Federal Court  Cour fédérale

Date: 20160119

Docket: T-2067-14

Citation: 2016 FC 57

Ottawa, Ontario, January 19, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

DALE RANDOLPH SKINNER

Applicant

and

ATTORNEY GENERAL OF CANADA AND CORRECTIONAL SERVICE OF CANADA AND BEAVER CREEK (MED) INSTITUTION

Respondents

JUDGMENT AND REASONS

[1] The Applicant, Dale Randolph Skinner, is a 53 year old inmate serving a life sentence at Beaver Creek Institution, a medium (as well as a minimum) security facility located in Gravenhurst, Ontario. He seeks judicial review of the denial of his third level grievance following his annual security reclassification review in June 2011. The reasons for this denial are stated in the offender grievance response dated February 9, 2012, made by an Assistant Commissioner at Correctional Services Canada [CSC]. It is the Assistant Commissioner's

decision which the Applicant asks the Court to review in his notice of application filed October 7, 2014.

I. Background

[2] Prior to serving his sentence at Beaver Creek Institution, the Applicant served a portion of his sentence at Pittsburgh Institution, a minimum security institution. In late February 2007, the Applicant was placed in administrative segregation at the Joyceville Institution and informed this was due to concerns arising from alleged comments he had made about a female correctional officer. The Applicant denied making these comments, and requested the identity of the informant, but was not given this information.

[3] In March 2007, the Applicant filed a second level grievance over his segregation and his transfer from the minimum security Pittsburgh Institution to the medium security Warkworth Institution. He also launched a habeas corpus proceeding in the Ontario Superior Court of Justice in respect of his transfer to the medium security institution. The Ontario Court denied the Applicant's request for a writ of habeas corpus in a decision released on June 3, 2009, finding that the Applicant had twice been provided with the comments he was alleged to have made, and that non-disclosure of the identity of informants did not breach procedural fairness because, within a prison context, disclosure would "result in almost certain injury or the death of those persons."

[4] Since his involuntary transfer from the Pittsburgh Institution, the Applicant has attempted to redress what he regards as an arbitrary transfer through channels other than the grievance

process established by the *Corrections and Conditional Release Act*, SC 1992, c 20 [the *CCRA*]. In June 2010, the Applicant wrote a letter to the Solicitor General of Canada, asking for the information in his security file and also complaining that CSC had refused to further investigate the reliability of the informant information which precipitated his transfer from Pittsburgh Institution. The response to this letter appears to be a letter from the CSC's Rights Redress and Resolution [RRR] branch dated September 27, 2010, advising the Applicant his concerns should have been addressed through the grievance process and that, as he did not file a third level grievance but instead took the matter to court, the matter was essentially beyond the auspices of CSC.

[5] Following the review of the Applicant's security classification in June 2011, the Applicant filed a second level grievance in respect of the decision to maintain his medium security rating. This decision to maintain the medium rating was based, in part, on the Applicant's alleged 2007 comments about the female correctional officer, and also on several psychological assessments and the Applicant's refusal to take a high potency sex drive reducing medication which had been recommended for him. The Applicant grieved that he had not been provided with an adequate "gist" of the 2007 informant information and how it was found to be reliable, and also demanded that the information be removed from his 2011 assessment if CSC did not disclose particulars about its 2007 investigation. On September 19, 2011, however, the Applicant was informed his second level grievance was denied and, consequently, on October 4, 2011, he filed a third level grievance, to which he subsequently added additional information. The Assistant Commissioner [the AC] denied this third level grievance in a decision dated

February 9, 2012. As noted earlier, it is this decision which is the subject of the Applicant's request for judicial review.

II. The Acting Commissioner's Decision

[6] In his decision, the AC identifies two issues: (1) the Applicant's security reclassification; and (2) the validity of the information used to justify the reclassification.

[7] With respect to the security reclassification, the AC noted that the Applicant's security reclassification scale assessment score had reduced to 19.5 from his previous score of 20 in 2010, and that he had completed all programming requirements except for the sex offender maintenance program. The AC reviewed the reasons why the Applicant's institutional adjustment rating had been lowered from moderate to low, despite his organization of a peaceful protest in 2009 that evolved into a major disturbance, and why the Applicant's escape rating was low, despite the comments made in 2007 about the female correctional officer being a "ticket out" of the institution. However, with respect to the Applicant's public safety rating, the AC remarked this rating remained high based not only on his 2007 comments but also on a 2011 psychological assessment showing no significant changes as well as his history of violent acts while on conditional release. The AC concluded that the Applicant's security classification appropriately remained at medium, and because the reclassification had been performed in line with the relevant policy, the AC therefore denied this portion of the grievance.

