Federal Court  Cour fédérale

Date: 20140612

Docket: T-409-13

Citation: 2014 FC 565

Ottawa, Ontario, June 12, 2014

PRESENT: The Honourable Madam Justice Heneghan

Docket: T-409-13

BETWEEN:

EDWARD LAC

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Lac (the "Applicant") seeks judicial review of a second-level grievance decision made pursuant to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the "Act") and the *Corrections and Conditional Release Regulations*, SOR/92-620 ("Regulations"). In that decision, dated February 5, 2013, the Assistant Deputy Commissioner, Institutional Operations ("Assistant Deputy Commissioner") denied the Applicant's appeal of his first-level grievance in

respect of the denial of his request for a transfer from the medium security facility at Matsqui Institution to a minimum security facility, that is, Ferndale Institution.

[2] The Applicant seeks the following relief:

> [a] an order to grant relieve of Applicant's *Charter Rights and Freedoms* sought under s.1, 2, 7, 9 and 10[c] from deprivation of life, liberty and security in which review of evidences exemplifies continuance of irreparable harm from legal custodial of Applicant.
>
> [b] order a decision based on supported erroneous findings of fact the previous decision maker failed to do or consider the materials submitted previous by the applicant asserting the alleged acts of any misconduct.
>
> [c] order the federal board, a commissioner or other tribunal, or agencies to do any act or thing it has unlawfully failed to do or refused or has unreasonably delayed in doing.
>
> [d] order to quash or set aside and refer back for determination in accordance with such directions as this Court considers appropriate that misconduct by law-making staff decision makers rendered unfair or biased fettered decision to establish unreasonable delay and infringement of the Applicant's Charter.
>
> [e] order to restore public confidence to adhere and administer a proper interpretation of the statute or of the proper relevant facts to be utilized for analysis and assessment for decision making; to be executed fairly and taken with full accountability; to be with compliance by the statute of the legislative body governed by it.

I. Background

[3] The following facts are taken from the affidavit of the Applicant, dated April 2, 2014, and filed in support of his application, as well as the Certified Tribunal Record.

[4] The Applicant is serving time at Matsqui Institution following a conviction on May 28, 2010, for the offences of breaking and entering a dwelling house, extortion, assault with a

weapon, and aggravated assault. He was sentenced to a term of five and one-half years in prison, after credit was given for time spent in pre-sentence custody. His custodial sentence began in January 2010.

[5] The Applicant unsuccessfully appealed his convictions and an application for leave to appeal was dismissed by the Supreme Court of Canada; see *R v Lac*, [2012] S.C.C.A. No. 90.

[6] The Applicant began serving his sentence in January 2010. In December 2010, he obtained employment in Matsqui Institution as a kitchen worker. He has maintained employment in different positions since that time and has received favourable performance reviews. He has not been involved in any disciplinary incidents while incarcerated at Matsqui Institution.

[7] On June 6, 2012, the Applicant applied for a transfer from Matsqui Institution, a medium-security facility, to Ferndale Institution, a minimum-security facility. As part of the assessment of his request, the Applicant's security classification was reviewed by a case management team. The team found that that a medium-security rating was appropriate for the Applicant.

[8] The Applicant's transfer request was denied on August 3, 2012, by the Assistant Warden. The Assistant Warden noted that the Applicant had no discipline history and that there was no change to the assessment of his risk of escape. The Assistant Warden also observed that the Applicant had declined to appear at the Warden's Board to discuss his case, refused to work with his case management team, was unwilling to discuss his criminal history and refused to accept responsibility for his offences.

[9] Further, the Assistant Warden noted that the Applicant appeared to have a heightened sense of entitlement, his offences included significant violence, he is still rated a moderate risk to public safety, and his transfer was opposed by Ferndale Institution. The Assistant Warden concluded that the Applicant remained assessed as a medium-security inmate and the request for a transfer was denied.

