Federal Court  Cour fédérale

Date: 20131121

Docket: T-1764-12

Citation: 2013 FC 1179

Ottawa, Ontario, November 21, 2013

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

DR. V.I. FABRIKANT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application by Dr. Fabrikant (the Applicant) for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [*FCA*] of the decision of Correctional Service Canada [CSC], rendered on August 3, 2012, refusing to provide him with a second parka (the Decision).

[2] The Decision under review is a third-level offender grievance response concerning institutional amenities at the Drummond institution (see page 7, paragraph 5 of the Applicant's motion record filed January 11, 2013). In his third-level grievance, the Applicant grieved that the Drummond institution refuses to provide him with adequate winter clothing, alleging that he had received two parkas at every other institution where he has been incarcerated in the past. The Applicant also alleged grand-fathered rights to justify his entitlement to two parkas.

[3] The third-level offender grievance response denies the Applicant's grievances on grounds that his grand-fathered rights argument has no basis and that *Regional procedure 885 of Quebec Region* [*Regional procedure 885*], Annex A, stipulates that one parka is given to each inmate every three years.

II. Facts

[4] The Applicant is presently incarcerated at the Archambault Institution, a federal penitentiary where he is serving a sentence of life imprisonment. The Applicant filed two grievances with CSC, when he was at the Drummond Institution, in accordance with section 90 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [the *CCRA*], through which he sought a review of the decisions refusing to grant him a second parka.

[5] The Applicant claims that he always received two parkas during the winter and that he needs a supplementary parka because he is 72 years old and is afflicted with a heart condition.

He claims that elderly people need more clothes in the winter than younger and healthier individuals.

[6] On October 18, 2012, the Applicant filed a motion for an interlocutory injunction in order to immediately obtain a second parka. This motion was denied on October 30, 2012.

[7] On November 27, 2012, the Applicant filed a second motion for interlocutory injunction in order to obtain a second parka, this time clarifying that it was strictly for outside use. This motion was denied on December 19, 2012 and was appealed by the Applicant. This appeal was dismissed with costs on September 12, 2013.

III. Legislation

[8] The applicable provisions of the *Corrections and Conditional Release Act*, cited above, the *Corrections and Conditional Release Regulations*, SOR/92-620 [the *CCRR*], the *Federal Courts Rules*, SOR/98-106 [the *FCR*] and the *Regional procedure 885* cited above, are reproduced in an appendix to this decision.

IV. Issue

[9] This application raises only one issue:

Was the refusal to provide the Applicant with a second parka reasonable?

V. Standard of review

[10] The Respondent submits that the applicable standard of review is that of reasonableness because the decision entails the interpretation, by the third-level grievance officer, of CSC procedures and policies, which are well known to the officer. The Respondent refers to *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, [2011] 3 SCR 654 at para 30.

[11] Even though it was not argued in his written submissions, at the hearing, the Applicant alleged that the applicable standard of review should be correctness, because the officers who rendered the Decision on his grievances are not well educated and cannot therefore properly interpret applicable legislation, policies and procedures.

[12] The Court rejects the Applicant's position and agrees with the Respondent. The standard of review for decisions taken pursuant to the *CCRA* was addressed by the Federal Court and determined to be that of reasonableness (see *Crawshaw v Canada (Attorney General)*, 2011 FC 133 at paras 24 to 26) when relating to the application of legal principles to facts and findings of facts. This Court must therefore determine whether the decision under review "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[13] The Supreme Court of Canada stated, in paragraph 57 of the *Dunsmuir* case, that :

> "An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may

> be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (*Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, 2004 SCC 26). This simply means that the analysis required is already deemed to have been performed and need not be repeated".

[14] Therefore, since the applicable standard of review has been satisfactorily identified by previous case law, the Court will apply the reasonableness standard.

Preliminary motion

[15] At the onset of the hearing, the Applicant presented an oral motion to be allowed to testify thereby introducing evidence related to five specific events that took place over the last months. Three of these events or encounters occurred in March of this year, one on August 26 and the last one on October 23rd and were not before the third-level grievance officer. Some of these events had already been the subject of a motion pursuant to rule 312 of the *FCR* that was dismissed by Prothonotary Tabib, in a decision rendered on November 1, 2013. The Applicant had attempted to file a motion before this Court to appeal the Protonotary's decision but it was not perfected on time.

