Federal Court  Cour fédérale

Date: 20171024

Docket: T-2165-16

Citation: 2017 FC 912

Ottawa, Ontario, October 24, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

MOHAMED AKHLAGHI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [the *Act*] of a decision [Decision] of the Independent Chairperson of the Disciplinary Court of the Collins Bay Institution [Collins Bay], made on November 17, 2016. In the Decision, the Independent Chairperson convicted the Applicant of the disciplinary offence of disobeying a justifiable order of a staff member, contrary to paragraph 40(a) of the *Corrections*

and Conditional Release Act, SC 1992, c 20 [the *CCRA*] and sentenced the Applicant to pay a $20.00 fine, and was suspended for 60 days. The application was heard in Kingston.

[2] For the reasons that follow the application is granted; the Decision below is not reasonable.

II. Facts

[3] On September 2, 2016, the Applicant and all inmates of the Applicant's range, the "J-Range" of the Maximum Security Unit at Collins Bay, refused a general order to return to their cells and "lock up" for evening "count" at 10:30 at night.

[4] Officer Hurran, an officer on duty the night of the incident at issue, testified at the Institutional Disciplinary Court Hearing [the Hearing]. According to Officer Hurran, the nightly "count" was called at 10:30 p.m. over the PA system. Inmates were required at that time to enter their cells. Typically, once all inmates are in their cells, Officer Hurran would hit "lock all", there would be a pause, and then all the cell doors in the range would close using an air system. The lights on the lock system screen would turn green when the doors are locked, or, if a given door is not secured closed, the light for that door is red.

[5] On the evening of September 2, 2016, when the officers, including Officer Hurran arrived at the J-range, they went to lock the doors, but neither the Applicant nor any of the other prisoners in that range were in their cells. In addition, numerous cell doors were blocked open with various items such as shoes or footlockers.

[6] Officer Hurran testified that the inmates were in their range, but despite numerous instructions to lock up, neither the Applicant nor any other inmate on the range made any movement to enter their cells.

[7] In particular, four penitentiary officers approached and walked onto the range telling the inmates to move into their cells. However, because the cells were blocked open and the inmates were not in their cells, the four officers could not do a normal security patrol. Officer Hurran testified that the officers could not go down to the range because, in the past, blocking cells open has been a trap set by prisoners for penitentiary officers who entered the area.

[8] Therefore, the four penitentiary officers vacated the range to speak to the range representative (another inmate).

[9] The Applicant's cell was at the far end of the J-Range.

[10] At the Hearing, Officer Hurran testified to observing the Applicant the night of the incident. Officer Hurran stated:

> [the Applicant] was observed on the range with the other inmates, and he was directed to enter the cell for lockup, and as I can recall, his cell was – I was unable to secure all the occupied cells in the range, due to the doors being blocked open.

[11] After discussions with the range representative and penitentiary officials, including the Warden, over the course of some two hours, all the inmates who had refused to enter their cells

eventually did so, including the Applicant, and were locked up much later that evening, between 12:20 a.m. and 12:40 a.m. the next morning, on September 3, 2016.

[12] There was no evidence, nor any allegation that the Applicant was involved in organizing or leading these actions by the inmates on his range. He had been in the penitentiary system since 2007 and his statutory release was set for 2017.

[13] The Applicant and all other inmates on the Applicant's range were charged with the same offence in relation to this incident, namely, disobeying a justifiable order. It was alleged that each inmate refused to lock up after multiple instructions, and that each inmate used an object to block his own cell door from closing.

[14] The Applicant gave evidence. He admitted that he did not obey the lock up order. Nor was there any dispute that the order was "justifiable" – it was given every night at the end of the prison day. While the Applicant denied blocking his cell, the Independent Chairperson said he was not concerned with cell blocking. Thus, it is not disputed that the Applicant disobeyed a justifiable order by not entering his cell, thereby breaching subsection 40(a) of the *CCRA*.

[15] The Applicant states that the refusal to lock up occurred following an inmate-on-inmate 'stabbing' that had been discovered earlier in the day. However, Officer Hurran stated that an inmate had been 'injured' that night. The parties agree the injured inmate was in a different range when injured, and that his cell was not on the Applicant's range.

[16] It is also agreed that the perpetrator's cell was in the J-Range with the Applicant, and that the perpetrator was actually in the J-Range when the inmates refused the lock up order. The Applicant argues that it was the presence - and anticipated imminent apprehension by prison authorities - of the aggressor inmate that precipitated the inmates' refusal to lock up that evening.

[17] At the Hearing, the Applicant stated that during his orientation sessions at the federal penitentiary system in 2007, he was told by staff to, "never go against the grain" and, "if everyone on the range is putting up their blockers, you have to put up the blocks. If they are refusing to lock up, don't ever be the person that – to go against the grain […]". He testified that he was told that if he went against the grain, he would be held accountable by the range and considered a "rat". The Applicant's evidence in this respect was not contradicted.

