Federal Court  Cour fédérale

Date: 20190531

Docket: T-1146-16

Citation: 2019 FC 774

Ottawa, Ontario, May 31, 2019

PRESENT: Mr. Justice Gleeson

BETWEEN:

MATTHEW G. YEAGER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Dr. Matthew Yeager, seeks judicial review of the June 8, 2016 decision of Mr. Miguel Costa, a Senior Project Officer with Correctional Service Canada [CSC], denying him access to the June 2016 John Howard Society Pre-Release Fair [2016 Fair or Fair] held in seven penitentiaries in Ontario. His attendance at the Fair was denied on the basis that the services he proposed to provide were inconsistent with the Fair's purpose.

[2] This is a reconsideration of my judgment in *Yeager v Canada (Attorney General)*, 2017 FC 577 [*Yeager FC*], in which I declined to consider the matter on its merits, having found that the Fair's dates had passed and the matter was moot. On appeal, the Federal Court of Appeal [FCA] noted that Dr. Yeager had subsequently been denied access to the 2017 and 2018 Fairs and found that this would have impacted upon the exercise of discretion with respect to the issue of mootness (*Yeager v Canada (Attorney General)*, 2018 FCA 187 at paras 13–16 [*Yeager FCA*]). The FCA further found that I had erred in my approach to assessing affidavit evidence (*Yeager FCA* at paras 17–23). The matter was remitted for my reconsideration.

[3] Dr. Yeager submits that the decision denying him access to the Fair was unreasonable as it fails to offer any justification for the conclusion that his services were inconsistent with the purpose of the Fair. He seeks the admission of two affidavits, which serve to explain the purpose of the Fair and pre-release education generally. He also argues the decision was procedurally unfair. Finally, he submits a directed verdict is warranted.

[4] The respondent opposes the admission of the affidavit evidence and submits the decision to deny Dr. Yeager entry to the Fair was reasonable as his purpose for attending was not consistent with the purpose of the event. The respondent further argues that the process was procedurally fair and that a directed verdict is neither available to Dr. Yeager nor warranted.

[5] For the reasons that follow, the application is dismissed.

II. Background

A. *The Applicant*

[6] Dr. Yeager is a criminologist and teaching professor in sociology and criminology with extensive experience in the criminal justice field. The record indicates he has a history of interactions with CSC, which have resulted in him being granted and refused access to institutions at different times.

B. *The Fair*

[7] The Fair is an annual event sponsored by the John Howard Society of Kingston [JHSK] at several Ontario prisons. The Warden of Warkworth Institution describes the Fair as an "opportunity for offenders to meet with community halfway houses and other community support services in order to establish contact with potential support for their release."

[8] Dr. Yeager has participated in the Fair intermittently in the past and last attended in 2013. He states that his purpose in attending is to "provide convicts with information about parole, parole preparation, representation at parole hearings, and collateral matters which impact upon release; disciplinary charges, segregation, classification, security scores, and ISO matters."

C. *Judicial History*

[9] Dr. Yeager applied to attend the 2015 Fair, but the respondent denied him access on the basis that he presented a security concern. The warden of one of the participating institutions also indicated that Dr. Yeager's proposed services were not consistent with the Fair's purpose.

[10] In April 2016, Dr. Yeager applied to JHSK to attend the upcoming 2016 Fair. Prior to a decision being made on his request, Dr. Yeager and Mr. Keith Madeley, an inmate at Warkworth Institution, filed an application pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [Court docket T-706-16] seeking, among other things, an interlocutory mandatory injunction allowing Dr. Yeager to attend the 2016 Fair.

[11] On June 7, 2016, Justice Yvan Roy denied the request for interlocutory relief in *Madeley v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 634 [*Madeley*]. The record before Justice Roy included an affidavit from Mr. Costa, which indicated that the Fair is "an event to provide inmates who are soon to be released with the resources necessary for successful reintegration back into the community" and focuses on services for inmates who are about to be released (*Madeley* at para 10). Dr. Yeager described the Fair in a similar manner as Mr. Costa and submitted an affidavit setting out his proposed services, which are described in much the same way as in the present application. Based on the record before him, Justice Roy concluded that Dr. Yeager's proposed services were inconsistent with the purpose of the Fair, as the Fair does not encompass parole issues (*Madeley* at paras 11, 36). The application for an interlocutory mandatory injunction was dismissed.