[10] On August 22, 2012, the Applicant submitted an appeal, that is, a second-level grievance, to the Regional Deputy Commissioner of Correctional Services Canada. He was advised that a response could be expected by September 26, 2012. On September 25, 2012, the Applicant was advised that this timeframe would not be met and he was given a new date of December 5, 2012, for a response. The Applicant wrote to Correctional Services Canada on October 2, 2012, and asked whether there was anything further he could do to facilitate the resolution of his grievance. He also enquired about the legal deadline for a decision.

[11] On October 24, 2012, the Applicant received a reply from the analyst assigned to his grievance. The analyst noted that Commissioner's Directive 081 ("Offender Complaints and Grievances") set out a timeframe for the resolution of inmate grievances. The analyst wrote the Applicant again on December 4, 2012, informing him that the anticipated timeline for the resolution of his grievance would not be met and the new anticipated date for a response was February 13, 2013.

[12] By letter dated February 6, 2013, the Regional Coordinator sent the Applicant a letter attaching the decision on his appeal. The decision is dated February 5, 2013, and was issued by the Assistant Deputy Commissioner.

[13] The Assistant Deputy Commissioner reviewed the criteria for classification of an inmate as appropriate for a medium or minimum-security facility as set out in section 18 of the Regulations. The Assistant Deputy Commissioner noted that in the Assistant Warden's decision, the Applicant was appropriately rated as moderate in institutional adjustment, escape risk, and public safety concern. Accordingly, he did not meet the criteria for placement in a minimum-security facility.

[14] The Assistant Deputy Commissioner also addressed the Applicant's submissions that the Assistant Warden had not fully considered the affidavit filed in support of his request. The Assistant Deputy Commissioner found that the Assistant Warden stated in her reasons that she had considered the Applicant's submissions. The Assistant Warden noted concerns about the Applicant's unwillingness to work with his case management team and that there was, consequently, a lack of information to support reducing the Applicant's security rating. As his security rating did not meet the criteria for a minimum-security facility, the Applicant's request was appropriately refused.

II. Issues

[15] The Applicant does not identify any particular issue but focuses throughout his written submissions upon the wrongfulness of his conviction. In challenging the conviction, the

Applicant raises issues of procedural fairness. He also questions the merits of the second-level grievance decision, again on the basis that he was wrongfully convicted.

[16] The Respondent raises a preliminary issue about the affidavit filed by the Applicant in this application for judicial review, arguing that the affidavit contains material that was not before the decision-maker and that such material should not be considered by the Court.

[17] The Respondent proceeds to raise as a substantive issue the prematurity of this application, submitting that since the Applicant did not exhaust the available grievance process, the Court should not exercise its discretion to hear this application.

[18] Further, the Respondent addresses the application on its merits and argues that it is trite law that the decision of the Assistant Deputy Commissioner is reviewable on the standard of correctness in respect of any breaches of procedural fairness. The Respondent submits that any issues of fact are reviewable on the standard of reasonableness; see the decision in *Reda v Canada (Attorney General)* (2012), 404 F.T.R. 85 at paragraph 34.

III. Discussion and Disposition

[19] I will first address the matter of the Applicant's affidavit. This affidavit contains documents as exhibits. Some of those documents, including those related to a request the Applicant made under the *Privacy Act*, R.S.C. 1985, c. P-21, those providing information regarding his performance, training and level of pay for his employment in Matsqui Institution,

and those concerning an attempt to receive reimbursement for repairs to his glasses, are not found in the Certified Tribunal Record.

[20] The general rule is that only the documentary material before the decision-maker can be considered by a Court upon judicial review. New material can be introduced in specific circumstances, for example to address issues of procedural fairness or jurisdiction. In this regard, see the decision in; *Ontario Association of Architects v Association of Architectural Technologists of Ontario* (2002), 291 N.R. 61 at paragraph 30.

[21] The "new" documents submitted by the Applicant do not address either procedural fairness or the jurisdiction of the Court, and they will not be considered.