[18] The Applicant also testified that in the circumstances, if he was the only person who entered his cell, "he would have problems. I couldn't stay on that range. I couldn't stay in Collins Bay Maximum Security. I would have been stabbed just like the other person", referring to the individual involved in the altercation that precipitated this incident.

[19] By way of background, it appears the Applicant had been in Collins Bay Medium, where there had been issues that resulted in him being moved to Collins Bay Maximum. He stated, "[s]o I was already on, you know, sticky grounds to begin with, so I wasn't going to be the only one to lock up to have more a […] problem" and he repeated, "I would have got stabbed like that other guy."

[20] In cross-examination, the Applicant acknowledged that he also knew that if he felt he was in danger, he was to "tell an officer". In this case, however, the Applicant did not tell an officer: there were no officers to tell. In this connection it is also worth recalling that his cell was at the far end of the range away from the prison officers.

[21] At the Hearing, the Applicant raised two defences.

(i) First, the defence of duress or compulsion by threats. Applicant's counsel argued that the Applicant felt, "that there was the implicit threat of future bodily harm or potentially death that he reasonably believed would be carried out." Counsel said the Applicant felt there was no safe avenue for escape, pointing to the fact that he was in a unit where another inmate had been assaulted, and he felt threatened with harm if he did not participate. The defence of duress is raised on judicial review.

(ii) The second defence was that of officially induced error of law based on the Applicant's evidence that he was advised, during his initial orientation not to put himself in a position of peril by "going against the grain"; language he recalls from nine years earlier when he entered federal custody. The Applicant argued that an officially induced error of law is a defence where the accused reasonably relied upon erroneous legal opinion. The Independent Chairperson made no finding on this defence which was not pursued on this judicial review.

[22] The Applicant was convicted of the offence charged, namely disobeying a justifiable order, contrary to paragraph 40(a) of *CCRA*. Central to his decision was the Independent Chairperson's ruling that duress was not a defence in law.

III. Issues

[23] The only issue is whether the Independent Chairperson's assessment of the Applicant's duress defence was reasonable.

IV. Decision

[24] In arriving at the Decision, the Independent Chairperson restated the evidence of Officer Hurran: the Applicant failed to lock up despite numerous orders to do so. The Independent Chairperson noted that there is no dispute that the Applicant failed to obey the lock up order.

[25] Because the reasons are short I will reproduce them in material respects:

> I think Mr. Akhlaghi agrees that he did not lock up. However, he is saying that it would go, basically to use his phrase, against the grain. In other words, he would be disobeying other inmates who may have more power or more control of the unit and other inmates if he locked up, and that may place him in some sort of jeopardy if he complied. So what he did was he went along with what the inmates indicated to him, and that was not to lock up, for whatever reason.
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> Submissions presented by the defence basically presented one of duress, that it would be dangerous for Mr. Akhlaghi to have locked up. There is a prison code. There is no doubt in my mind that prison code exists, and that you must kind of follow what you are being told by perhaps inmates who might be, for a better term, in charge of that unit, whether legally or otherwise; probably illegally. However, that is not a defence to the charge. What it does is it helps to explain his behaviour that he didn't do this entirely on his own free will; that he did so because the other inmates didn't lock up. […] The submissions that Mr. Gray [the penitentiary's representative at the Hearing, Court comment] made today where the best I have heard from him ever where he said there would be anarchy if this was allowed to be used as a defence, and I agree with him. There would be chaos, because an inmate would be able to say I was told to do this and if I didn't this what happened. It's

> almost like a mob mentality and the Act – the *Correctional and Conditional Release Act* is not to punish an individual, but it is to correct their behaviour, and when they all go along with this sort of mob mentality, where one or, at the time he may feel that he has to go along in order to get along with the people that he lives with every day, and that helps to explain his actions, and it is understandable, but it cannot be relied on as a defence. It would go more towards a sanction imposed, because the Court is not without understanding of what it's like to live in the confines of the penitentiary, where you have individuals who have a – some who have a criminal mindset and want to continue controlling other people and continuing doing things that they ought not to do; but as I indicated, the Act is there to correct one's behaviour, and that's what the purpose of this tribunal is for. So to acquit sends the wrong message to him that he was told and not to do this. It doesn't correct his behaviour, so I find that while it's understandable it's not a defence in law.
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> Accordingly, I will find Mr. Akhlaghi guilty of the charge and convict him, and I think the issue of penalty would be more appropriate for leniency, given the circumstances that this entire situation revolved upon.
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> [Emphasis added.]

[26] The Independent Chairperson did not address the Applicant's argument concerning officially induced error of law argument; this argument was not pursued on judicial review.

V. Standard of Review

[27] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." The Federal Court of Appeal has determined that the appropriate standard of review in cases such as the one presently before the bar is reasonableness: *Canada (Procureur général) c L'Espérance*, 2016 CAF 306. At para 7, Trudel

JA stated: “[À] notre avis, la Juge n’aurait pu intervenir si elle avait analysé la décision du tribunal indépendant selon la norme raisonnable, tel qu’elle devait le faire.”

[28] While the Applicant in his written submissions argued it was correctness, at the hearing he conceded the standard of review is reasonableness. I agree. The judicial review proceeded on the basis that the standard of review is reasonableness.