[12] On June 22, 2016, Dr. Yeager and Mr. Madeley discontinued the underlying application in T-706-16. The 2016 Fair took place between June 20 and 23, 2016.

[13] On July 16, 2016, Dr. Yeager filed this application seeking judicial review of the June 8, 2016 decision of Mr. Miguel Costa, Senior Project Officer of the CSC [the Costa decision]. In that application, he sought relief in the form of an order for *mandamus* compelling the respondent to allow him to participate in the Fair subject to his compliance with normal security measures. In support of his application, Dr. Yeager swore an affidavit and filed two additional affidavits. The first, affirmed by Ms. Lisa Finateri, sets out background and history relating to the Fair. The second was sworn by Dr. Dawn Moore, a professor who has written extensively in the area of criminology, and addresses the scope of "pre-release education."

[14] I issued my decision on the application on June 13, 2017. As noted above, I dismissed the application for mootness and declined to admit the additional affidavit evidence. I also found an order of *mandamus* was not warranted.

[15] On October 15, 2018, the FCA allowed Dr. Yeager's appeal. The Court found that Dr. Yeager's subsequent denials in 2017 and 2018 would have affected my mootness analysis as (1) they demonstrated that a live controversy continued to exist between the parties that would likely reoccur in 2019, and (2) the timing between any application to the Fair and a decision would likely render any future judicial review application moot (*Yeager FCA* at paras 13–16). The Court also held that the test from *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 [*White Burgess*], applied to the admissibility of the affidavit of Dr. Moore and that

the affidavit of Ms. Finateri should be considered under the exceptions set out in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*AUCC*] (*Yeager FCA* at paras 18–23). The FCA agreed that an order of *mandamus* was not warranted (*Yeager FCA* at paras 24–26).

D. *The Reconsideration Process*

[16] Following the FCA's decision, I directed the parties to submit a joint proposal on the reconsideration process and timetable. On November 21, 2018, Dr. Yeager's counsel submitted a proposal on behalf of both parties and also requested the Court to consider whether it was able to deal with the reconsideration in an open-minded fashion or whether another judicial officer would be better placed to reconsider the matter.

[17] On November 30, 2018, I issued an order regarding the next steps in the proceeding. The order also addressed the request that the Court consider whether it was able to deal with the reconsideration. The order informed the parties that I was confident I was in a position to address the reconsideration in an open-minded fashion but advised that this view was without prejudice to the right of either party to take a formal position on the matter. Neither party has done so.

[18] The parties subsequently provided supplementary written submissions, and additional oral submissions have also been heard.

III. Decision under Review

[19] On June 20, 2016, the applicant received the Costa decision of June 8, 2016. The decision was set out in a three-paragraph letter, which is reproduced in full:

> Dear Mr. Yeager,
>
> Your application for access to the 2016 John Howard Society Pre-Release Fairs to be held at various Federal Institutions in the Ontario region has been reviewed.
>
> The services you propose to offer offenders is [*sic*] not consistent with the purpose of the Pre-Release fair. As such your application for clearance is denied.
>
> Please do not hesitate to contact me if you have further questions or wish to discuss the matter further.

IV. Issues

[20] Having considered the parties' written and oral submissions, I have framed the issues as follows:

A. Are the Finateri and Moore affidavits admissible?

B. Should an adverse inference be drawn against the respondent due to gaps in the decision and the tribunal record?

C. Is the decision unreasonable?

D. Was the process unfair?

E. Is the remedy of a directed verdict warranted?

V. Standard of Review

[21] This Court has previously concluded that the decisions of CSC officials relating to prison management and involving a question of mixed fact and law are owed deference (*Londono v Canada (Attorney General)*, 2007 FC 694 at para 9; *Harnois v Canada (Attorney General)*, 2010 FC 1312 at paras 20, 22). The parties agree that the decision to deny Dr. Yeager access to the Fair is reviewable against a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9).