[8] As to the second portion of the grievance concerning the validity of the information utilized for the reclassification, the AC noted the Applicant contests the information about his

alleged 2007 comments and his involvement in organizing a peaceful protest in 2009. The AC also noted that the 2007 information was used to justify the Applicant's transfer to Warkworth Institution. The AC found that the Applicant was aware of this information for over two years before grieving about it, and that while it was considered in the security reclassification it was not the only information considered.

[9] The AC acknowledged that under section 24 of the *CCRA* there is an obligation to ensure information about an offender is as accurate, up to date, and complete as possible, and that an offender can request CSC to correct incorrect information. He further stated that, based on CSC's policy for recording preventive security information and also on correspondence with staff at the Pittsburgh Institution, the 2007 informant information is "Believed Reliable" in status, meaning it gives every indication of being accurate but has not been confirmed; whereas the information regarding the Applicant's participation in the 2009 riot was of "Completely Reliable" status, meaning it had been substantiated or confirmed by an independent source. The information as to the Applicant leading the protest in 2009 was of "Unknown Reliability," meaning a security officer had been unable to assess the reliability of the information. The AC noted that, despite the Applicant's request that the information used in his security reclassification be changed or removed, he had not filed a request for a file correction pursuant to CSC's policy CD 701, a process which had been suggested to him in the second level grievance. Thus, the AC determined that the information used in the Applicant's security reclassification had been correctly identified and used, and therefore denied the second portion of the grievance.

[10] Subsequent to the AC's decision, the Applicant received additional information about the informant information in a memorandum dated April 5, 2013, which had been prepared for purposes of his Parole Board of Canada hearing in July 2013. This memorandum mentioned two unnamed inmates who would not confirm that the Applicant had made the remarks about the female correctional officer; the officer wrote that he believed the Applicant had chosen to make his remarks specifically to inmates who would not "rat" on him. After the Parole Board determined in July 2013 that day parole should not be granted to the Applicant, he issued a statement of claim in the Ontario Superior Court of Justice in November 2013 against Her Majesty the Queen, CSC, an unnamed informant (John Doe), the Warden of Pittsburgh Institution, and two employees at the Institution. This claim sought, amongst other things, damages for defamation and for misfeasance in public office arising from the Applicant's involuntary transfer in 2007. In a decision dated June 5, 2014, the Applicant's claim was dismissed, in part because the Ontario Court found several of the claims were ones over which the Federal Court has exclusive jurisdiction.

III. Issues

[11] The Applicant raises numerous issues with respect to alleged violations by CSC of his rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], and additionally as to whether CSC:

1. violated section 4 of the *CCRA* which requires CSC to use the least restrictive measures, that offenders retain rights and privileges except as are necessarily

removed due to sentences, and that correctional decisions be made in a fair and forthright manner with access to an effective grievance procedure;

2. failed to properly exercise its authority with regard to the third level grievance;
3. denied procedural fairness in refusing to comply with sections 40 to 44 of the *CCRA*;
4. violated the Applicant's right to protected information under CSC policy CD 701; and
5. failed to properly address the third level grievance by not following the requirements of section 90 of the *CCRA*.

[12] For its part, the Respondent submits that the issues are (1) whether it is improper for the Applicant to raise the involuntary 2007 transfer decision in this judicial review, and (2) whether the third level grievance decision is reasonable.

[13] In my view, the issues which require the Court's attention are: (1) the scope of this judicial review and whether it is confined to considering only the third level grievance decision; (2) whether the AC's decision was reasonable, and (3) whether there was any violation of procedural fairness with respect to the third level grievance decision.

IV. Analysis

A. *What is being judicially reviewed?*

[14] It is the AC's decision which the Applicant asks the Court to review in his notice of application, and he appropriately requests an order of certiorari to quash that decision.