[29] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[30] In *Chshukina v Canada (Attorney General),* 2016 FC 662, [*Chshukina*] at paras 20-21, Roy J, determined that decisions such as this by independent chairpersons are to be accorded deference. Justice Roy made the following additional determinations which I also accept:

> [20] This type of review is at the heart of the specialized jurisdiction of independent chairpersons, whose role is to determine whether a disciplinary offence was committed. In these matters, the person conducting the hearing will not find the inmate guilty unless “satisfied beyond a reasonable doubt” (subsection 43(3) of the [*CCRA*]).
>
> [21] Consequently, this Court will have to accord deference to the impugned decision. Rather than replace the judgment of the independence chairperson, it seeks to determine whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[31] The Supreme Court of Canada further instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc.*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses'*].

VI. Analysis

[32] In this case, a major issue in assessing reasonableness is the Independent Chairperson's finding that the defence of duress is not a defence in law. *Dunsmuir* requires that a decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. While judicial review often focuses on the record, it is also the case, per *Dunsmuir*, that judicial review requires such decisions to be defensible in respect of "the law". In my respectful view, the finding that duress is "not a defence in law" is not defensible in respect of the law as *Dunsmuir* demands. My reasons follow.

[33] As noted, the Independent Chairperson ruled that "duress is not a defence in law." I note that this ruling was not simply a misstatement or oversight by the Independent Chairperson; it was his only answer to the only defence raised by the Applicant that the Independent Chairperson considered.

[34] Moreover, the proposition that duress is not a defence was stated not once but three times in the Independent Chairperson's reasons; I underlined them and repeat them now:

> Submissions presented by the defence basically presented one of duress, that it would be dangerous for Mr. Akhlaghi to have locked up. There is a prison code. There is no doubt in my mind that a prison code exists, and that you must kind of follow what you are being told by perhaps inmates who might be, for a better term, in charge of that unit, whether legally or otherwise; probably illegally. However, that is not a defence to the charge.
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> …
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> The submissions that Mr. Gray [the penitentiary's representative at the Hearing, *Court note*] made today where the best I have heard from him ever when he said there would be anarchy if this was allowed to be used as a defence, and I agree with him. There would be chaos, because an inmate would be able to say I was told to do this and if I didn't this would happen.
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> …
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> So to acquit him sends the wrong message to him that he was told and not to do this. It doesn't correct his behaviour, so I find that while it's understandable it's not a defence in law.

[35] Before going further, I wish to place this ruling in context. The Independent Chairperson found that there is a prison code, and that prisoners "must" obey the prison code in this case. Those findings are supported by the record. The Respondent did not dispute these findings, and in my view they are reasonable.

[36] The Independent Chairperson's finding that the Applicant did not return to his cell when ordered is also defensible on the record and reasonable: it was admitted.

[37] The Court should also defer to the finding that to allow the defence of duress in the prison context would create anarchy and chaos. I note there was no expert or other evidence to this effect. Rather, that was the submission of the institution's representative [Mr. Gray] at the hearing. That said, as noted above, deference is owed to the decision-maker, and this particular finding by the Independent Chairperson is a reasonable inference.

[38] It is also the case, as the Applicant submitted, and the Respondent did not dispute, that an inmate charged with the offence of failure to obey a justifiable order under subsection 40(a) of the *CCRA* is entitled to the same legal defences available in an ordinary criminal trial. This was the conclusion Beaudry J, in *Lemoy v Canada (Attorney General),* 2009 FC 448, [2009] FCJ No 589 at para 32, which relied on the finding of Létourneau JA, in *Ayotte v Canada,* 2003 FCA 429 [*Ayotte*]:

> [32] In *Ayotte*, above, the Federal Court of Appeal extended to persons charged with disciplinary offences under the *CCRA* the same procedural safeguards, in terms of their defence, that apply in ordinary trials. The Court acknowledged the particular nature of the prison system, where authorities must have a degree of flexibility to ensure that order is maintained. Nevertheless, those who are charged with a disciplinary offence are entitled to procedural fairness.

[39] See also the finding of Blais J, (as he was then) in *Zanth v Canada (Attorney General),* 2004 FC 1113 at para 26:

> [26] In *Ayotte* […] Létourneau J.A., on behalf of the Federal Court of Appeal, clearly gave persons charged with disciplinary offences under the Act the same procedural safeguards as those in ordinary trials, in terms of defences. Létourneau J.A. acknowledged the particularities of the prison system, where the authorities must have a degree of flexibility to ensure that order is maintained. At the same time, in the words of the Court of Appeal, those who are charged with a disciplinary offence are entitled to procedural equity:

> [11] Simply put, the prison disciplinary process calls for flexibility and efficiency, but flexibility and efficiency that must be sought and achieved through procedural fairness and compliance with the mandatory provisions of the law.

