Federal Court  Cour fédérale

Date: 20111026

Docket: T-1889-10

Citation: 2011 FC 1226

Ottawa, Ontario, October 26, 2011

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

TYSHAN RILEY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Tyshan Riley seeks judicial review of a decision of the Senior Deputy Commissioner ("SD Commissioner") of the Correctional Service of Canada ("CSC") rejecting his third-level grievance with respect to the Institutional Head's decision denying his request to participate in private family visits ("PFVs") with his spouse and two daughters.

[2] Mr. Riley essentially argues that the SD Commissioner relied on erroneous information including unproven, unsubstantiated assertions by the police and thus, his decision should be quashed.

[3] It appears from the SD Commissioner's decision that there is no impediment to Mr. Riley's participation in PFVs with his daughters,[1] should he apply to do so under the supervision of another legal guardian. Therefore, the only issue before this Court is the denial of PFVs with Dana-Lee Williams, his spouse.

[4] For reasons that follow and despite the able submissions of Mr. Riley's counsel, the Court finds that the decision contains no reviewable error that would justify its intervention.

FACTUAL BACKGROUND

[5] Mr. Riley is a first-time federal offender serving a life sentence for first degree murder, attempted murder and commission of an offence for a criminal organization at Millhaven Institution,[2] a maximum security prison in Bath, Ontario since September 2009. It appears that Mr. Riley was identified as a leader of the Galloway Boys gang.

[6] In December 2009, Mr. Riley applied for PFVs with his spouse and her two daughters, aged 10 and 11, who consider Mr. Riley their father.

[1] The first page of the two-page representations of Mr. Riley at the third level relates to his right to see his daughters.
[2] It appears that at the time of the grievance, Mr. Riley still had outstanding charges and he had appealed his convictions.

[7] A Community Assessment ("CA") was completed in March 2010 in relation to this application. The CA contained information from Toronto Police Service regarding Ms. Williams' criminal history and accurately listed her convictions (Fail to Comply with Recognizance -3 counts, Commission of Offence for Criminal Organization, Conspiracy to commit an Indictable Offence), as well as withdrawn charges (various firearm related offences in addition to a charge for possession of a Schedule 1 substance for the purpose of trafficking and conspiracy to commit murder). It was noted that Ms. Williams was charged with committing offences in relation to gang activity similar to those that Mr. Riley was involved in and that her offences were "in relation to conspiring to murder a witness in order to prevent him from testifying against [Mr. Riley]". It was also stated that the police was "very concerned [Ms. Williams] will attempt to bring contraband inside the institution" and that she "was investigated for drug trafficking and intercepted phone calls confirmed that [she] had conversations about conspiracy to traffic in drugs". The CA indicated that it was worrisome that she was also convicted of FTC by working at a local detention centre.[3]

[8] A subsequent Assessment for Decision ("A4D") by Mr. Riley's Case Management Team ("CMT") concluded that Ms. Williams was "not recommended as suitable to participate" in the PFV program with Mr. Riley. It is in this A4D that the Applicant notes the erroneous references to a drug conviction whereas the CA accurately lists the charge as withdrawn.

[3] It appears from the CA that one of the FTC convictions of Ms. Williams relates to her part-time employment as a Detention and Custody worker at the York Detention Centre in Toronto, against the conditions of her release on recognizance which included not attending any jail or detention centre [Grievance File of Inmate Tyshan Riley, Exhibit A to the Affidavit of Emily Macleod ("Certified Record"), p. 63]. Also noted at page 64 is the fact that Mr. Riley had already attempted to introduce contraband into the Millhaven Institution upon his admission from a provincial correctional facility.

[9] The Correction Intervention Board ("CIB") concurred with the CMT that Mr. Riley's request should not be approved.

[10] Mr. Riley's application for PFVs was indeed denied by the Institutional Head ("IH") soon thereafter. The IH refers to the institution's significant concerns regarding Ms. Williams' criminal history, the management of criminal organizations within the institution as per *Commissioner's Directive 568-3 – Identification and Management of Criminal Organizations* ("*CD 568-3*") and the fact that the activities of Mr. Riley and Ms. Williams could not be monitored by security staff within the confines of a PFV.

