured plan to visit Ms. Elder's place of work, was that CSC staff often stop for food on ETAs and he asked his driver if it would be okay.

F. *The decisions cancelling the Applicant's ETAs*

[21] On March 3, 2023, the Warden issued two decisions. First, the Applicant's existing ETAs to visit Ms. Elder at her residence were cancelled. The Warden found that the Applicant was aware that Ms. Conners was not an approved visitor at Ms. Elder's residence and that his visits with Ms. Conners on four occasions and his request to stop at a location other than the approved destination in his structured plan, were not appropriate. He found the Applicant culpable.

[22] The Warden considered the Applicant's rebuttals and while he acknowledged that there were multiple times that CSC staff did not act in accordance with policy, he nevertheless remained of the view the structured plan was not adhered to and that the Applicant was responsible for his actions.

[23] Second, stemming from the first decision, the Applicant's Application for Extended ETAs was refused.

G. *The Applicant's grievance and the Decision under Review*

[24] In March 2023, the Applicant filed a final grievance under the *CCRA*. The Applicant sought reinstatement of his ETAs, explaining that he was not aware of the details of his permits and he always sought and was granted the permission of his escorting CSC staff whose direction he followed.

[25] On May 29, 2023, the Special Advisor issued the Decision under section 80.1 of the *CCRR*. He denied the Applicant's grievance on the basis that the Applicant's ETAs were appropriately suspended in accordance with the policy. He considered the Warden to have provided sufficient justification for the cancellation of the Applicant's ETAs in accordance with the *CCRA*.

[26] The Special Advisor's reasons for denying the Applicant's grievance seeking reinstatement of his ETAs reads in part:

> The [Warden] explained that, in addition to the incident regarding your ETA on 2023-01-31, review of your ETAs revealed that on three separate occasions your girlfriend and her three children had attended ETAs at your mother's house, despite not being included in the structured plan. While it was recognized that Correctional Service Canada did not thoroughly ensure that all information and actions during your ETAs were completed in accordance with policy, this did not preclude your responsibility for ensuring that your behaviour on ETAs was in line with the structured plan. It was noted that you were provided the decision documents with respect to your ETA that only included your mother's residence, at

> which your brother also resided, and that you were aware that your girlfriend was not an approved visitor at the time your ETA package was approved. Further, it was explained that it would not be appropriate to approve additional ETAs due to your behaviour. Your rebuttal was considered by the [Warden].
>
> …
>
> Please note that the [Warden] has taken corrective measures with staff for not following policy and had the Assistant Wardens review the general processes for Temporary Absences to prevent any future incidents from occurring.

IV. Preliminary Issue

[27] The Application Record contains evidence that was not before the Special Advisor. The Respondent objects to this evidence. While the evidence consists of various paragraphs of an affidavit of the Applicant as well as five exhibits attached thereto, at the oral hearing counsel for the Applicant only pursued two exhibits. The first is a letter from Mr. Dreeshen [the Dreeshen Letter]. In the Dreeshen Letter, Mr. Dreeshen takes full responsibility for the events of January 31, 2022 as his CSC driver and escort. The second is a letter from Colin MacGonigill, the Social Programs Officer who drove the Applicant on many of his other ETAs [the MacGonigill Letter]. The MacGonigill Letter is written in support of the Applicant's day parole application and is essentially a character reference; it does not speak to the events surrounding any of the Applicant's ETAs.

[28] Generally, this Court is limited on judicial review to the evidentiary record that was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency* (*Access Copyright*), 2012 FCA 22 at para 19 [*Access Copyright*]). The recognized exceptions to this rule include evidence that: (i) comprises general background

information that might assist the reviewing court in understanding issues relevant to the proceeding; (ii) is relevant to an alleged denial of procedural fairness by the decision maker that is not evident in the record before the decision maker; and (iii) illustrates the complete absence of evidence before the decision maker on an impugned finding (*Access Copyright* at para 20).