[40] Similarly, see in the following passages from the reasons of Létourneau JA, in *Ayotte*:

> [15] In fact, subsection 43(3) of the *Act* provides that the person conducting the hearing of a prison disciplinary complaint "shall not find the inmate guilty unless satisfied beyond a reasonable doubt, based on the evidence presented at the hearing, that the inmate committed the disciplinary offence in question":
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> | | |
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> | 43. (3) The person conducting the hearing shall not find the inmate guilty unless satisfied beyond a reasonable doubt, based on the evidence presented at the hearing, that the inmate committed the disciplinary offence in question. | 43. (3) La personne chargée de l'audition ne peut prononcer la culpabilité que si elle est convaincue hors de tout doute raisonnable, sur la foi de la preuve présente, que le détenu a bien commis l'infraction reprochée. |
>
> [16] The decision-maker's obligation to be satisfied beyond a reasonable doubt of the guilt of the accused as well as the onus imposed on the complainant or on the prosecutor to provide such evidence are inextricably linked to the presumption of innocence: *R v Lifchus*, [1997] 3 S.C.R. 320, at paragraph 13. "It is one of the principal safeguards which seeks to ensure that no innocent person is convicted.": *ibidem*. The failure to understand and to properly apply this standard of proof irreparably prejudices the fairness of the trial or the hearing: *ibidem*.
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> [19] The chairperson of the court could not disregard the only true defence raised by the appellant without compromising procedural fairness and failing in his duty to hold a full hearing. To repeat the remarks of Denault J. in *Hendrickson v Kent Institution Disciplinary Court (Independent Chairperson)* (1990), 32 F.T.R. 296 (F.C.T.D.), or of Addy J. in *Re Blanchard and Disciplinary Board of Millhaven Institution and Hardtman*, [1983] 1 F.C. 309 (F.C.T.D.), he should have examined "both sides of the question". He could dismiss the defence advanced by the appellant, but he could not disregard it in light of the evidence submitted.

> [20] Similarly, he could weigh and assess the evidence submitted by the appellant in support of his defence but he could not ignore it: *Canada (Attorney General) v Primard*, [2003] F.C.J. No. 1400; *Maki v The Canada Employment Insurance Commission et al.*, [1998] F.C.J. No. 1129; *Boucher v Canada (Attorney General)*, [1996] F.C.J. No. 1378; *Lépine v Canada (Employment and Immigration Commission*, [1990] F.C.J. No. 131; *Rancourt v Canada (Employment and Immigration Commission)*, [1996] F.C.J. No. 1429.
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> [21] The motions judge should have expressed disapproval of these two failures by the court to consider important and relevant elements of the proceedings, the effect of which was to deprive the appellant of a full and fair hearing, thereby resulting in a serious injustice" within the meaning of *Martineau v Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, and justifying the relief sought.
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> [Emphasis added.]

[41] And as Roy J, held in *Chshukina* at para 24:

> [24] It cannot be disputed that the common law defences, justifications and excuses are available. The General part of the *Criminal Code*, R.S.C., 1985, c. C-46, makes specific provisions for this, and these apply in respect of proceedings for an offence under any Act of Parliament (subsection 8(3) of the *Criminal Code*). The alleged offence is set out in paragraph 40(r) of the *Act*. Common law defences can be invoked.

[42] In addition, the Applicant submitted, and it was not disputed, that duress is a well-established defence in Canadian law, recognized both in the *Criminal Code,* RSC, 1985, c C-46 [the *Criminal Code*] and at common law. Duress is a complete defence. At section 17, the *Criminal Code* provides:

Compulsion by threats	**Contrainte par menaces**
17 A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person	**17** Une personne qui commet une infraction, sous l'effet de la contrainte exercée par des menaces de mort immédiate ou

who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).	de lésions corporelles de la part d'une personne présente lorsque l'infraction est commise, est excusée d'avoir commis l'infraction si elle croit que les menaces seront mises à exécution et si elle ne participe à aucun complot ou aucune association par laquelle elle est soumise à la contrainte. Toutefois, le présent article ne s'applique pas si l'infraction commise est la haute trahison ou la trahison, le meurtre, la piraterie, la tentative de meurtre, l'agression sexuelle, l'agression sexuelle armée, menaces à une tierce personne ou infliction de lésions corporelles, l'agression sexuelle grave, le rapt, la prise d'otage, le vol qualifié, l'agression armée ou infliction de lésions corporelles, les voies de fait graves, l'infliction illégale de lésions corporelles, le crime d'incendie ou l'une des infractions visées aux articles 280 à 283 (enlèvement et séquestration d'une jeune personne).
[Emphasis added.]	[Soulignements ajoutés.]