[11] After unsuccessfully grieving the matter to the second level,[4] Mr. Riley submitted a third-level grievance repeating his allegations of use of erroneous information [grievance number U40A00038395]. He also attached a letter from his wife denying her involvement in drugs or gang activity, documents showing the drug charges against her were withdrawn, a letter from the Children's Aid Society ("CAS") stating there was no CAS involvement since 2006, letters from his daughters and letters of support on behalf of Ms. Williams.[5]

[12] In his decision denying the grievance, the SD Commissioner refers once again to concerns expressed with respect to Mr. Riley's wife's criminal history and contact with pro-criminal

[4] While the grievance process was ongoing, it appears that Ms. Williams was indicated on by the drug dog during a visit (Second level grievance decision, Certified Record, p. 39; see also the letter from the Visiting & Correspondence Department to Mr. Riley, Certified Record, p. 55).

[5] Namely, a letter from the lawyer who represented Ms. Williams in criminal proceedings which led to the abovementioned convictions; another letter from a lawyer who was the former employer of Ms. Williams in 2003-2004 and finally a letter from the Elizabeth Fry Society describing Ms. Williams as a valued member of its prevention and advocacy team. All the documents submitted by Mr. Riley are in the Certified Record that was before the decision maker, which he is presumed to have considered [*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ no 598 (CA) (QL), at para 1].

individuals. He notes that the CA mentions police information "suggesting" that she was involved in gang-related activities and that, as a result, the police were not supportive of Mr. Riley's request for PFVs with his wife. He also considers the fact that the CIB concurred with the CMT to reject Mr. Riley's request. The SD Commissioner confirms that Mr. Riley's case was to be reviewed in conjunction with *CD 568-3* as Mr. Riley was identified as the leader of Galloway Boys gang. Although the decision maker also relies on the A4D, he specifies which portions he considers most relevant. These portions include the attitude of Ms. Williams during the interview carried out for the Community Assessment, where she gave a misleading impression that she did not know the extent of Mr. Riley's criminal behaviour. Also included are the types of crimes for which Ms. Williams was convicted and their context, as well as the police's current opposition to the PFV request. These points are expressly linked to the assessment of the IH who indicated in his decision that Ms. Williams had demonstrated a willingness to participate in gang-related activities. There is no reference to a conviction for drug-related offences.

[13] Finally, the SD Commissioner directly acknowledges Mr. Riley's statements that his wife's conviction was the result of an injustice, that she was not guilty, that she is not a gang member, nor does she associate with gang members, including Mr. Riley's argument that the absence of CAS involvement with his children since 2006 supports his position in that respect. However, after noting that CSC does not speak to issues concerning the administration of justice, the SD Commissioner remarks that this is not in and of itself sufficient to conclude that Ms. Williams had not been involved in gang activities, especially given her conviction in 2008 for the Commission of an Offence for Criminal Organization. The SD Commissioner indicates that, in his view, the IH's decision to deny the PFV application was in compliance with the applicable directives.

ANALYSIS

[14] It is agreed and need not be further discussed that the applicable standard of review is reasonableness [*McDougall v Canada (Attorney General)*, 2011 FCA 184 at para 24, [2011] FCJ No 841 (QL), *Harnois v Canada*, 2010 FC 1312 at para 20, [2010] FCJ no 1613 (QL)]. For the benefit of Mr. Riley, it is worth explaining that this means that the Court must only consider whether the decision under review falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law [*Dunsmuir*, at para. 47]. It cannot substitute its own assessment to that of the specialized decision maker to whom the legislator granted a wide discretion to apply the *Regulations Respecting Corrections and the Conditional Release and Detention of Offenders*, SOR/92-620 ("*Regulations*") and the *Commissioner's Directives CD 770–Visits* and *CD 568-3* [see Appendix A for the relevant provisions].

[15] Although it is clear that while serving his sentence, Mr. Riley is to "retain the rights and privileges of all members of society, except those that are necessarily removed or restricted as a consequence of the sentence" (section 4(*e*) of the *Corrections and Conditional Release Act*, SC 1992, c 20 ("*CCRA*"), this is always subject to the protection of society, including the security of the penitentiary (subsection 71(1) *CCRA*) [*Russell v Canada*, 2007 FC 1162, at para 16-20, [2007] FCJ no 1514 (QL) [*Russell 2007*]].

[16] Furthermore, an inmate does not have an absolute right to contact visits [*Flynn v Canada (Attorney General)*, 2007 FCA 356, para 12-13, [2008] 3 FCR 18] and visits can be prohibited under section 91 of the *Regulations*, "where the institutional head or staff member believes on

reasonable grounds that during the course of the visit the inmate or visitor would jeopardize the security of the penitentiary or the safety of any person, or plan or commit a criminal offence."