[29] The Applicant submits that the Dreeshen Letter falls under the general background and absence of evidence exceptions. I disagree. The Dreeshen Letter does not provide general background information, rather it provides information going to the merits of the reasonableness of the Special Advisor's Decision and is therefore not permitted (*Henri v. Canada (Attorney General)*, 2016 FCA 38 at para 40). Nor can it be said that there was no evidence to support the Special Advisor's finding that the Applicant did not follow the structured plan attached to the First ETA. Neither exception applies.

[30] The Applicant argues that the MacGonigill Letter engages the exception related to the alleged denial of procedural fairness in that it establishes that the Special Advisor failed to consider the Applicant's version of events and failed to adequately scrutinize the actions of CSC staff which were not in accordance with CSC policy. Leaving aside the merits of these arguments as matters going to issues of procedural fairness, they simply do not square with the actual contents of the MacGonigill Letter, which does not address the events of any ETA or staff compliance with CSC policy.

[31] The Dreeshen and MacGonigill Letters fail to meet the exceptions enumerated in *Access Copyright*. The Court will not consider this new evidence.

V. Issues and Standard of Review

[32] The following issues are raised on this judicial review:

A. Was the process by which the Special Advisor arrived at his Decision procedurally fair?

B. Was the Special Advisor's Decision reasonable?

[33] In the context of the CSC offender grievance process, issues going to procedural fairness are reviewed on a correctness standard (*Johnson v Canada (Commissioner of Corrections),* 2018 FC 529 at para 20). The ultimate question is whether the Applicant knew the case he had to meet and had an opportunity to respond to it before a fair and impartial decision maker (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 41). Notably, grievance process decisions have been held to be administrative in nature and therefore attract a low level of procedural fairness (*Yu v Canada (Attorney General)*, 2012 FC 970 at paras 36-40).

[34] The standard of review applicable to the merits of a grievance decision by the CSC is reasonableness (*Creelman v Canada (Attorney General),* 2020 FC 936 at paras 20-22). 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" (*Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 at para 85 [*Vavilov*]).

VI. Analysis

A. *The Applicant was afforded procedural fairness*

[35] The Applicant has identified a number of procedural unfairness issues: (i) the lack of clarity in the application process and approval of family contact ETAs; (ii) the Special Advisor failed to consider the fact that the CSC Staff were aware of the Applicant's visits with Ms. Conners and failed to consider the Applicant's evidence without explaining why he preferred the submissions of CSC staff; (iii) the failure on the part of the Correctional Manager to provide written reasons at the meeting of January 27, 2023; and (iv) the failure of the Special Advisor to seek out the Dreeshen and MacGonigill Letters.

[36] All but the last issue, are issues more properly directed to the reasonableness of the Special Advisor's Decision as they are advanced by the Applicant in support of his defence on the merits of the Decision which he says was not properly considered by the Special Advisor.

(1) *No duty to seek out the Dreeshen and MacGonigill Letters*

[37] The Applicant argues that in his grievance submissions he mentioned that he had "a couple letters from [his] drivers" that he could provide speaking to "his history and ETAs". He did not specify the contents of these letters nor did he provide the names of the individuals he had letters from. These were later identified in the Application Record as the Dreeshen and MacGonigill Letters. The Applicant argues that as a matter of procedural fairness, the Special Advisor was under a duty to seek these letters out. The Applicant's argument is not supported by

Federal Court of Appeal authority which holds that applicants are obliged to put their best foot forward when making out their case and that tactical decisions not to do so will disentitle them from putting that evidence before a reviewing panel (*Rana v Teamsters, Local Union No. 938*, 2020 FCA 190 at paras 10-11). The duty to ensure the Dreeshen and MacGonigill Letters were before the Special Advisor rested with the Applicant alone.