[15] The Applicant has also requested, however: (1) an order to return him to a minimum security classification and thereafter transfer him to Beaver Creek Minimum Security Institution; and (2) an order that the CSC "expunge the offending informant information this matter centres on."

[16] These two requests are neither appropriate nor possible to grant in the context of this judicial review proceeding because they indirectly challenge the Applicant's administrative segregation and involuntary transfer from Pittsburgh Institution in 2007. The procedural fairness of the Applicant's involuntary transfer has been dealt with directly by the Ontario Superior Court in June 2009. That Court also refused to quash his involuntary transfer.

[17] In addition, these requests cannot now be addressed by this Court, much less remedied, because the Applicant's second level grievance concerning these matters appears to be still outstanding. At the hearing of this matter, the Applicant took issue with the Respondent's submission that his grievance about his administrative segregation and involuntary transfer has been abandoned. According to the Applicant, this grievance was deferred because of the habeas

corpus application. If it has been deferred, then subsection 81 of the *Corrections and Conditional Release Regulations* (SOR/92-620) [*Regulations*] provides as follows:

81. (1) Where an offender decides to pursue a legal remedy for the offender's complaint or grievance in addition to the complaint and grievance procedure referred to in these Regulations, the review of the complaint or grievance pursuant to these Regulations shall be deferred until a decision on the alternate remedy is rendered or the offender decides to abandon the alternate remedy.	**81.** (1) Lorsque le délinquant décide de prendre un recours judiciaire concernant sa plainte ou son grief, en plus de présenter une plainte ou un grief selon la procédure prévue dans le présent règlement, l'examen de la plainte ou du grief conformément au présent règlement est suspendu jusqu'à ce qu'une décision ait été rendue dans le recours judiciaire ou que le détenu s'en désiste.
(2) Where the review of a complaint or grievance is deferred pursuant to subsection (1), the person who is reviewing the complaint or grievance shall give the offender written notice of the decision to defer the review.	(2) Lorsque l'examen de la plainte ou au grief est suspendu conformément au paragraphe (1), la personne chargée de cet examen doit en informer le délinquant par écrit.

[18] The record before the Court does not contain information or evidence as to whether the Applicant's second level grievance has been either abandoned or deferred. Nevertheless, it does appear that the Applicant has not exhausted the internal review mechanism open to him to further grieve his administrative segregation and involuntary transfer from Pittsburgh Institution in 2007. Consequently, the Court should not consider any issues pertaining to these events (see: *Robertson v Canada (Attorney General),* 2015 FC 303 at paras 32-33, [2015] FCJ No 371; *Spidel v Canada (Attorney General),* 2010 FC 1028, [2010] FCJ No 1292).

[19] As to the Applicant's request to expunge the informant information, the Court should neither address nor grant any remedy in this regard because the Applicant has apparently yet to avail himself of the procedure available to him, pursuant to subsection 24(2) of the *CCRA*, to correct the informant information. This procedure was pointed out to the Applicant in the second level grievance decision and again in the AC's decision.

[20] In short, the issues arising on this application for judicial review are those confined to the third level grievance decision. No issues associated with the Applicant's administrative segregation and involuntary transfer in 2007 should be considered. The Ontario Superior Court dealt with such issues in 2009 and it appears that the Applicant's grievance concerning such issues remains outstanding. Accordingly, it is not necessary to consider the three *Charter* issues raised by the Applicant since they relate to his segregation and involuntary transfer in 2007.

B. *Was the Assistant Commissioner's decision reasonable?*

[21] The applicable standards of review in respect of the AC's decision have been succinctly stated in *Fischer v Canada (Attorney General)*, 2013 FC 861, 438 FTR 70, where Justice Martineau stated:

> [22] Issues of procedural fairness in the context of judicial review of decisions made in the course of the CSC offender grievance process, as well as issues dealing with the interpretation of legislation, are generally dealt with under the correctness standard of review: *Kim v Canada (AG)*, 2012 FC 870 at para 32 [*Kim*]; [other citations omitted]…However, findings of fact and mixed fact and law made in the course of the CSC offender grievance process and under the CCRA are reviewable under the standard of review of reasonableness: [citations omitted]… In addition, CSC is owed a high degree of deference by the Court due

> to its expertise in inmate and institution management: *Kim* at para 59.