[22] In considering procedural fairness issues, the FCA has recently held that despite an awkwardness in terminology, fairness issues are essentially reviewable against a correctness standard (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54). However, in this context, correctness requires the Court to assess whether, in light of the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], the process followed achieved the standard of fairness required in the circumstances (*Lv v Canada (Citizenship and Immigration)*, 2018 FC 935 at para 16).

VI. Analysis

A. *Is the affidavit evidence admissible?*

[23] In oral submissions, Dr. Yeager's counsel clarified that the Moore and Finateri affidavits are before the Court solely to support and advance the procedural fairness arguments. The affidavits speak to the procedural history and background of the Fair and the scope of pre-release

services in the correctional context. Dr. Yeager argues that the affidavits contain information he would have placed before the decision-maker had he been given an opportunity to do so in his application process.

[24] The respondent opposes the admission of the Moore and Finateri affidavits and also objects to a portion of Dr.Yeager's affidavit.

The Moore affidavit

[25] The FCA found that Rule 81 of the *Federal Courts Rules*, SOR/98-106, does not apply to experts and that the test from *White Burgess* governs the admission of the Moore affidavit (*Yeager FCA* at para 18).

[26] Dr. Yeager submits that Dr. Moore was properly qualified as an expert in the areas of pre-release education of inmates and CSC visitor security screening procedures. She also has expertise in criminology, parole eligibility, and programming at correctional institutions. It is argued that Dr. Moore's affidavit addresses the issue of what constitutes pre-release education and its relevance to parole. It is submitted that the affidavit provides a necessary expert opinion on what is meant by pre-release services in the correctional context. As the record contains nothing about parole education and its relevance to pre-release services, Dr. Moore's affidavit also provides necessary context to assess whether the decision-maker was open to the facts and the relevant standard upon which parole is considered in the pre-release context.

[27] The respondent argues that there is no need for an expert opinion in this matter and that Dr. Moore's affidavit does not provide information likely to be outside the Court's experience and knowledge. The respondent further argues that even if the Moore affidavit contains correct information about the benefits of parole education, the purpose of the Fair is set out in references to a CSC affidavit in the *Madeley* decision, and the focus is post-release services.

[28] In *White Burgess*, the Supreme Court of Canada refined the test from *R v Mohan*, [1994] 2 SCR 9, applying to expert evidence. The test is to be applied in two parts. First, the Court considers the threshold requirements for admissibility (relevance, necessity, absence of an exclusionary rule, and a properly qualified expert). Evidence not meeting these requirements should be excluded (*White Burgess* at para 23). Second, the Court engages in a discretionary gatekeeping step, balancing the risks and benefits of admitting the evidence to decide whether the potential benefits justify the risks (*White Burgess* at para 24).

[29] I am satisfied that Dr. Moore has the expertise, knowledge, and experience to speak on the matters addressed in her affidavit. However, the affidavit speaks to the issue of pre-release education generally. The benefit of pre-release educational programming for inmates is not in dispute, nor is the scope of pre-release education. The affidavit is neither relevant nor necessary and for this reason fails on the first part of the *White Burgess* test.

[30] The Moore affidavit states that pre-release education relates to the delivery of information and skills that will assist in early release, rehabilitation, and reintegration. Dr. Moore does not state, nor would it be logical to conclude, that specific educational events cannot focus

on a single aspect of pre-release education. In other words, there is nothing to suggest that CSC is barred from providing an event with a post-release focus.

[31] Even if I were to conclude the affidavit was relevant to the issues raised, it is not necessary. The purpose of the Fair is set out in *Madeley* at paragraph 36, where Justice Roy found that the "pre-release fairs do not encompass parole issues…these are called pre-release fairs because of when the fairs take place, that is before release. The contention that the fairs are concerned with issues that occur before the release, such as parole or disciplinary issues is untenable on this record." This purpose is similarly described to Dr. Yeager in a letter from the Warden of Warkworth Institution in June 2015 and again in a letter from the Minister of Public Safety in April 2016. The purpose of the Fair is adequately set out in the record, rendering Dr. Moore's affidavit unnecessary.

