Date: 20100312

Docket: T-381-09

Citation: 2010 FC 294

Ottawa , Ontario, March 12, 2010

PRESENT: THE CHIEF JUSTICE

BETWEEN:

RONALD MCCAULEY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant was serving an indeterminate sentence as a dangerous sexual offender at Ferndale Institution, a minimum security federal facility.

[2] On April 19, 2008, another dangerous offender escaped from the same institution. This incident precipitated a classification review of all dangerous offenders held under minimum security conditions.

[3] On or about May 2, 2008, on the basis of an Assessment for Decision (the assessment for decision) signed by an institutional parole officer and approved by his superior on that day, the applicant was involuntarily transferred on an emergency basis to the medium security Mission Institution.

[4] The applicant, through counsel, filed a rebuttal to the assessment for decision for the consideration of the Ferndale Institution warden. He did so pursuant to the rights afforded to him in the regulations.

[5] The assessment for decision, in general terms, justified the medium security classification because of the applicant's substantial risk to re-offend violently, a finding informed at least in part from the quality of his Risk Factor Monitoring Logs (logs):

> In addition to the above assessments, Mr. McCauley's most recent Program Report dated 2008 04 15 further substantiates his risk to re-offend violently and/or sexually and that Mr. McCauley continues to provide varied degrees of insight in his SOP logs.
> (See also paragraph 38 of respondent's memorandum).

[6] In this case, the applicant's logs were some 100 pages of his handwritten notes on printed forms setting out his self-assessment of risk factors and events which affected his feelings. Those logs were to be prepared daily.

[7] Despite the applicant's requests, the correctional officials did not or could not make available his logs for the preparation of his rebuttal submissions to the negative assessment for decision.

[8] The refusal or inability to provide the logs at the initial stage of the grievance process has not been explained through affidavit evidence in this proceeding.

[9] In her written rebuttal of June 2, 2008, the applicant's counsel noted that her inability to review the applicant's logs hampered the preparation of her submission "[s]ince the stated reason for Mr. McCauley's transfer is his mixed participation in the SOP Maintenance group, including comments about unsatisfactory logs …":

> … I have been unfortunately hampered in making these submissions by the inability to review Mr. McCauley's logs and other file information contained in Mr. McCauley's personal effects. Mr. McCauley has been trying to access his personal effects for many weeks, to no avail. Since the stated reason for Mr. McCauley's transfer is his mixed participation in the SOP Maintenance group, including comments about unsatisfactory logs, he would have liked to have access to these logs, and the comments made on them by facilitators, before submitting his rebuttal.

[10] On June 17, 2008, the warden of the Ferndale Institution confirmed the applicant's security classification as medium and authorized his placement at the Mission Institution.

[11] The applicant filed second and third-level grievances without the assistance of counsel. Both were denied.

[12] This proceeding is the application for judicial review of the negative third-level grievance decision.

[13] Both parties agree on the two issues presented in this proceeding. First, was the applicant's right to procedural fairness breached by not making his logs available to him for the preparation of his rebuttal to the assessment for decision? Second, was the decision to transfer the applicant to a medium-security institution an unreasonable one?

[14] In my view, the procedural fairness issue is dispositive of this proceeding, either pursuant to statutory requirements or common law principles.

[15] Section 27(1) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, sets out the respondent's statutory duty to provide the inmate, challenging a proposed transfer of penitentiary institution, "… all the information to be considered in the taking of the decision or a summary of that information":

27. (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	27. (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

considered in the taking of the decision or a summary of that information.	renseignements entrant en ligne de compte dans celle-ci, ou un sommaire de ceux-ci.

[16] In this case, because the involuntary transfer from Ferndale to Mission was made on an emergency basis for reasons of public safety, the applicant's representations were made after the transfer.

[17] The applicant's right, after the emergency transfer, to "… an opportunity to make representations with respect to the transfer" is set out in s. 13(2)(a) of the *Corrections and Conditional Release Regulations*, SOR/92-620:

13(2)… the institutional head of the penitentiary to which the inmate is transferred … shall	13(2) … le directeur du pénitencier où le détenu est transféré … doit :
(a) meet with the inmate not more than two working days after the transfer to explain the reasons for the transfer and give the inmate an opportunity to make representations with respect to the transfer in person or, if the inmate prefers, in writing;	*a*) rencontrer le détenu dans les deux jours ouvrables suivant le transfèrement afin de lui expliquer les motifs de cette mesure et de lui donner la possibilité de présenter ses observations à ce sujet, en personne ou par écrit, au choix du détenu;

[18] The Supreme Court of Canada, in transfer circumstances not dissimilar to those in this case, considered the respondent's duty of disclosure in *May v. Ferndale Institution*, 2005 SCC 82, where the facts are summarized at paragraphs 4-7. It was not in issue in *May*, nor in this proceeding, "…

that a transfer from a minimum- to a medium-security institution involves a significant deprivation of liberty for inmates."