[43] The Supreme Court of Canada has also recently discussed the defence of duress. In *R v Ryan*, 2013 SCC 3 [*Ryan*] at paras 2 and 23:

> [2] As we see it, the defence of duress is available when a person commits an offence while under compulsion of a threat made *for the purpose of compelling* him or her to commit it.
>
> [23] The rationale underlying duress is that of moral involuntariness, which was entrenched as a principle of fundamental justice in *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687, at para. 47: "It is a principle of fundamental justice that only voluntary conduct — behaviour that is the product of a free will

> and controlled body, unhindered by external constraints — should attract the penalty and stigma of criminal liability." It is upon this foundation that we build the defences of duress and necessity. As Lamer C.J. put it in *Hibbert*, the underlying concept of both defences is "normative involuntariness", in other words, that there is "no legal way out" (para. 55). While the test to be met is not dictated by this generally stated rationale underlying the defence, its requirements are heavily influenced by it. As was discussed in *Perka*, defences built on the principle of moral involuntariness are classified as excuses. The law excuses those who, although morally blameworthy, acted in a morally involuntary manner. The act remains wrong, but the author of the offence will not be punished because it was committed in circumstances in which there was realistically no choice (*Ruzic*, at para. 34; *Perka*, at p. 248). The principle of moral involuntariness is "[a] concessio[n] to human frailty" in the face of "agonising choice" (*Ruzic*, at para. 40; Stuart, at p. 490). The commission of the crime is "remorselessly compelled by normal human instincts" (*Perka*, at p. 249). As LeBel J. put it in *Ruzic*: "Morally involuntary conduct is not always inherently blameless" (para. 41).

[44] Also see *R v Ruzic*, 2001 SCC 24, at paras 71 and 100 where the Supreme Court stated:

> [71] The House of Lords recently confirmed that the test for duress is an objective one: did the accused reasonably believe that the threat would be carried out if he did not commit the crime, and would a person of "reasonable firmness sharing the [accused's] characteristics" have succumbed to the threat? (*Howe, supra, per* Lord Mackay, at p. 800, where he endorses the English Court of Appeal's decision in *R. v. Graham*, [1982] 1 All E.R. 801, at p. 806). This test is arguably more stringent than s. 17 of the *Criminal Code* , which is entirely subjective and does not require that the accused's belief be reasonable. It is also arguably more stringent than the common law formulation of the defence in Canada, which results in an objective-subjective standard, as in the case of the defence of necessity. As in Canada, the accused bears an evidential burden of laying a factual foundation for the defence of duress (if no such foundation may be inferred from the Crown's case). Once the factual foundation is established, the Crown has the onus of disproving duress (*Smith & Hogan: Criminal Law*, *supra*, at p. 242).
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> [100] There was no misdirection either on the burden of proof. The accused must certainly raise the defence and introduce some evidence about it. Once this is done, the burden of proof shifts to

> the Crown under the general rule of criminal evidence. It must be shown, beyond a reasonable doubt, that the accused did not act under duress. Similarly, in the case of the defence of necessity, the Court refused to shift the burden of proof to the accused (see *Perka*, *supra*, at pp. 257-59), although the defence must have an air of reality, in order to be sent to the jury, as the Court held in *Latimer*, *supra*.

[45] In this connection, and since the Supreme Court of Canada's 2013 ruling in *Ryan* at para 55, it is settled law that duress includes the following elements:

> [55] we can conclude that the common law of duress comprises the following elements:
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> • an explicit or implicit threat of death or bodily harm proffered against the accused or a third person. The threat may be of future harm. Although, traditionally, the degree of bodily harm was characterized as "grievous", the issue of severity is better dealt with at the proportionality stage, which acts as the threshold for the appropriate degree of bodily harm;
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> • the accused reasonably believed that the threat would be carried out;
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> • the non-existence of a safe avenue of escape, evaluated on a modified objective standard;
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> • a close temporal connection between the threat and the harm threatened;
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> • proportionality between the harm threatened and the harm inflicted by the accused. This is also evaluated on a modified objective standard;
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> • the accused is not a party to a conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association.

[46] Based on the foregoing, I have come to the conclusion that the Independent Chairperson acted unreasonably when he held that duress was not a defence in law. I also note the linkage

made by the Independent Chairperson between his finding that to allow the defence of duress would result in chaos and anarchy, and his ruling that duress was not a defence in law. In my view that conclusion was drawn as a matter of policy. While I afford the Independent Chairperson flexibility, to my mind that flexibility does not extend to his abrogating a defence afforded by both statute and common law as occurred in this case. That in my view is a matter for the legislature.

[47] The Respondent further supported the conclusions of the Independent Chairperson respecting the legal availability of the defence of duress by arguing that the Independent Chairperson was essentially assessing whether the facts established an air of reality to the defence of duress. She stated in her memorandum: "[i]n determining that the Applicant had not established a defence in law, the Chairperson essentially determined that there was no air of reality to the Applicant's defence."