[32] I decline to admit Dr. Moore's affidavit.

The Finateri affidavit

[33] Dr. Yeager relies on the FCA's decision in *AUCC* to argue that the Finateri affidavit provides some context against which to assess the partiality of the impugned decision, especially because the decision-maker and the record do not provide a clear basis to assess the "purpose" of the Fair. In *AUCC*, the FCA recognized that providing general background that may assist in understanding the issues on judicial review is an exception to the rule limiting the record on judicial review to the record before the decision-maker (*AUCC* at para 20(a)). Dr. Yeager also argues that the affidavit fills a void in the evidentiary record by providing highly relevant and

persuasive historical context relating to how the Fair was established, its historical purpose, and principles governing the eligibility of participants and the role of inmate groups.

[34] The respondent submits the affidavit does not provide general background information that may assist the Court in understanding issues relevant to the judicial review and therefore does come within one of the exceptions described in *AUCC*. The respondent notes that the affidavit is limited to the Fair in the 2000–2009 time periods and that this does not assist in assessing a decision regarding the 2016 Fair. The respondent argues the affidavit does not fill a void in the evidentiary record and is not helpful in determining whether CSC failed to properly consult with inmates in respect of the Fair.

[35] In *AUCC*, the FCA explained that under the *Federal Courts Act*, a reviewing court on judicial review does "not delve into or re-decide the merits" of what has been decided (*AUCC* at para 18). This role underpins the rationale for the general rule that new evidence should not be included on judicial review, as the court should be wary of becoming a "forum for fact-finding on the merits of the matter"(*AUCC* at para 19). However, the FCA has also recognized exceptions to this general rule: affidavit evidence that (1) in a neutral and uncontroversial way provides general background information that might assist the court in understanding the issues; (2) brings attention to procedural defects not otherwise found in the record; or (3) highlights the complete absence of evidence in relation to a particular finding (*AUCC* at para 20; *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 45).

[36] The Finateri affidavit does provide some historical context and is relied upon in advancing Dr. Yeager's fairness arguments. I will admit the affidavit on this basis and address the weight to be given to it below.

The Yeager affidavit

[37] The respondent takes issue with paragraph 19 of Dr. Yeager's affidavit, where it is stated that he participated in the Fairs "in order to offer inmates knowledge, resources and tools relevant to parole and offender reintegration in [the] community" [emphasis added]. The respondent submits that the reference to "offender reintegration in [the] community" provides a new explanation for Dr. Yeager's attendance at the Fair. This new purpose, the respondent argues, goes to the merits of the matter, as information related to offender reintegration in the community seems related to the stated purpose of the Fair.

[38] Dr. Yeager's counsel argues that in his application to participate in the 2016 Fair, Dr. Yeager described the services he offered as including, in addition to parole-related services, "collateral matters which impact on release" and that this broad statement could include post-release services. I am unpersuaded. Dr. Yeager did not explicitly offer to provide post-release services in his initial application, nor do I interpret his description of the services he did offer as including post-release services by way of implication. The words "and offender reintegration in community" are struck from paragraph 19 of Dr. Yeager's affidavit.

B. *Should an adverse inference be drawn against the respondent due to gaps in the decision and the tribunal record?*

[39] Dr. Yeager relies on rule 81(2) of the *Federal Courts Rules* in submitting that the Court should draw an adverse inference due to the respondent's failure to provide evidence of Mr. Costa's personal knowledge of the Fair and its context and purpose. I decline to do so.