[22] Furthermore, it is not the task of the Court to reweigh the evidence before the AC (see: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 61, [2009] 1 SCR 339). Although the Court can intervene "if the decision-maker has overlooked material evidence or taken evidence into account that is inaccurate or not material" (*James v Canada (Attorney General*) 2015 FC 965 at para 86, 257 ACWS (3d) 113), it should not interfere if the AC's decision is intelligible, transparent, justifiable, and defensible in respect of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708.

[23] The AC's decision determines two substantive matters: (1) it denies the Applicant's grievance about his security classification; and (2) it denies his grievance concerning the validity of the informant information used, in part, to justify the security classification decision. As a whole, I find the AC's decision is intelligible, transparent, justifiable, and defensible in respect of the facts and the law.

[24] The AC's denial of the grievance concerning the security reclassification is within the range of acceptable outcomes. The AC reviewed the pertinent policy and regulation and clearly stated that, in relation to the Applicant's public safety rating, the 2007 comments attributed to the

Applicant were not the only information relied upon for the security classification, nor was it the most current.

[25] As to the validity of the information upon which the security classification was based, the Applicant argues that section 24(1) of the *CCRA* was breached by CSC's use of erroneous information, that the informant information is exaggerated and not confirmed, and that the reliability of the information is improperly based on the personal opinion of the security officer who investigated the alleged comments made in 2007. However, the Applicant's arguments in this regard must be rejected in view of this Court's decision in *Tehrankari v Canada (Attorney General)*, 2012 FC 332, [2012] FCJ No 441 where the Court held (at para 35) that, although subsection 24(1) of the *CCRA* requires CSC 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," that does not mean CSC must reinvestigate information obtained from reliable sources. In this case, the AC was entitled to rely on the classification of this information as "Believed Reliable" and "Completely Reliable" without reinvestigating these reliability ratings. The AC's decision in respect of the validity of the information upon which the security classification was based is reasonable.

[26] The AC noted that the file correction procedure is open to the Applicant. This is a reasonable suggestion by the AC in view of the Court's decisions in *Eakin v Canada (Attorney General)*, 2014 FC 959 at paras 60-65, 465 FTR 132, and in *Wood v Canada (Attorney General)*, 2015 FC 2 at para 21, [2015] FCJ No 518. Furthermore, it should be noted that in *Kim v Canada (Attorney General)*, 2012 FC 870 at paras 46 and 58, 415 FTR 135, the Court found it was not

unfair to require an offender to start a separate procedure to correct the information in his file. Although these cases can be distinguished because their facts differ from those in the Applicant's case, they nonetheless clearly suggest it was reasonable for the AC in this case to advise and require the Applicant to address what he regards as incorrect information through a file correction request pursuant to CSC's policy CD 701.

C. *Was there any breach of procedural fairness in the Assistant Commissioner's Decision?*

[27] The Applicant raises issues as to whether CSC failed to properly exercise its authority or improperly dealt with his grievance contrary to section 90 of the *CCRA*. However, his arguments in this regard focus on the 2007 events and the use of the informant information. They do not challenge the manner by which the AC rendered his decision. The Commissioner's Directives (CD-081, CD-081-1) contain the procedures to be followed with respect to grievances, and the Applicant has not identified any errors in compliance with these directives. Nor has the Applicant identified any problem with the relevant *Regulations* which deal with grievance procedures.

[28] The Applicant's argument that the AC failed to act fairly in accordance with section 90 of the *CCRA*, by using personal opinions rather than reliable information as the basis for the third level grievance decision, is misguided. There are no such personal opinions in the AC's decision. To the extent that the Applicant may be referring to the personal opinions of the security officer who initially investigated the 2007 incident, those matters are beyond the scope of the AC's decision and this judicial review of such decision.

[29] As to the other issues and arguments advanced by the Applicant, these too centre around and take issue with the Applicant's segregation and involuntary transfer in 2007; they do not question the way in which the AC rendered his decision. Thus, the Court's intervention is not required to rectify any procedural unfairness suffered by the Applicant in the rendering of the AC's decision.

V. Conclusion

[30] For the reasons stated above, the Applicant's application for judicial review is dismissed. There is no award of costs.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and there is no award of costs.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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