Federal Court		Cour fédérale

Date: 20100628

Docket: T-986-09

Citation: 2010 FC 704

Ottawa, Ontario, June 28, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

DUANE WILLIAMS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application for judicial review of a decision by the Commissioner of Corrections (the Commissioner), dated May 11, 2009, which upheld the involuntary transfer of the applicant from medium security Warkworth Institution in Ontario to maximum security Port-Cartier Institution in Quebec.

[2] The applicant requests an order quashing the decision of the Commissioner and an order quashing the underlying Correctional Services Canada (CSC) decision to transfer the applicant.

Background

[3] The applicant was sentenced in 2004 to ten years for robbery. With additional convictions in 2005 and 2006, an additional 41 days has been added to his ten year sentence. After his initial conviction, the applicant cooperated with Toronto Police in their investigations of other individuals and cooperated with the Crown in at least one subsequent prosecution. This put the applicant at risk of being targeted for physical harm by other inmates. Even though the offences he had committed and the security reclassification score (SRS) indicated that the applicant was a maximum security inmate, CSC placed him at medium security Warkworth for his own protection.

[4] By January 19, 2009 when CSC made the decision to transfer him to Port-Cartier, the applicant was in segregation without the possibility of release to the general population in the near future and had been in segregation for 12 of the last 17 months. The applicant was segregated in October 2007 for being suspected of introducing drugs into the institution, in June 2008 for being confrontational and aggressive with a CSC officer and finally in September 2008 following an alleged altercation with another offender. The applicant did not grieve any of his segregations but now denies any wrongdoing and by implication, challenges those segregations.

[5] In September and October 2008, the applicant was scored as maximum security on the SRS. He was recommended for transfer to Port-Cartier. The applicant contested the recommendation on

the grounds that his three administrative segregations did not warrant transfer and on the grounds that he would be unable to integrate at Port-Cartier due to the language barrier. His submission was unsuccessful and CSC made the decision to transfer him. The applicant's appeal of the decision went directly to the third and final level of grievance. On May 11, 2009, the Senior Deputy Commissioner, on behalf of the Commissioner, denied the third level grievance concluding:

> You were properly reassessed as being a Maximum security offender based on your requirement for a high degree of supervision and control within the penitentiary. As such, you were to be transferred to a Maximum security institution, and none of the Maximum security institutions in Ontario were suitable. Therefore, you were transferred to Port-Cartier Institution in order to provide you with an opportunity to reintegrate with the general population in a protective custody environment. As such, this grievance is **denied**. You are encouraged to begin working with your Case Management Team to pursue a Voluntarily Inter-Regional Transfer to an institution outside the Ontario region.
>
> [Emphasis in original]

[6] The applicant commenced this application for judicial review of the Commissioner's decision on the grounds that the CSC failed to observe a principle of natural justice by acting contrary to or ignoring certain provisions contained in sections 24 and 28 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the Act).

[7] For ease of reference, the relevant statutory provisions are included with these reasons in the Annex.

Issues

[8] The issues are as follows:

1. What is the scope of this judicial review?

2. Did the Commissioner breach his duty of fairness to the applicant by failing to comply with the provisions of subsection 24(1) of Act?

3. Did the Commissioner fail to comply with subsection 24(1) by failing to distinguish between facts and allegations in the applicant's record?

4. Did the Commissioner breach his duty of fairness to the applicant by failing to comply with the provisions of section 28 of the Act?

5. Was the Commissioner's decision upholding the transfer reasonable?

Applicant's Written Submissions

[9] The applicant submits that using information that does not comply with the provisions of section 24 of the Act or is speculative, amounts to a breach of the duty of fairness. The information used to determine the applicant's transfer did not comply because it failed to include or mention:

- that the police and the CSC had recommended that the applicant continue to reside at Warkworth;
- the deficiencies in the allegation that the applicant had introduced drugs, including the fact that no drugs were found and that others had access to his cell;
- that his "refuse a direct order" infringement was resolved informally with an apology;
- the incompleteness of the allegation that the applicant was in a fight; and

- the lack of factual evidence to support the contention that the applicant muscled other inmates.