[48] It is certainly the case that an accused must do more than simply allege that the defence of duress entitles him or her to an acquittal: *R v Fontaine*, 2004 SCC 27 [*Fontaine*]. It is not disputed that before an accused may rely on duress he or she must first establish that there is an air of reality to that allegation. This requires that there be evidence on the record upon which a properly instructed jury, acting judicially, could entertain a reasonable doubt as to the defence that has been raised: see *Fontaine* at paras 55-56:

> [55] With respect to all other "affirmative" defences, including alibi, duress, provocation and others mentioned in *R v Cinous*, [2002] 2 S.C.R. 3, at para. 57, the persuasive and the evidential burdens are divided.
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> [56] As regards these "ordinary", as opposed to "reverse onus" defences, the accused has no persuasive burden at all. Once the

> issue has been "put in play" (*R. v. Schwartz*, [1988] 2 S.C.R. 443), the defence will succeed unless it is disproved by the Crown elementary beyond a reasonable doubt. Like all other disputed issues, however, defences of this sort will only be left to the jury where a sufficient evidential basis is found to exist. That foundation cannot be said to exist where its only constituent elements are of a tenuous, trifling, insignificant or manifestly unsubstantive nature: there must be evidence in the record upon which a properly instructed jury, acting judicially, could entertain a reasonable doubt as to the defence that has been raised.

[49] However, I cannot accept the Respondent's characterization of the Independent Chairperson's reasons to the effect that he "essentially" determined that there was no air of reality to the Applicant's defence. That is simply not the case. Nowhere in the reasons of the Independent Chairperson is there any mention of air of reality. There is no mention of air of reality as being the test considered. There is no mention of air of reality in the analysis. There is no mention of air of reality in the conclusion. With respect, that interpretation is entirely the Respondent's construct and cannot reasonably be borne by the reasons themselves.

[50] The Respondent argued that the Court should support the decision by reference to the record as per the Supreme Court of Canada's decision in *Newfoundland Nurses'* at paras 14 to 16. To this end, it was submitted that the Court should look to the record for the purpose of assessing the reasonableness of the outcome, and should seek to supplement the reasons before finding the decision unreasonable. Further, it was argued that if the reasons allow this Court to understand why the Independent Chairperson made his decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria will be met.

[51] I am unable to do so for a number of reasons. As the Supreme Court of Canada stated in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 54:

> [54] I should not be taken here as suggesting that courts should not give due regard to the reasons provided by a tribunal when such reasons are available. The direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision" is not a "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" (*Petro-Canada v. Workers' Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56). Moreover, this direction should not "be taken as diluting the importance of giving proper reasons for an administrative decision" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 63, *per* Binnie J.). On the contrary, deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided. Nonetheless, this is subject to a duty to provide reasons in the first place. When there is no duty to give reasons (e.g., *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504) or when only limited reasons are required, it is entirely appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review. The point is that parties cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons.
>
> [Emphasis added.]

[52] To the same effect see the Federal Court of Appeal's decision in *JMSL v Canada (Citizenship and Immigration)*, [2014] FCJ No. 439, [2014] ACF No 439 [*JMSL*] at paras 29-30, where Stratas JA found:

> [29] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 suggests that this does not allow a reviewing court free rein to dive into the record before the administrative decision-maker to save the decision.

> [30] In *Alberta Teachers' Association,* at paragraph 54, Justice Rothstein, writing for the majority of the Supreme Court, found that giving respectful attention to the reasons which could be offered in support of a decision is not a "carte blanch" to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rational for the result."

[53] *JMSL* also establishes that a reviewing court may only take on wholesale revision or rewriting of a decision - which I am asked to do in this case - where to send the matter back would serve no useful purpose, but not where it might well reach a different result, see para 38:

> [38]This is a situation where the Officer, informed by these reasons of her error and of the proper standard to be applied, might well reach a different result. There is evidence in the record that could support a decision either way. I cannot say that the record leans so heavily against relief that sending the matter back to the Officer would serve no useful purpose, as per *MiningWatch Canada v. Canada (Fisheries and Oceans),* 2010 SCC 2 [2010] 1 SCR 6. Nor can I say that the record is unequivocally in favour of relief allowing us to award *mandamus* and grant the subsection 25(1) application.

[54] I am asked to decide the case by reference to the record. This I cannot do. The Independent Chairperson should have considered the elements of duress but did not. He left no dots on the page for me to connect as required by the Federal Court of Appeal's decision of *Lloyd v Canada (Revenue Agency),* [2016] FCJ No 374 per Rennie JA, at para 24:

> In light of the adjudicator's findings, even on a generous application of the principles in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, [2011] 3 SCR 708, the basis upon which the 40-day suspension was justified cannot be discerned without engaging in speculation and rationalization. As I noted in *Komolafe v. Canada (Citizenship and Immigration),* 2013 FC 431, at para, 11:
>
> > *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given,

> nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

[55] To do as suggested asks this Court to determine first of all, whether there is an air of reality to the alleged defence, and secondly and if so, to decide whether the defence of duress was or was not established on the evidence. Based on the foregoing jurisprudence, and while it is possible for this Court to perform the duties of the Independent Chairperson in the appropriate case, in my view this is not such a case. The determination of whether there is an air of reality to the alleged defence, with its many elements set out at paragraph 46 above, and if so, whether the defence is made out on the facts of this case are quintessentially matters of fact in the first place. They are, therefore, matters for an independent chairperson to assess and determine.

[56] In addition, considerations of the elements of duress are questions for those charged by Parliament to make within the context of the penitentiary system. The deference owed to such independent chairpersons militates strongly in favour of returning the matter to the independent tribunal whose duty it was to make the decision in the first place.