[17] In his memorandum, Mr. Riley relies mainly on subsection 24(1) of *CCRA* which, in his view, should inform how section 71 of the *CCRA* and section 91 of the *Regulations* should be construed and applied. He also refers to the decision of Justice von Finckenstein in *Russell v Canada*, 2006 FC 1209, [2006] FCJ no 1508 (QL) [*Russell*].

[18] During the hearing, Mr. Riley's counsel explained his client's frustration vis-à-vis the lack of what he considered to be appropriate remedies to rectify the wrong impression created by the inaccurate and unsubstantiated assertions made by the police and by the erroneous reference in the A4D to a drug conviction whereas those charges were in fact withdrawn.

[19] The Court noted that paragraphs 24(2)(*a*) and (*b*) of *CCRA* do offer a remedy. In fact, in *Russell*, the Court was reviewing a decision denying Mr. Russell's request to have references to a withdrawn sexual assault charge (which had also been erroneously referred to as a conviction in a subsequent report) removed from his inmate file. This type of grievance is more akin to Mr. Riley's own grievance numbered V40A00037953 where he was contesting the accuracy of the information contained in the CA report. However, this grievance was rejected and was not pursued further. Mr. Riley never filed a grievance with respect to the specific inaccuracies in the A4D which refers to a drug conviction. Grievance number V40A00037953 is now closed. It was not before the SD Commissioner and is not an issue to be determined by this Court.

[20] That said, it was apparent from the Offender Grievance Executive Summary of the third-level grievance decision that the Millhaven Institution had taken steps to rectify the file with respect to the inaccurate reference to the drug conviction.

[21] Thus, there is no doubt in the Court's mind that the SD Commissioner was not led astray by this inaccuracy, especially given that each level of the grievance process is a *de novo* hearing [see *Tyrell v Canada (Attorney General)*, 2008 FC 42, at para 37-38, [2008] FCJ no 69 (QL); *Collin v Leclerc Institution*, 2009 FC 1293 para 7, [2009] FCJ no 1634 (QL)].

[22] Furthermore, since Mr. Riley is not before this Court for the correction of erroneous information, a more instructive case is *Russell 2007*, a judicial review application by the same Mr. Russell seeking to quash a third-level grievance decision denying his request for PFVs with his wife. In that case, Mr. Russell contended that the panel ignored the fact that there was no sexual component to his present offences. Madam Justice Tremblay-Lamer concluded that the decision to deny PFVs was nonetheless reasonable, since the assessment of Mr. Russell's potential risk took into account his entire offending pattern (*Russell 2007*, para 24).

[23] It is clear in the present case that the assessment of potential risk also took into account the entire offending pattern of Mr. Riley and Ms. Williams. This consideration of the overall pattern of offences also responds to Mr. Riley's assertion that there is no evidence of Ms. Williams' current involvement with gang activity or members: it is her overall criminal history that forms the basis of the decision.

[24] Although Ms. Williams denies having been involved in any drug-related activity, thereby contesting the accuracy of the police allegations with respect to intercepted telephone conversations compromising her, the SD Commissioner was entitled to consider, as part of the file before him, the fact that the police did oppose Mr. Riley's request, whether or not this position was well-founded. This was evidently only one of many factors he considered in reaching his own decision which, in the Court's view, clearly falls within the range of acceptable outcomes which are defensible with respect to the facts and the law.

[25] The reasoned decision of the SD Commissioner is thus reasonable. It is cogent and transparent. The Court should thus not intervene.

[26] The application is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Johanne Gauthier"

Judge

APPENDIX A

***Corrections and Conditional Release Act*, SC 1992, c 20, ("CCRA")**

Principles that guide the Service
4. The principles that shall guide the Service in achieving the purpose referred to in section 3 are

(*a*) that the protection of society be the paramount consideration in the corrections process;

(…)

(*e*) that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence;

(…)

Principes de fonctionnement
4. Le Service est guidé, dans l'exécution de ce mandat, par les principes qui suivent :

a) la protection de la société est le critère prépondérant lors de l'application du processus correctionnel;

(…)

e) le délinquant continue à jouir des droits et privilèges reconnus à tout citoyen, sauf de ceux dont la suppression ou restriction est une conséquence nécessaire de la peine qui lui est infligée;

(…)

Accuracy, etc., of information
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.

Exactitude des renseignements
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.

Correction of information
(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.

Correction des renseignements
(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.