[10] The CSC is also under a legislated obligation to take all reasonable steps to ensure that an inmate is kept in the least restrictive environment. Pursuant to section 28 of the Act, the CSC must also take into account accessibility to a person's home community and family, the compatibility of the culture and linguistic environment and the availability of appropriate programs.

[11] The applicant submits that this obligation was breached. He was moved much farther away from his family and now rarely receives any visits. Furthermore, the only programs offered at Port-Cartier are in French, which the applicant does not speak.

Respondent's Written Submissions

[12] The respondent submits that while the only subject of review is the Commissioner's decision upholding the applicant's transfer, the applicant is attempting to collaterally attack the CSC's decision to increase the applicant's security classification. Because *Federal Court Rules* dictate that judicial review is limited to a single order in respect of which relief is sought, the decision regarding the applicant's security classification is beyond the scope of this judicial review. If the applicant wished to challenge the decision to increase his security classification, he could have filed a grievance. Similarly, if he wished to challenge the information relied on when he was placed in segregation, he could have filed a complaint.

[13] The applicable standard of review is reasonableness says the respondent. On the spectrum of reasonableness, a large degree of deference is due to the CSC as it is charged with maintaining the safety and security of penitentiaries and the surrounding community.

[14] The decision was complicated because the nearest available maximum security institution was in Quebec. The Commissioner understood this would move him farther from family and would pose language difficulties, but had a solid set of reasons on which to base the decision. The decision followed and complied with section 28 of the Act and discussed and answered all of the applicant's grounds for grieving.

[15] Finally, the respondent submits that there was no breach of procedural fairness. The applicant was provided the reasons for the decision to transfer him and was given an opportunity to rebut the decision with the assistance of counsel

Analysis and Decision

[16] **Issue 1**

What is the scope of this judicial review?

Rule 302 of the *Federal Court Rules* generally limits applications for judicial review to a single administrative decision in respect of which relief is sought.

[17] The only decision that the applicant has sought to review is the decision of the Commissioner to uphold his transfer to Port-Cartier. I would then agree with the respondent that the decision increasing the applicant's security classification and the various decisions placing the applicant in administrative segregation are beyond the scope of this review.

[18] The respondent also contends that the information CSC relied on in making those underlying decisions is similarly beyond the scope of this review. I would disagree.

[19] The reviewing Court is bound by and limited to the record that was before the judge or the Board (see *Bekker v. Canada*, 2004 FCA 186, [2004] F.C.J. No. 819 (QL) at paragraph 11). Fairness to the parties and the court or tribunal under review dictates such a limitation. However, in this case, the Commissioner did review some aspects of the information which was relied on by CSC in making those underlying decisions. To the extent that that information was relied on by the Commissioner and formed part of the tribunal's record, it is within the scope of this judicial review.

[20] To summarize, while I can and will consider to some degree the evidence before the Commissioner which related to the applicant's reclassification and segregation decisions, the only decision in respect of which relief is possible, is the decision of the Commissioner to uphold his transfer.

[21] **Issue 2**

Did the Commissioner breach his duty of fairness to the applicant by failing to comply with the provisions of subsection 24(1) of Act?

In *Tehrankari v. Canada (Correctional Service)*, [2000] F.C.J. No. 495, 188 F.T.R. 206 (T.D.) (QL), Mr. Justice Lemieux considered the regime in section 24 to be part of an offender's "rights package" and described it as follows:

> 39 The particular provision involved is section 24 which mandates the Service to take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up-to-date and complete as possible conditioned by a provision which says that where an offender believes there is an error or omission in the information, the offender may request the Service to correct that information and, if the request is refused, the Service must attach to the information a notation indicating the offender has requested a correction and setting out the correction requested.

[22] Mr. Justice Lemieux concluded in *Tehrankar* above, at paragraph 44, that the correctness standard should apply to the interpretation of section 24 and reasonableness for the application of the law to the facts resulting in the decision.