[57] At the end of this analysis I must review the decision as an organic whole, keeping in mind that judicial review is not a treasure hunt for errors. While I have noted aspects of the Decision that are defensible in respect of the facts, and found that the decision is entitled to deference, I am not persuaded the rejection of the defence of duress is defensible "in respect of the law" which, in my respectful view, establishes the opposite, as noted above.

[58] On balance, I conclude that the Decision is not reasonable in that it does not fall within the range of acceptable outcomes that are defensible in respect of the facts and law.

[59] Therefore, judicial review must be granted and the decision set aside for redetermination.

VII. Costs

[60] There is no reason why costs should not follow the event. Thus, the Applicant is entitled to his costs. The parties agreed that regardless of who was successful, costs would be set at $1,500.00 all inclusive of fees, taxes and disbursements which amount is reasonable and is therefore ordered.

JUDGMENT

THIS COURT'S JUDGMENT is that judicial review is granted, the decision of the Independent Chairperson is set aside, the charge against the Applicant is remanded for redetermination before a differently decision maker, the whole with costs in the amount of $1,500.00 payable by the Respondent to the Applicant.

"Henry S. Brown"
Judge

Relevant Legislation

Corrections and Conditional Release Act, SC 1999, c 20, section 38-44

Purpose of disciplinary System	***Objet***
38 The purpose of the disciplinary system established by sections 40 to 44 and the regulations is to encourage inmates to conduct themselves in a manner that promotes the good order of the penitentiary, through a process that contributes to the inmates' rehabilitation and successful reintegration into the community.	Le régime disciplinaire établi par les articles 40 à 44 et les règlements vise à encourager chez les détenus un comportement favorisant l'ordre et la bonne marche du pénitencier, tout en contribuant à leur réadaptation et à leur réinsertion sociale.
System Exclusive	***Dispositions habilitantes***
39 Inmates shall not be disciplined otherwise than in accordance with sections 40 to 44 and the regulations.	39 Seuls les articles 40 à 44 et les règlements sont à prendre en compte en matière de discipline.
Disciplinary offences	***Infractions disciplinaires***
40 An inmate commits a disciplinary offence who	40 Est coupable d'une infraction disciplinaire le détenu qui :
(a) disobeys a justifiable order of a staff member;	a) désobéit à l'ordre légitime d'un agent;
(b) is, without authorization, in an area prohibited to inmates;	b) se trouve, sans autorisation, dans un secteur dont l'accès lui est interdit;
c) wilfully or recklessly damages or destroys property that is not the inmate's;	c) détruit ou endommage de manière délibérée ou irresponsable le bien d'autrui;
(d) commits theft;	d) commet un vol;
(e) is in possession of stolen property;	e) a en sa possession un bien volé;
(f) is disrespectful toward a person in a manner that is likely to provoke them to be violent or toward a staff member in a manner that could undermine their authority or the authority of staff members in general;	f) agit de manière irrespectueuse envers une personne au point de provoquer vraisemblablement chez elle une réaction violente ou envers un agent au point de compromettre son autorité ou celle des agents en général;
(g) is abusive toward a person	g) agit de manière outrageante

or intimidates them by threats that violence or other injury will be done to, or punishment inflicted on, them;

envers une personne ou intimide celle-ci par des menaces de violence ou d'un autre mal, ou de quelque peine, à sa personne;

(h) fights with, assaults or threatens to assault another person;

h) se livre ou menace de se livrer à des voies de fait ou prend part à un combat;

(i) is in possession of, or deals in, contraband;

i) est en possession d'un objet interdit ou en fait le trafic;

(j) without prior authorization, is in possession of, or deals in, an item that is not authorized by a Commissioner's Directive or by a written order of the institutional head;

j) sans autorisation préalable, a en sa possession un objet en violation des directives du commissaire ou de l'ordre écrit du directeur du pénitencier ou en fait le trafic;

(k) takes an intoxicant into the inmate's body;

k) introduit dans son corps une substance intoxicante;

(l) fails or refuses to provide a urine sample when demanded pursuant to section 54 or 55;

l) refuse ou omet de fournir l'échantillon d'urine qui peut être exigé au titre des articles 54 ou 55;

(m) creates or participates in

(i) a disturbance, or
(ii) any other activity
that is likely to jeopardize the security of the penitentiary;

m) crée des troubles ou toute autre situation susceptible de mettre en danger la sécurité du pénitencier, ou y participe;

(n) does anything for the purpose of escaping or assisting another inmate to escape;

n) commet un acte dans l'intention de s'évader ou de faciliter une évasion;

(o) offers, gives or accepts a bribe or reward;

o) offre, donne ou accepte un pot-de-vin ou une récompense;

(p) without reasonable excuse, refuses to work or leaves work;

p) sans excuse valable, refuse de travailler ou s'absente de son travail;

(q) engages in gambling;

q) se livre au jeu ou aux paris;

(r) wilfully disobeys a written rule governing the conduct of inmates;

r) contrevient délibérément à une règle écrite régissant la conduite des détenus;

(r.1) knowingly makes a false claim for compensation from the Crown;

r.1) présente une réclamation pour dédommagement sachant qu'elle est fausse;

(r.2) throws a bodily substance towards another person; or

(s) attempts to do, or assists another person to do, anything referred to in paragraphs (a) to (r).