Contacts and visits
71. (1) In order to promote relationships between inmates and the community, an inmate is entitled to have reasonable contact, including visits and correspondence, with family, friends and other persons from outside the penitentiary,

Rapports avec l'extérieur
71. (1) Dans les limites raisonnables fixées par règlement pour assurer la sécurité de quiconque ou du pénitencier, le Service reconnaît à chaque détenu le droit, afin de favoriser ses rapports avec la collectivité, d'entretenir, dans la mesure du possible, des

subject to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons.

relations, notamment par des visites ou de la correspondance, avec sa famille, ses amis ou d'autres personnes de l'extérieur du pénitencier.

Visitors' permitted items
(2) At each penitentiary, a conspicuous notice shall be posted at the visitor control point, listing the items that a visitor may have in possession beyond the visitor control point.

Objets permis lors de visites
(2) Dans chaque pénitencier, un avis donnant la liste des objets que les visiteurs peuvent garder avec eux au-delà du poste de vérification doit être placé bien en vue à ce poste.

Where visitor has non-permitted item
(3) Where a visitor has in possession, beyond the visitor control point, an item not listed on the notice mentioned in subsection (2) without having previously obtained the permission of a staff member, a staff member may terminate or restrict the visit.

Possession d'objets non énumérés
(3) L'agent peut mettre fin à une visite ou la restreindre lorsque le visiteur est en possession, sans son autorisation ou celle d'un autre agent, d'un objet ne figurant pas dans la liste.

***Regulations Respecting Corrections and the Conditional Release and Detention of Offenders*, SOR/92-620**

Visits
90. (1) Every inmate shall have a reasonable opportunity to meet with a visitor without a physical barrier to personal contact unless

(*a*) the institutional head or a staff member designated by the institutional head believes on reasonable grounds that the barrier is necessary for the security of the penitentiary or the safety of any person; and
(*b*) no less restrictive measure is available.

(2) The institutional head or a staff member designated by the institutional head may, for the purpose of protecting the security of the penitentiary or the safety of any person, authorize the visual supervision of a visiting area by a staff member or a mechanical device, and the supervision shall be carried out in the least obtrusive

Visites
90. (1) Tout détenu doit, dans des limites raisonnables, avoir la possibilité de recevoir des visiteurs dans un endroit exempt de séparation qui empêche les contacts physiques, à moins que :
a) le directeur du pénitencier ou l'agent désigné par lui n'ait des motifs raisonnables de croire que la séparation est nécessaire pour la sécurité du pénitencier ou de quiconque;

b) il n'existe aucune solution moins restrictive.

(2) Afin d'assurer la sécurité du pénitencier ou de quiconque, le directeur du pénitencier ou l'agent désigné par lui peut autoriser une surveillance du secteur des visites, par un agent ou avec des moyens techniques, et cette surveillance doit se faire de la façon la moins gênante possible dans les circonstances.

manner necessary in the circumstances.

(3) The Service shall ensure that every inmate can meet with the inmate's legal counsel in private interview facilities.

(3) Le Service doit veiller à ce que chaque détenu puisse s'entretenir avec son avocat dans un local assurant à l'entrevue un caractère confidentiel.

91. (1) Subject to section 93, the institutional head or a staff member designated by the institutional head may authorize the refusal or suspension of a visit to an inmate where the institutional head or staff member believes on reasonable grounds

91. (1) Sous réserve de l'article 93, le directeur du pénitencier ou l'agent désigné par lui peut autoriser l'interdiction ou la suspension d'une visite au détenu lorsqu'il a des motifs raisonnables de croire :

(*a*) that, during the course of the visit, the inmate or visitor would

(i) jeopardize the security of the penitentiary or the safety of any person, or

(ii) plan or commit a criminal offence; and

a) d'une part, que le détenu ou le visiteur risque, au cours de la visite :

(i) soit de compromettre la sécurité du pénitencier ou de quiconque,

(ii) soit de préparer ou de commettre un acte criminel;

(*b*) that restrictions on the manner in which the visit takes place would not be adequate to control the risk.

b) d'autre part, que l'imposition de restrictions à la visite ne permettrait pas d'enrayer le risque.

(2) Where a refusal or suspension is authorized under subsection (1),

(2) Lorsque l'interdiction ou la suspension a été autorisée en vertu du paragraphe (1) :

(*a*) the refusal or suspension may continue for as long as the risk referred to in that subsection continues; and

a) elle reste en vigueur tant que subsiste le risque visé à ce paragraphe;

(*b*) the institutional head or staff member shall promptly inform the inmate and the visitor of the reasons for the refusal or suspension and shall give the inmate and the visitor an opportunity to make representations with respect thereto.

b) le directeur du pénitencier ou l'agent doit informer promptement le détenu et le visiteur des motifs de cette mesure et leur fournir la possibilité de présenter leurs observations à ce sujet.