[19] In *May*, in general terms, a majority (6-3) of the Supreme Court described the respondent's duty of disclosure as "onerous" and specifically with respect to transfer decisions, as "substantial and extensive", at paragraphs 95 and 100:

> 95. In order to assure the fairness of decisions concerning prison inmates, s. 27(1) of the *CCRA* imposes an onerous disclosure obligation on CSC. It requires that CSC give the offender, at 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." [Emphasis in the original text]
>
> […]
>
> 100. Having determined that the applicable statutory duty of disclosure in respect of the transfer decisions is substantial and extensive, we must now go on to consider whether it was respected in these cases. If it was not, the transfer decisions will have been unlawful. [Emphasis added]

[20] The logs were eventually delivered to the applicant in August 2008 prior to the third level of the grievance process. The respondent notes that the applicant did not rely on his logs during the third level grievance when he represented himself.

[21] Where procedural fairness is in play, the test is based on the information provided to the griever at the time of the initial decision. The respondent cannot cure any failure to meet the requirements of procedural fairness when the applicant was filing his rebuttal submissions at the

initial stage by providing the logs subsequently at the third level review: *Flynn v. Canada (Attorney General)*, 2007 FCA 356 at paragraph 28, where Justice Letourneau stated:

> If additional information provided at these later stages can support the merits of the decision under review, it cannot compensate for a breach of procedural fairness surrounding the taking of the initial decision.

[22] The respondent relies on four arguments to conclude that there was no breach of procedural fairness. In my view, taken individually and collectively, the respondent's submissions are not persuasive.

[23] First, the applicant did not receive "a summary" of the information contained in his logs, as asserted by the respondent. The authors' references to the logs in the various reports relied upon by the decision-maker were their assessment, not "a summary" of what the applicant wrote. The authors' interpretations may well differ from a summary of what the applicant wrote in his logs.

[24] Second, the respondent submits that the warden did not have access to the logs. That appears to be correct. However, if the logs had been provided to the applicant, they would have become available in turn to the warden prior to his making his decisions of June 17, 2008. To state that the warden did not have access to the logs begs the procedural fairness issue.

[25] Furthermore, even if the warden did not have access to the logs themselves, his decision was based in part on the information drawn from the logs. The warden relied on the reports of persons,

including the applicant's Sex Offender Maintenance Program Facilitator (facilitator) and others who were members of the case management team that prepared the assessment for decision.

[26] The warden's decisions, both dated June 17, 2008, relied on "the information" within the meaning of s. 27, contained in the logs, even if he did not have physical access to them:

> "You continue to have difficulty identifying cognitive distortions in your logs and your logs are of "mixed quality" and you continue to have difficulty with emotional management."
>
> "Your logs continue to be of "mixed quality," with a mix of brief and superficial entries coupled with honest and "raw" entries.
>
> "You must improve your participation in the Sex Offender Maintenance program, specifically the group portion and in your logs, to address the deficiencies as noted by the facilitator."
>
> "You are having difficulties adhering to the structured format of both the group and logging requirements."
>
> " … your most recent Program Report dated 2008 04 15 further substantiates … that you continue to provide varied degrees of insight in your logs."
> (pages 42-44 and 47 of the respondent's record)

[27] On the record in this proceeding, it appears that these extracts from the warden's decisions were drawn, at least in part, from the assessment for decision of May 2, 2008 to which the applicant had the right to make rebuttal submissions. The assessment for decision was prepared by the applicant's case management team and includes the following comments, similar to those in the warden's decision:

> "As well, other concerns include that his logs can be of 'mixed quality' where some are superficial in content where others provide insight to his mind set regarding his risk."

> "… Mr. McCauley's most recent Program Report dated 2008 04 15 further substantiates his risk to re-offend violently and/or sexually and that Mr. McCauley continues to provide varied degrees of insight in his SOP logs."