[40] Although the decision in issue is brief and the record limited, I am not convinced by Dr. Yeager's submissions to the effect that the purpose of the Fair is unclear. As noted earlier, there is correspondence to Dr. Yeager from CSC officials as early as June 2015 that speaks to the purpose of the Fair. In April 2016, the Minister of Public Safety provided the same information in a letter to Dr. Yeager. In *Madeley*, Justice Roy relied on an affidavit from Mr. Costa, the decision-maker in this matter, where Mr. Costa described the Fair. Justice Roy states:

> [10] The pre-release fairs taking place in Federal institutions in the province of Ontario in the month of June appear to be run by the JHS. The record is devoid of an affidavit being provided by a representative of the JHS that would have explained the nature of those events. Instead, the Court had to rely on the evidence offered by Mr. Miguel Costa, a Senior Project Officer with the Correctional Service of Canada (CSC). In his affidavit, Mr. Costa describes the pre-release fairs in the following fashion:
>
> > 14. John Howard Society (JHS) pre-release Fair is an event to provide inmates who are soon to be released with the resources necessary for successful reintegration back into the community. Examples of the types of services, programs and supports which are offered include employment opportunities and information about accessing personal support programs in the community such as alcoholics anonymous.
> >
> > (Affidavit of Miguel Costa, para 14)

> Mr. Costa asserts at paragraph 16 that the fairs are focused on services for inmates who are about to be released. It is not for possible service providers to offer services and the fairs are not meant to provide information about parole or how to prepare a Parole Board hearing. Although organized by the JHS, it is the CSC that is responsible for the content of the fair and insuring that all participants are authorized to participate. Thus, JHS does not approve fair participants and forwarding an application does not constitute an endorsement of the services offered by the applicant.

[41] There is evidence in the record that describes the purpose of the Fair, including evidence from Mr. Costa. Therefore, I decline to draw an adverse inference.

C. *Is the decision unreasonable?*

[42] Dr. Yeager argues that Mr. Costa's decision is completely deficient as it relates to setting out any justification or context indicating how it was reached. He submits that the decision fails to meet the hallmarks of reasonableness—transparency, intelligibility, and justification—and that, in the context of a record bereft of a cogent explanation of the conclusion reached, the decision must be quashed. I disagree.

[43] Although the Costa decision is brief and the record is sparse, the basis and reasons for the decision are evident: the services being offered by Dr. Yeager in 2016 did not align with the purpose or intent of the Fair. The record demonstrates that the purpose of the Fair was not newly developed in the Costa decision, nor was it unknown to Dr. Yeager at the time of his application. As previously noted, Dr. Yeager had been advised of CSC's position on the purpose of the Fair as early as June 2015. The Finateri affidavit may well demonstrate that the purpose of the Fair and CSC's involvement in the program had evolved from what it was between 2001 and 2009,

and perhaps even as late as 2013 when Dr. Yeager last attended. However, this again does not render the decision unreasonable.

[44] CSC has broad discretion under the *Corrections and Conditional Release Act*, SC 1992, c 20 [Act], to provide rehabilitation programming. The process and procedures it follows in developing programs and determining the purpose of program elements, including the Fair, are for CSC to determine within the framework of the Act. CSC is owed deference in this respect. Neither Dr. Yeager nor Ms. Finateri can determine or declare the purpose of the Fair. Similarly, Dr. Yeager was not owed a more detailed explanation for the denial of his application simply on the basis that he had participated in the Fair in prior years. It is ultimately for CSC to provide programming and to determine who can provide services at such events.

[45] Dr. Yeager notes that Queen's Prison Law Clinic, The Innocence Canada Foundation, and parole officers were approved to attend the 2016 Fair. He argues that these groups and individuals are exclusively involved in pre-release activities and that their involvement demonstrates that the purpose of the Fair remains broader than post-release services. He submits their attendance demonstrates the unreasonableness of the decision denying his application.

[46] The participation of these groups does not assist Dr. Yeager. The record does not contain the applications of the attending parole officers or the two organizations in issue. In the absence of a description of the services these groups proposed to offer at the Fair, Dr. Yeager's submissions that these individuals and groups "are exclusively focused upon pre-release matters and prisoner rights advocacy" is, at best, speculative.