[22] I turn now to the issue of prematurity.

[23] Section 90 of the Act sets out a grievance process for the resolution of inmate complaints. This process consists of four stages, as set out in sections 74 to 82 of the Regulations as follows:

1) An initial complaint;
2) Written grievance to the institutional head ("first-level grievance");
3) An appeal to the Regional Head ("second-level grievance"); and
4) A further appeal to the Commissioner of Corrections ("third-level grievance").

[24] The process set out in the Act and Regulations is supplemented by a Commissioner's Directive; in this case specifically Commissioner's Directive 081 ("Offender Complaints and

Grievances"). This directive sets out, among other things, timelines to be followed in pursuing the grievance process.

[25] It is well established that a Court has discretion to refuse adjudication of an application for judicial review where an adequate alternative remedy is available. In *Giesbrecht v. Canada et al.* (1998), 148 F.T.R. 81 at paragraph 10, the Court said the following:

> On its face, the legislative scheme providing for grievances is an adequate alternative remedy to judicial review. Grievances are to be handled expeditiously and time limits are provided in the Commissioner's Directives. There is no suggestion that the process is costly. If anything it is less costly than judicial review and more simple and straightforward. Through the grievance procedure an inmate may appeal a decision on the merits and an appeal tribunal may substitute its decision for that of the tribunal appealed from. Judicial review does not deal with the merits and a favourable result to an inmate would simply return the matter for redetermination to the tribunal appealed from.

[26] It is clear from the record that the Applicant has not exhausted the grievance process. Subsection 80(1) of the Regulations in force at the time of the Applicant's grievance provides that where an offender is not satisfied with the decision of an institutional head, an appeal can be made to the head of the region.

[27] The Applicant followed this course, appealing to the Regional Deputy Commissioner of the Correctional Service of Canada.

[28] Subsection 80(2) of the Regulations in force at the relevant time provides that a further appeal from the head of the region lies to the Commissioner of Corrections.

[29] The Applicant did not present an appeal to the Commissioner of Corrections. This failure is fatal.

[30] In *McMaster v. Canada (Attorney General)* (2008), 334 F.T.R. 240 at paragraph 27, the Court said that early recourse to the Court may be appropriate where there are "urgent, substantial, matters and an evident inadequacy in the grievance procedure". On the basis of the record here, I see no urgent matters. There is no "evident inadequacy" in the grievance procedure.

[31] I will touch briefly upon the broad arguments raised by the Applicant about a breach of procedural fairness.

[32] The basic characteristic of procedural fairness is the ability of an affected party to present his or her case and to answer to any responding arguments. On the basis of the record here, I am satisfied that the Applicant had the opportunity to present his case. He chose to proceed to the second-level grievance; he chose not to continue to the third level. There was no interference with his right to present his case.

[33] Similarly, I am satisfied, on the basis of the record before me, that the Applicant had full disclosure of relevant information. There is no evidence of "tampering" with the record, as alleged by the Applicant. Likewise, while the delay in processing the Applicant's second-level grievance is a concern, the Applicant has failed to present any evidence that he has suffered harm or prejudice from that delay, such that it constitutes a breach of procedural fairness.

[34] It follows that the application will be dismissed, with costs. I would observe that even if he had been successful, there is no basis to award damages, in any amount, to the Applicant. Damages, as a remedy, are not available in an application for judicial review. In this regard, I refer to the decision in *Canada v. Tremblay*, [2004] 4 F.C.R. 165 at paragraph 28.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs. In the exercise of my discretion, pursuant to Rule 400 of the *Federal Courts Rules*, SOR/98-106, I award costs to the Respondent in the amount of $250.00.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-409-13
STYLE OF CAUSE:	EDWARD LAC v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA HEARD BY WAY OF VIDEO CONFERENCE
DATE OF HEARING:	DECEMBER 12, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	HENEGHAN J.
DATED:	JUNE 12, 2014

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