[28] One of the members of the applicant's case management team was his facilitator. He apparently used the applicant's logs to prepare his reports. His comments were as follows:

> - LOGS: Mr. McCauley has not logged a deviant fantasy since this writer has had him for a client (approx 2 months). When asked about that fact he stated that he no longer has or is troubled by deviant fantasies or disturbing thoughts. His logging is improving and he now can be counted on to include his feelings on a semi-regular basis. I noted to him in his logs that there were missed opportunities for exploring his cognitive distortions. These notes were made in times where Mr. McCauley was wrapped up in circle reasoning causing him some negative emotionality. (December 12, 2007, at page 167 of respondent's record).
>
> - Logs: Mr. McCauley's logs are generally mixed in quality. At times he can be extremely brief and superficial. At other times it appears he logs fairly honestly when he writes raw feelings and thoughts about those he comes into contact with throughout the day. This writer's main concern is that there are often large parts of his daily log that are left uncompleted including the more important parts such as the fantasy section and the cognitive distortion portion. These are lost opportunities for Mr. McCauley to reframe his irrational thoughts to more helpful rational ones that will keep him in a lower emotional arousal. (April 15, 2008, at page 129 of respondent's record).
>
> - However, Mr. Proudfoot and I differ somewhat in the assessment of his logs. This author sees Mr. McCauley's logs of mixed quality of which this writer has had varied results in persuading Mr. McCauley to improve them." (May 12, 2008, at page 124 of respondent's record).

> - His logs and group disposition continue to be of mixed quality; his strengths being his un-nuanced way of expressing his thoughts and his candid sharing of what he chooses to disclose." (May 12, 2008, at page 126 of respondent's record).

[29] The logs are not part of the tribunal record and were filed in this proceeding by the applicant.

[30] On my review of the record, I find that the information in the logs was "considered in the taking of the decision" that resulted in his transfer from a minimum to a medium security institution.

[31] The applicant was provided with neither a "summary of that information", in the words of s. 27, nor the logs themselves. He prepared them. They were his documents. They dealt with one of the two issues determinative of the transfer to a medium security institution. He should have been afforded access to the logs.

[32] Third, I attribute no merit to the respondent's submission that the applicant himself had created the logs and was therefore aware of their contents. This argument assumes he was able to remember their content, particularly to rebut their assessment by correctional officials. Of equal importance, his lawyer's inability to access the logs comprised his opportunity to make representations through counsel.

[33] Fourth, the applicant's failure, in the respondent's view, to use the logs at the third-level grievance cannot cure, for the reasons mentioned in *Flynn*, the respondent's failure to produce them at the rebuttal stage.

[34] In summary, the correctional officials should have made the logs available to the applicant prior to the filing of his rebuttal submissions.

[35] The statutory obligation in s. 27(1) required the correctional officials to provide "… all the information to be considered in the taking of the decision or a summary of that information." This required the correctional officials to provide at least a summary of the logs to the applicant, if not the logs themselves. This was not done. The assessment of the logs by members of the case management team and others do not constitute a "summary". I can understand how the preparation of a summary of the applicant's 100 pages of logs might be problematic. If the compilation of a summary was impractical, the correctional officials would have been required by s. 27(1) to provide the logs themselves: "…all the information to be considered in the taking of the decision…".

[36] Also, regardless of the statutory requirement, procedural fairness dictated, in the circumstances of this case, that the applicant and his counsel be afforded access to the logs at the rebuttal or first level grievance of the process, particularly in view of the relevance of the logs in the decision to effect the transfer to the medium security institution.

[37] In *May*, at paragraphs 92 and 99, the majority grounded its decision concerning the onerous, substantial and extensive duty of disclosure on the principle of the offender's right to know the case being asserted by the institution. In this case, even if the applicant can be said to have known the case against him, he was not afforded the logs which would have been his tool to rebut the assessment for decision. In my respectful view, common sense dictated that he be given access to his logs.

[38] Neither party suggested that s. 18(b) of the Regulations presented a complete solution to this litigation, regardless of the procedural fairness issue.

[39] This application for judicial review will be granted. The third level grievance is the subject matter of this judicial review. However, as this decision turns on procedural fairness and in the light of *Flynn*, the first level decisions of the warden (at pages 39-48 of the respondent's record) will be set aside and the matter referred back for re-determination.

JUDGMENT

1. This application for judicial review is granted.

2. The warden's decisions of June 17, 2008 to uphold the applicant's involuntary transfer to Mission Institution and to increase his security classification to medium security are set aside and the matter referred back for re-determination at the first level review, by the warden or institutional head of Ferndale Institution, or a designate of that person other than the acting warden who signed the decisions of June 17, 2008.

3. Costs are payable to the applicant in the mid-range of Column III.

"Allan Lutfy"

Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-381-09
STYLE OF CAUSE:	RONALD MCCAULEY v. AGC
PLACE OF HEARING:	Vancouver, B.C.
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