92. (1) Subject to section 93, the institutional head or a staff member designated by the institutional head may authorize a complete suspension of the visiting rights of all inmates in a penitentiary where the security of the penitentiary is significantly jeopardized and no less restrictive measure is available.

92. (1) Sous réserve de l'article 93, le directeur du pénitencier ou l'agent désigné par lui peut autoriser la suspension complète des droits de visite de tous les détenus du pénitencier lorsque la sécurité de celui-ci est sérieusement menacée et qu'il n'existe aucune autre solution moins restrictive.

(2) Every complete suspension of visiting rights under subsection (1), shall be reviewed by

(2) La suspension des droits de visite visée au paragraphe (1) doit être revue :

(*a*) the head of the region on or before

a) dans les cinq jours d'application de cette

the fifth day of the suspension; and
(*b*) by the Commissioner on or before the fourteenth day of the suspension.

mesure, par le responsable de la région;
b) dans les 14 jours d'application de cette mesure, par le commissaire.

Commissioner's Directive Number 568-3 – Identification and Management of Criminal Organizations

2. To recognize that membership and association with a criminal organization shall be considered a significant risk factor and a serious threat to the safe, secure, orderly and efficient management and operations of our institutions and community operational units.

2. Reconnaître que l'appartenance ou l'association à une organisation criminelle pose un risque important et une menace sérieuse pouvant compromettre la gestion et le fonctionnement sûrs, ordonnés et efficients de nos établissements carcéraux et de nos unités opérationnelles dans la collectivité.

4. To prevent members or associates of criminal organizations from exercising influence and power in institutions and in the community and to prevent actions and circumstances that enhance the image, prestige and status of criminal organizations by acknowledging their status or by conferring privileges and concessions. Normally, this would preclude members or associates of criminal organizations from participating in activities such as being Inmate Committee members, inmate canteen operators, or institutional spokepersons for cultural groups or associations.

4. Empêcher les membres d'organisations criminelles et les individus associés à celles-ci d'exercer une influence et un pouvoir dans les établissements et dans la collectivité. Prévenir les actes et les situations, comme la reconnaissance de leur statut ou l'octroi d'avantages et de concessions, qui consacrent le statut et le prestige des organisations criminelles. Cela signifie qu'en principe, les membres d'organisations criminelles ou leurs associés ne pourraient pas participer à des activités telles qu'agir à titre de membre du Comité de détenus, de préposé à la cantine ou de porte-parole de groupes culturels ou d'associations au sein de l'établissement.

20. Membership and association with a criminal organization shall be considered a significant risk factor when making any decision related to the offender.

20. L'appartenance ou l'association à une organisation criminelle doit être considérée comme un facteur de risque important lors de la prise de décision concernant un délinquant.

Commissioner's Directive Number 770 –Visiting

REFUSAL OR SUSPENSION OF VISIT
17. The Institutional Head may authorize the refusal or suspension of a visit between an inmate and a member of the public where he or she believes on reasonable grounds that:

a. during the course of the visit the

REFUS OU SUSPENSION DES VISITES
17. Le directeur de l'établissement peut autoriser le refus ou la suspension d'une visite à un détenu par un membre de la collectivité lorsqu'il a des motifs raisonnables de croire :

a. que, au courant de la visite, le

inmate or the member of the public would:

1. jeopardize the security of the penitentiary or the safety of an individual, or
2. plan or commit a criminal offence; and

b. restrictions on the manner in which the visit takes place would not be adequate to control the risk.

détenu ou le membre de la collectivité risque :

1. de compromettre la sécurité de l'établissement ou de quiconque, ou
2. de planifier ou de commettre un acte criminel;

b. que le fait d'apporter des restrictions aux modalités relatives à la visite ne permettrait pas de réduire le risque.

29. The Institutional Head may refuse to permit a private family visit, even if the above conditions are fulfilled on the basis of case management reports which clearly indicate that a visitor or inmate should be considered ineligible to participate in private family visiting due to a potential for harm to the inmate or the visitor(s), or for any other exceptional circumstance.

29. Le directeur de l'établissement peut refuser toute permission de visite familiale privée, même quand les conditions susmentionnées sont remplies, si les rapports établis par la gestion des cas montrent clairement que le visiteur ou le détenu devrait être considéré comme inadmissible en raison d'un danger éventuel pour le détenu ou le visiteur ou de toute autre circonstance exceptionnelle.

FEDERAL COURT

SOLICITORS OF RECORD

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