[16] The Court, after hearing both the Applicant and the Respondent, dismissed the Applicant's oral motion, on grounds that the evidence he wants to introduce by testimony was not part of the record before the third-level grievance officer and is not determinative of the issue as they all took place after the grievance was filed and the Respondent is not in a position to respond at this late stage. In sum, the Applicant failed to convince this Court that the facts alleged warrant the exception sought.

VI. Positions of the parties

A. Applicant's position

[17] The Applicant submits that the Respondent breached section 83 of the *CCRR* cited above, that creates the obligation to ensure that inmates are adequately clothed and fed (see paragraph 83 (2) (*a*)).

[18] The Applicant claims that he has always received two parkas every winter, the only exception being the time he spent at the Drummond institution. He alleges that initially, when he was transferred back to the Archambault penitentiary in April 2011, he had 2 parkas, but one parka was taken away on grounds that *Regional procedure 885* entitles inmates to receive only one parka.

[19] The Applicant acknowledges that this policy has "always existed" but claims that he always received two parkas notwithstanding.

[20] At the hearing the Applicant refuted the Respondent's argument based on acquired rights and argued that his claim is based rather on legitimate expectations. Since the Respondent has always provided a second parka in the past he can legitimately claim to be entitled to receive an additional one.

[21] The Applicant claims to suffer from a heart condition which makes him feel the cold more harshly than other inmates. He alleges that a doctor has prescribed a second parka in the past but that he cannot find the original prescription.

[22] He submits that *Regional procedure 885* mandates one pillow and 2 blankets per prisoner, but this has never prevented him from receiving more blankets and pillows; consequently the same flexibility should apply with regards to parkas.

[23] The Applicant also filed exhibit number 2, which contains scientific articles supporting his argument that elderly people need more clothes in winter than "younger and healthier individuals" and that exercise outdoors provides significant health advantages. He claims that if he feels cold then he is not adequately clothed and therefore considers that Respondent has breached section 83 of the *CCRR*.

[24] The Applicant submits that several paragraphs of the Respondent's amended affidavit are irrelevant and that the affiant had no personal knowledge of the facts alleged. On that score the Applicant directed the Court to the transcript of the examination of Mr. Charland. He drew the Court's attention to paragraphs 6 and 7 of Mr. Charland's affidavit relating to the temperature in his cell. Pointing out that these facts are irrelevant since he requires a second parka strictly for outdoor use. He also underlined the apparent contradictions between paragraph 14 of the affidavit and Mr. Charland's statement on page 43, line 23, where the latter acknowledged that he had no evidence that the Applicant took his second parka from another inmate. The Court was also directed to paragraph 16 where Mr. Charland mentions a subterfuge to obtain a second

parka, versus the answers provided by Mr. Charland on pages 55 and 57 of the transcript, where he admitted that he did not verify with Mr. Provençal whether the Applicant had been given a second parka in the past.

[25] Finally, the Applicant raised what he believes is a contradiction with respect to paragraph 10 of Mr. Charland's affidavit stating that he was refused a prescription for a second parka and Mr Charland's response to a question from the Applicant at page 55, wherein he confirms not having verified with the Doctor why the request for a prescription for a second parka was denied.

[26] The Applicant equally underlined that the third-level decision never challenged that he did receive a second parka.

[27] The Applicant also asserts, in his written representations, that the affiant's lawyer is the one who typed the text of the affidavit and that the Court should infer that rule 82 of the *FCR* was breached.

[28] The Applicant refutes the Respondent's claims that he does not need to walk outside in the winter in order to improve or maintain his health. He relies on the scientific articles filed in support of that contention. He also rejects the Respondent's submission that he could walk and exercise inside when he is uncomfortable outside or simply go outside for shorter periods of time on multiple occasions, claiming that these suggestions are unsafe for someone with cardiac problems.

[29] Finally, the Applicant underlines that the Decision ignored the fact that Chief Justice Rolland ordered that he be given a second parka for the purpose of his transportation to Court when he testified as a witness in a trial in 2011.

[30] The Applicant is therefore asking the Court to:

a) Order the Respondent to allow Applicant to have two parkas in his possession;

b) Order the Respondent to include in *Regional procedure 885* the following phrase: "the norms described in this instruction are flexible: they can be changed according to special need (*sic*) of specific prisoners, especially elderly and sick prisoners", with costs.

B. Respondent's position

[31] The Respondent rejects the Applicant's argument based on past practices to provide two parkas.