[38] I am satisfied that the Applicant was afforded procedural fairness. He knew the case he had to meet (which was whether he had breached the terms and conditions established for his ETAs) and he had a chance to provide his rebuttal to the application for the cancellation of his ETAs both orally and in writing. There is no dispute that he received disclosure of key documents including the Assessment Decision related to the First ETA which included the structured plan containing the terms and conditions of his approved ETAs.

B. *The Special Advisor's Decision is reasonable*

[39] The Applicant has raised two issues, which he argues render the Special Advisor's Decision unreasonable.

[40] First, the Applicant argues that the available evidence did not support the Special Advisor's conclusion that the Applicant "failed in his responsibility for ensuring that his behaviour on ETAs was in line with the structured plan" and accordingly, it lacks a rational chain of analysis. I disagree. While the Special Advisor was brief in his reasoning, he placed the focus of the Applicant's culpability squarely on the Applicant's failure to adhere to the structured plan. This was reasonable and rational. It is the structured plan that is required by the

CCRA for ETAs and it is the structured plan that sets out the destination and contacts for the ETAs. The Applicant was given a copy of the structured plan. However, he chose instead to focus on the ETA permit given to his CSC driver, his interpretation of his conversation with the Correctional Manager, and his CSC driver's discretion. This was misguided.

[41] Secondly, the Applicant argues that the Special Advisor ignored evidence making the conclusion that the Applicant was responsible for his failure to adhere to the structured plan unjustified in relation to the factual constraints. The Applicant points to the following evidence that he says the Special Advisor ignored:

a) the Applicant's evidence that he took "all steps available to him" to ensure that he complied with the rules applicable to his ETAs;

b) the ETA was "silent" on seeing other people at Ms. Elder's residence;

c) the Applicant's confusion stemming from the meeting with the Correctional Manager who did not provide the Applicant with written reasons related to his Application for Extended ETAs; and

d) the role that the CSC staff played in contributing to the Applicant's confusion over the ability to deviate from the terms of the ETAs.

[42] This evidence goes to the Applicant's "honest confusion" defence, which the Applicant believes was not properly considered by the Special Advisor.

[43] While administrative decision-makers are not required to respond to every argument (*Vavilov* at para 128), the basis for the Applicant's "honest confusion" defence was in fact acknowledged by the Special Advisor when he summed up the Applicant's position as follows:

> You explain that you were not aware that you were violating the rules of your ETAs by having additional members attend or by adding stops, as you were given permission by the escorting officers and you were not aware of the details of your permits.

[44] The Special Advisor's finding that the Applicant was aware of the terms of his ETA but deviated from those terms and bore some responsibility for those deviations was open to him on the evidence and he is owed a high degree of deference in grievance matters, owing to his expertise in inmate and institutional management (*Skinner v Canada (Attorney General),* 2016 FC 57 at para 21). The Special Advisor did not find that the Applicant was intentionally deceptive and he rightfully acknowledged the role that the CSC staff played in perpetuating the Applicant's belief that he was entitled to deviate from the terms of his ETAs with CSC staff approval. However, the Special Advisor's Decision shows he found the Applicant bore *some* responsibility for not following the structured plan and was culpable. Given that this conclusion was open to the Special Advisor on the record, what the Applicant is essentially asking this Court to do is to reassess this finding and hold CSC staff *completely* responsible. This is not the role of the Court on judicial review (*Vavilov* at paras 83 and 125).

VII. Costs

[45] Both parties seek costs, however, neither party made any submissions to support their request. No costs shall therefore be awarded.

VIII. Conclusion

[46] The Applicant has not shown the Special Advisor's Decision to be unreasonable nor procedurally unfair. Rather, I find it to be intelligible, transparent and justified on the facts before the Special Advisor. Accordingly, this application for judicial review is dismissed without costs.

JUDGMENT in T-1857-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There are no costs awarded.

"Allyson Whyte Nowak"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1857-23
STYLE OF CAUSE:	CHRISTOPHER ELDER v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	EDMONTON, ALBERTA
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