Informal resolution

41 (1) Where a staff member believes on reasonable grounds that an inmate has committed or is committing a disciplinary offence, the staff member shall take all reasonable steps to resolve the matter informally, where possible.

Charge may be issued

(2) Where an informal resolution is not achieved, the institutional head may, depending on the seriousness of the alleged conduct and any aggravating or mitigating factors, issue a charge of a minor disciplinary offence or a serious disciplinary offence.

Notice of Charge

42 An inmate charged with a disciplinary offence shall be given a written notice of the charge in accordance with the regulations, and the notice must state whether the charge is minor or serious.

Hearing

43 (1) A charge of a disciplinary offence shall be dealt with in accordance with the prescribed procedure, including a hearing conducted in the prescribed manner.

Presence of inmate

(2) A hearing mentioned in subsection (1) shall be conducted with the inmate

r.2) lance une substance corporelle vers une personne;

s) tente de commettre l'une des infractions mentionnées aux alinéas a) à r) ou participe à sa perpétration.

Tentative de règlement informel

41 (1) L'agent qui croit, pour des motifs raisonnables, qu'un détenu commet ou a commis une infraction disciplinaire doit, si les circonstances le permettent, prendre toutes les mesures utiles afin de régler la question de façon informelle.

Accusation

(2) À défaut de règlement informel, le directeur peut porter une accusation d'infraction disciplinaire mineure ou grave, selon la gravité de la faute et l'existence de circonstances atténuantes ou aggravantes.

Avis d'accusation

42 Le détenu accusé se voit remettre, conformément aux règlements, un avis d'accusation qui mentionne s'il s'agit d'une infraction disciplinaire mineure ou grave.

Audition

43 (1) L'accusation d'infraction disciplinaire est instruite conformément à la procédure réglementaire et doit notamment faire l'objet d'une audition conforme aux règlements.

Présence du détenu

(2) L'audition a lieu en présence du détenu sauf dans les cas suivants :

present unless
(a) the inmate is voluntarily absent;
(b) the person conducting the hearing believes on reasonable grounds that the inmate's presence would jeopardize the safety of any person present at the hearing; or
(c) the inmate seriously disrupts the hearing.

a) celui-ci décide de ne pas y assister;
b) la personne chargée de l'audition croit, pour des motifs raisonnables, que sa présence mettrait en danger la sécurité de quiconque y assiste;

c) celui-ci en perturbe gravement le déroulement.

Decision
(3) The person conducting the hearing shall not find the inmate guilty unless satisfied beyond a reasonable doubt, based on the evidence presented at the hearing, that the inmate committed the disciplinary offence in question.

Déclaration de culpabilité
(3) La personne chargée de l'audition ne peut prononcer la culpabilité que si elle est convaincue hors de tout doute raisonnable, sur la foi de la preuve présentée, que le détenu a bien commis l'infraction reprochée.

Disciplinary sanctions
44 (1) An inmate who is found guilty of a disciplinary offence is liable, in accordance with the regulations made under paragraphs 96(i) and (j), to one or more of the following:

(a) a warning or reprimand;

(b) a loss of privileges;
(c) an order to make restitution, including in respect of any property that is damaged or destroyed as a result of the offence;
(d) a fine;
(e) performance of extra duties; and
(f) in the case of a serious disciplinary offence, segregation from other inmates — with or without restrictions on visits with family, friends and other persons from outside

Sanctions disciplinaires
44 (1) Le détenu déclaré coupable d'une infraction disciplinaire est, conformément aux règlements pris en vertu des alinéas 96i) et j), passible d'une ou de plusieurs des peines suivantes :
a) avertissement ou réprimande;
b) perte de privilèges;
c) ordre de restitution, notamment à l'égard de tout bien endommagé ou détruit du fait de la perpétration de l'infraction;
d) amende;
e) travaux supplémentaires;

f) isolement — avec ou sans restriction à l'égard des visites de la famille, des amis ou d'autres personnes de l'extérieur du pénitencier — pour un maximum de trente

the penitentiary — for a maximum of 30 days.

Collection of fine or restitution

(2) A fine or restitution imposed pursuant to subsection (1) may be collected in the prescribed manner.

jours, dans le cas d’une infraction disciplinaire grave.

Amende ou restitution

(2) Le recouvrement de l’amende et la restitution s’effectuent selon les modalités réglementaires.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2165-16
STYLE OF CAUSE:	MOHAMED AKHLAGHI v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	KINGSTON, ONTARIO
DATE OF HEARING:	SEPTEMBER 19, 2017
JUDGMENT AND REASONS:	BROWN J.
DATED:	OCTOBER 24, 2017

APPEARANCES:

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Carrie-Anne Bourassa	FOR THE RESPONDENT

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