[23] The applicant did not engage the section 24 procedure nor did the Commissioner expressly interpret or even refer to section 24 in his reasons. Instead, the applicant suggests that the duty of fairness was breached when the Commissioner relied on information which did not comply with subsection 24(1) which states:

24.(1) The Service shall take all reasonable steps to ensure that any information about an offender that it uses is as	24.(1) Le Service est tenu de veiller, dans la mesure du possible, à ce que les renseignements qu'il utilise

accurate, up to date and complete as possible.	concernant les délinquants soient à jour, exacts et complets.

[24] Of course, CSC can never know with absolute certainty that the information it uses will be completely accurate. Subsection 24(1) requires the CSC to take all reasonable steps. Subsection 24(2) provides for a procedure whereby inmates can seek to correct information they believe is in error.

[25] There is no evidence that the applicant engaged that process and in all other respects was given adequate due process and treated fairly. Consequently, he cannot now assert non-compliance with subsection 24(1) as grounds for his claim that the duty of fairness was breached.

[26] **Issue 3**

Did the Commissioner fail to comply with subsection 24(1) by failing to understand the difference between facts and allegations in the applicant's record?

The substance of a decision may fail to meet the reasonableness standard if it is clear that the decision maker based his or her decision on an allegation which was misconstrued as a fact. In light of subsection 24(1) of the Act, such a misconstruction by the CSC will always result in an unreasonable decision.

[27] In *Brown v. Canada (Attorney General)*, 2006 FC 463, 290 F.T.R. 143, this Court granted relief to an inmate who had challenged the information on his record for accuracy. An allegation

stated as a fact was ordered removed. As noted in the present case, the applicant has not directly challenged the information in his record. The accuracy of the information on his record is not within the scope of this review *per se*. Instead, the inquiry here is into whether the Commissioner misunderstood any of the allegations against the applicant and accepted them for their truth instead of merely as allegations made.

[28] As noted in *Brown* above by Madam Justice Mactavish, there are good and valid reasons for recording and keeping on file allegations made against an inmate, even if the allegations turn out to be completely false (paragraphs 29 and 30).

[29] The applicant does not point to any such misunderstanding in the decision. Upon review, each instance cited by the Commissioner was properly qualified as not having been proven or was simply a recitation of the documented allegation resulting in administrative segregation.

[30] In the section dealing with the applicant's claim that he could be managed successfully at Warkworth, the Commissioner stated:

> There were a number of other portions of the A4D: OSL which the complainant contends are either not accurate or taken out of context, such as indication that a drug dog indicated on the complainant's cell, a package of drugs being found near a visitor of the complainant, reports of the complainant muscling other offenders for their canteen items and a positive THC urinalysis in May 2008. While none of these indicate on their own that the complainant's Institutional Adjustment rating should be amended to High, together they indicate that the complainant has frequent or major difficulties causing serious institutional adjustment problems, requiring significant/constant management intervention and would benefit from a highly structured environment in which individual or group

> interaction is subject to constant and direct supervision pursuant to CD 710-6, Annex A (please see policy section above). As such, the complainant meets the criteria for requiring a high degree of supervision and control within the penitentiary, and best fits the description of a Maximum security offender, which is [sic]accordance with his SRS score or [*sic*] 29.

[31] It is clear that the Commissioner did not base his opinion on the truth of the allegations made against the applicant and did not draw any unfair inferences. In any event, as noted above, the decision increasing his security classification had already been made and was a decision that the applicant did not challenge. There were various methods available to the applicant to challenge or have stricken information in his record. He chose not to. Nor did he challenge any of the allegations resulting in segregation.

[32] The applicant's claim that he was being called on to prove a negative with respect to the mentioned allegations lacks any basis.. I would not allow judicial review on this ground.

[33] **Issue 4**

Did the Commissioner breach its duty of fairness to the applicant by failing to comply with the provisions of section 28 of the Act?

Section 28 of the Act informs the substantive decisions surrounding the placement of prisoners. It does not relate directly to the procedure involved in those decisions. Demonstrated failure to observe the considerations in section 28 of the Act is a factor the Court will consider in assessing the reasonableness of a placement or transfer decision.