[32] The Respondent refers to the definition of "acquired rights" found in Hubert Reid, *Dictionnaire de droit québécois et canadien*, (Montréal: Wilson et Lafleur, 2010), and submits that in order for such a right to be recognized, the use must have been lawful. He posits that in this case the second parka was never authorized under the applicable procedures nor tolerated in practice. The Respondent notes that the Applicant himself acknowledges that *Regional procedure 885* has always existed.

[33] The Respondent submits that Annex A of *Regional procedure 885* specifically provides for one parka per inmate and claims that the Applicant has failed to file any reliable evidence, medical or factual, to indicate that he requires a second parka or that he needs to walk outside in the winter to improve his health.

[34] The Respondent also underlines that section 83 of the *CCRR* does not grant inmates with an absolute right to walk outdoors in all circumstances and that consequently the CSC takes reasonable steps, weather permitting.

[35] The Respondent claims that the scientific articles submitted by the Applicant constitute new evidence as these documents were never part of the record, when the third-level grievance officer took his decision. Consequently, he alleges that the Court should reject these documents. Failure to do so would transform this judicial review into a *de novo* appeal (see *Ontario Association of Architects v Association of Architectural Technologists of Ontario*, [2001] 1 FC 577, 2002 FCA 218).

[36] The Respondent also argues that the Applicant refers to "clear evidence in the Applicant's medical file" but such evidence does not exist.

[37] The Respondent denies both the Applicant's claim that a prescription for a second parka was ever issued by a medical practitioner and the existence of an informal practice to grant him the extra parka. The Respondent submits that the Applicant has never been officially provided with a second parka nor has he been authorized to have one in his possession.

[38] As to Applicant's claim that Respondent breached rule 82 of the *FCR*, the Respondent refers to Justice Gleason's recent decision which stated that it is a common practice for counsel to draft affidavits and that there is nothing improper in doing so (see *Fabrikant v Canada (Correctional Service)*, 2012 FC 1496 at para 6 [*Fabrikant*]).

[39] The Respondent submits that the Applicant has failed to demonstrate the need for the Court to depart from its role in judicial review to return the matter back to the federal board that rendered the decision if it concludes that is was unreasonable (see *Brychka v Canada (Attorney General)*, [1998] 141 FTR 258 at para 27).

[40] Consequently the Respondent submits that the Court should dismiss this Application for judicial review with costs.

VII. Analysis

Was the refusal to provide the Applicant with a second parka reasonable?

[41] The Court concludes that the refusal to provide the Applicant with a second parka is reasonable for the following reasons.

[42] The Court disagrees with the Applicant's contention that he has acquired rights or legitimate expectations, as he explained in the course of the hearing, to be provided with two

parkas based on past practice. The Court agrees with the Respondent that it was not incumbent on Respondent to verify with each penitentiary where the Applicant has been detained whether or not he had received a second parka. The burden to adduce such evidence rests on the Applicant in this instance.

[43] The Supreme Court of Canada clarified the concept of vested rights in *Dikranian v Quebec (Attorney General)*, 2005 SCC 73 at paras 37 and 39:

> "**37.** Few authors have tried to define the concept of "vested rights". The appellant cites Professor Côté in support of his arguments. Côté maintains that an individual must meet two criteria to have a vested right: (1) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement (Côté, at pages. 160-61). [Emphasis added]
>
> . . .
>
> **39**. A court cannot therefore find that a vested right exists if the juridical situation under consideration is not tangible, concrete and distinctive. The mere possibility of availing oneself of a specific statute is not a basis for arguing that a vested right exists".

[44] Since the Applicant was never positioned legally to claim the existence of an acquired or vested right. *Regional procedure 885* has and continues to prescribe one parka per inmate he cannot claim to have an acquired right to a second parka.

[45] With respect to legitimate expectations, the concept applies strictly to procedural matters as was recently reaffirmed by the Supreme Court of Canada in *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 97; consequently it cannot create substantive rights.

[46] As to the Applicant's contention based on the fact that he has been provided with more bedding despite the wording in *Regional procedure 885* mandating one pillow and 2 blankets per prisoner, the Court notes that Annex C of *Regional procedure 885* states, in the column "Conditions", that these articles are given "as required". Therefore, the regulation allows for some discretion as to bedding, however it is to be noted that the wording used in Annex A regarding parkas does not grant any discretion.

[47] The Court also finds that the Applicant has failed to adduce evidence from a medical authority that his cardiac condition warrants the exception sought from the application of *Regional procedure 885* to provide him with two parkas.

[48] Exhibit 2 constitutes new evidence which was not before the third-level grievance officer; consequently it cannot be considered in this judicial review.

[49] As to the Applicant's contention that the Respondent's affidavit contravenes sections 81 and 82 of the *FCR*, this Court disagrees. Our Court, in *Canada (Minister of Citizenship and Immigration) v Pierre*, 2012 FC 1169, at paragraph 23, addressed the issue of "personal knowledge" found in section 81:

> "**23.** […] When the admissibility of an affidavit must be determined, the Court has to take into account the "reality of the surrounding circumstances. It depends, among other things, on the office or qualifications of the [affiant] and whether it is probable that a person holding such office or having such qualifications would, of his own knowledge, be aware of the particular facts" (see *Smith Kline and French Laboratories Ltd v Novopharm Ltd*, [1984] F.C.J. No. 223)".

[50] Mr. Charland drafted the affidavit as acting chief administrator and services manager of the Archambault Penitentiary, Correctional Services Canada. It is likely that based on his own knowledge, he would be aware of most facts described in his affidavit. Consequently his affidavit is admissible though the Court acknowledges that some of the answers provided in the course of his examination do contradict, partially, statements found in paragraphs 10 and 16. It is clear that paragraphs 6 and 7 of Mr. Charland's affidavit are irrelevant in the current proceedings, but more importantly, the apparent inconsistencies with respect to paragraphs 14 and 16 do not modify the Court's assessment that the Applicant has failed to provide conclusive evidence that the Decision is unreasonable, since it was acknowledged in the third-level decision that the Applicant had a second parka when he was transferred to Archambault.

[51] Regarding the Applicant's claim that rule 82 of the *FCR* was breached because the affidavit was drafted by counsel, the Court rejects this argument for the same reasons provided by Justice Gleason, in another case concerning the Applicant (see *Fabrikant* cited above at para 6).

[52] Finally, the Court must dismiss the Applicant's contention that paragraph 83 (2) (*d*) of the *CCRR* has been violated by the Respondent. Paragraph 83 (2) (*d*) states that "reasonable steps" must be taken to afford inmates the opportunity to "exercise for at least one hour every day outdoors, weather permitting, or indoors where the weather does not permit exercising outdoors". No evidence was submitted to the effect that Applicant was not afforded this opportunity.

[53] The Applicant has failed to discharge the requisite burden of proof to succeed in this application because he has not adduced any evidence to establish that Respondent breached his statutory duty to ensure that he is adequately clothed for prevailing weather conditions. The Applicant has not filed any evidence to prove that his medical condition warrants the provision of a second parka or that he was ever given a prescription for one.

[54] In sum the Applicant has not convinced this Court that the Decision was unreasonable; consequently this application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that

1) The application for judicial review is dismissed;

2) The whole with costs.

"André F.J. Scott"

Judge

Appendix

***Sections 81, 82 and 312 of the Federal Courts Rules*, SOR/98-106 provide as follows:**

81. (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.	**81.** (1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.
(2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.	(2) Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.
82. Except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit.	**82.** Sauf avec l'autorisation de la Cour, un avocat ne peut à la fois être l'auteur d'un affidavit et présenter à la Cour des arguments fondés sur cet affidavit.
312. With leave of the Court, a party may	**312.** Une partie peut, avec l'autorisation de la Cour :
(*a*) file affidavits additional to those provided for in rules 306 and 307;	*a*) déposer des affidavits complémentaires en plus de ceux visés aux règles 306 et 307;
(*b*) conduct cross-examinations on affidavits additional to those provided for in rule 308; or	*b*) effectuer des contre-interrogatoires au sujet des affidavits en plus de ceux visés à la règle 308;
(*c*) file a supplementary record.	*c*) déposer un dossier complémentaire.

Section 90 of the *Corrections and Conditional Release Act*, SC 1992, c 20 provides as follows:

90. There shall be a procedure for fairly and expeditiously resolving offenders' grievances on matters within the jurisdiction of the Commissioner, and the procedure shall operate in accordance with the regulations made under paragraph 96(*u*).

90. Est établie, conformément aux règlements d'application de l'alinéa 96*u*), une procédure de règlement juste et expéditif des griefs des délinquants sur des questions relevant du commissaire.