[34] Applicants to this Court cannot avoid the doctrine of substantive review by claiming that misinterpretation or ignorance of a substantive legislative provision amounts to a breach of procedural fairness.

[35] The applicant was given a fair process generally and does not raise any legitimate issues of procedural fairness.

[36] **Issue 5**

Was the Commissioner's decision upholding the transfer reasonable?

The parties agree that the ultimate decisions of the CSC or the Commissioner regarding prisoner transfers are to be afforded deference and are subject to review against the reasonableness standard.

[37] Though the transfer resulted in moving the applicant farther away from his family and into an environment where he would face language difficulties, it was a reasonable decision which easily falls within the range of possible acceptable outcomes outlined by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9 (QL).

[38] The factors in section 28 of the Act were listed and considered by the Commissioner. It was a tough decision. No other Ontario maximum security prisons were available due to safety and security concerns; a fact the applicant understood and accepted. The applicant was a maximum security offender and had been classified as requiring a maximum security setting. This combined

with his continuing segregation at Warkworth indicates that a maximum security institution outside Ontario where the applicant could re-integrate into the general population, would put the applicant in the least restrictive environment required by section 28 of the Act. Port-Cartier was the closest institution matching that description.

[39] The applicant also pointed out that representations had been made to him that he would be placed in medium security at Warkworth despite his SRS score indicating that he was a maximum security inmate. However, any such representations were made prior to the occurrence of the incidents that led to his transfer to Port-Cartier Institution. As such, they do not assist the applicant.

[40] It remains open to the applicant to pursue a voluntary transfer to another maximum security institution outside Ontario.

[41] The Commissioner's decision upholding the transfer was reasonable as it was within the range of possible acceptable outcomes. I would not allow judicial review on this ground.

[42] The application for judicial review is therefore dismissed.

[43] There shall be no order for costs.

JUDGMENT

[44] **IT IS ORDERED that:**

1. The judicial review application is dismissed.

2. There shall be no order for costs.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Corrections and Conditional Release Act, S.C. 1992, c. 20

24.(1) The Service shall take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible.	24.(1) Le Service est tenu de veiller, dans la mesure du possible, à ce que les renseignements qu'il utilise concernant les délinquants soient à jour, exacts et complets.
(2) Where an offender who has been given access to information by the Service pursuant to subsection 23(2) believes that there is an error or omission therein, (a) the offender may request the Service to correct that information; and (b) where the request is refused, the Service shall attach to the information a notation indicating that the offender has requested a correction and setting out the correction requested.	(2) Le délinquant qui croit que les renseignements auxquels il a eu accès en vertu du paragraphe 23(2) sont erronés ou incomplets peut demander que le Service en effectue la correction; lorsque la demande est refusée, le Service doit faire mention des corrections qui ont été demandées mais non effectuées.
. . .	. . .
28. Where a person is, or is to be, confined in a penitentiary, the Service shall take all reasonable steps to ensure that the penitentiary in which the person is confined is one that provides the least restrictive environment for that person, taking into account	28. Le Service doit s'assurer, dans la mesure du possible, que le pénitencier dans lequel est incarcéré le détenu constitue le milieu le moins restrictif possible, compte tenu des éléments suivants :

(a) the degree and kind of custody and control necessary for

(i) the safety of the public,

(ii) the safety of that person and other persons in the penitentiary, and

(iii) the security of the penitentiary;

a) le degré de garde et de surveillance nécessaire à la sécurité du public, à celle du pénitencier, des personnes qui s'y trouvent et du détenu;

(b) accessibility to

(i) the person's home community and family,

(ii) a compatible cultural environment, and

(iii) a compatible linguistic environment; and

b) la facilité d'accès à la collectivité à laquelle il appartient, à sa famille et à un milieu culturel et linguistique compatible;

(c) the availability of appropriate programs and services and the person's willingness to participate in those programs.

c) l'existence de programmes et services qui lui conviennent et sa volonté d'y participer.

FEDERAL COURT

SOLICITORS OF RECORD

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