Section 83 of the *Corrections and Conditional Release Regulations*, SOR/92-620 provides as follows:

Living Conditions

Physical Conditions

83. (1) The Service shall, to ensure a safe and healthful penitentiary environment, ensure that all applicable federal health, safety, sanitation and fire laws are complied with in each penitentiary and that every penitentiary is inspected regularly by the persons responsible for enforcing those laws.

(2) The Service shall take all reasonable steps to ensure the safety of every inmate and that every inmate is

(*a*) adequately clothed and fed;

(*b*) provided with adequate bedding;

(*c*) provided with toilet articles and all other articles necessary for personal health and cleanliness; and

(*d*) given the opportunity to exercise for at least one hour every day outdoors, weather permitting, or indoors where the weather does not permit exercising outdoors.

Conditions de détention

Conditions matérielles

83. (1) Pour assurer un milieu pénitentiaire sain et sécuritaire, le Service doit veiller à ce que chaque pénitencier soit conforme aux exigences des lois fédérales applicables en matière de santé, de sécurité, d'hygiène et de prévention des incendies et qu'il soit inspecté régulièrement par les responsables de l'application de ces lois.

(2) Le Service doit prendre toutes les mesures utiles pour que la sécurité de chaque détenu soit garantie et que chaque détenu :

a) soit habillé et nourri convenablement;

b) reçoive une literie convenable;

c) reçoive des articles de toilette et tous autres objets nécessaires à la propreté et à l'hygiène personnelles;

d) ait la possibilité de faire au moins une heure d'exercice par jour, en plein air si le temps le permet ou, dans le cas contraire, à l'intérieur.

Regional procedure 885 Quebec Region

ANNEXE « A »

PLAN DE DISTRIBUTION DES ARTICLES VESTIMENTAIRES POUR TOUS LES NIVEAUX DE SÉCURITÉ

ANNEX « A »

SCALE OF ISSUE OF CLOTHING ARTICLES FOR ALL LEVELS OF SECURITY

ARTICLES ITEM	QUANTITÉ ET FRÉQUENCE DE LA REMISE QUANTITY AND FREQUENCY OF ISSUE		REMARQUES CONDITIONS
	REMISE INITIALE INITIAL SCALE	REMISE SUBSÉQUENTE FREQUENCY	
Anorak (vert) **Parka (green)**	**1**	**3 ans** **3 years**	
Bas de toilette ou de laine **Dress socks or Wool socks**	**5**	**3 paires par année** **3 pairs/year**	
Blouson demi-saison **Jacket**	**1**	**2 ans** **2 years**	
Bottes d'hiver (*) **Winter boots (*)**	**1**	**VOIR NOTE 1**	
Bottes de sécurité (*) **Safety boots (*)**	**1**	**VOIR NOTE 1**	**Au besoin/si nécessaire** **As required/when necessary**
[…]	**[…]**	**[…]**	**[…]**

ANNEXE « C »

LITERIE, DRAPS, SERVIETTES

ANNEX « C »

BEDDING, LINENS, TOWELS

ARTICLES ITEM	QUANTITÉ ET FRÉQUENCE DE LA REMISE QUANTITY AND FREQUENCY OF ISSUE		REMARQUES CONDITIONS
	REMISE INITIALE INITIAL SCALE	REMISE SUBSÉQUENTE FREQUENCY	
Draps **Sheets**	**1 ensemble** **1 set**		**Au besoin** **As required**
Taie d'oreiller **Pillow case**	**1** **1**		**Au besoin** **As required**
Couverture thermale **Blanket thermal**	**2** **2**		**Au besoin** **As required**
Serviettes de bain **Bath towels**	**4** **4**	**1 an** **1 year**	
Débarbouillettes **Wash cloths**	**3** **3**	**1 an** **1 year**	

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1764-12
STYLE OF CAUSE:	DR. V.I. FABRIKANT v ATTORNEY GENERAL OF CANADA

MOTION HELD VIA VIDEOCONFERENCE ON NOVEMBER 6, 2013 FROM MONTRÉAL AND SAINTE-ANNE-DES-PLAINES, QUEBEC

REASONS FOR JUDGMENT AND JUDGMENT: SCOTT J.

DATED: NOVEMBER 21, 2013

APPEARANCES:

DR. V. I. FABRIKANT	FOR THE APPLICANT ON HIS OWN BEHALF
Me Pascale-Catherine Guay	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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