[47] In the record Dr. Yeager does include web pages for Queen's Prison Law Clinic and The Innocence Canada Foundation that outline the activities of these groups. He argues that these pages demonstrate no activities related to post release. I disagree. The Queen's Prison Law Clinic web page makes reference to conducting "test case litigation," and The Innocence Canada Foundation web page refers to the provision of financial assistance to the wrongfully convicted. Both might well involve post-release contact. Similarly, and as the respondent has noted, parole officers meet with inmates post release. The evidence simply serves to highlight the speculative nature of Dr. Yeager's submissions in this regard.

D. *Was the process unfair?*

[48] Dr. Yeager argues the process was unfair for a number of reasons. Before addressing his arguments, I will briefly consider the level of fairness owed in these circumstances.

What level of procedural fairness is owed?

[49] In *Baker*, Justice L'Heureux-Dubé reaffirmed that the content of the duty of procedural fairness varies based on the context of the case. She identified five non-exhaustive factors for determining the content of the duty of procedural fairness: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) "the choices of procedure made by the agency itself" (*Baker* at paras 23–27). This list is non-exhaustive (*Baker* at para 28), but it is

clear from *Baker* that the duty upon the decision-maker is to provide a fair process within the context of the decision being rendered.

[50] I am of the view that the level of procedural fairness owed in this case is low. The nature of the decision being made is administrative, not judicial, and the Act provides CSC with broad discretion in developing and delivering rehabilitation programs (Act, s 5(b)). I am also not persuaded that a decision with respect to attendance at a pre-release fair is one that objectively attracts interests or consequences that are of significant import to Dr. Yeager personally or to the inmates attending the pre-release Fair. In reaching this conclusion, I am not ignoring or minimizing Dr. Yeager's criminology expertise, nor am I suggesting that his expertise would not be of assistance or value to inmates. Instead, I have considered: (1) that Dr. Yeager's proposed participation is voluntary; (2) the purpose of the Fair as stated by CSC; (3) the fact that Dr. Yeager's services, as described in his application, do not reflect the stated purpose of the Fair; and (4) the absence of any indication in the record that the scope of the Fair has adversely impacted inmates. Further, procedure and processes dating back to 2009, as disclosed in the Finateri affidavit, cannot form the basis of a legitimate expectation in 2016. CSC was consistent in its approach to the Fair in 2015 and 2016.

Was there a duty to consult an inmate committee?

[51] Dr. Yeager relies on section 74 of the Act to argue that the modification of educational programming for inmates must involve CSC consultation with inmate committees and that a failure to consult may result in a quashing of the decision to implement changes (*William Head Institution Inmate Committee v Canada (Correctional Service)* (1993), 66 FTR 262 at para 9

[*William Head*]). Relying, in part, upon the Finateri affidavit, Dr. Yeager argues that the purpose of the Fair has changed; that inmates had a procedural right to consultation before any such change was implemented; and that since the respondent has not placed evidence in the record evidencing consultation, the Court must assume a procedural breach.

[52] Based on the record, I am far from convinced that section 74 of the Act or *William Head* is of application in these circumstances. However, I need not decide the question. Dr. Yeager seeks to assert a right that, if it exists on these facts, belongs to others—the inmates who would be affected by this decision. He cites no authority to support this position. I also note that there is nothing on the record to suggest that any inmates believe there has been a failure to consult.

Did the decision maker fail to consider the contents of Dr. Yeager's application?

[53] Dr. Yeager also argues that the decision-maker failed to consider his entire application package. He notes that the tribunal record does not contain the letter covering his application, a copy of his $15 cheque, or his participant information form. Further, the record *does* contain his security clearance form, which, in his view, is consistent with Ms. Finateri's explanation that CSC's role in approving participation in the Fair was limited to security screening during her tenure. The absence of this documentation from the tribunal record reflects, in Dr. Yeager's submission, a failure on the part of the decision-maker to review the entire application package, and this in turn is fatal to the decision.

[54] In addressing this argument, it is necessary to consider the context of Dr. Yeager's 2016 application. Dr. Yeager had been before the Court in *Madeley* seeking a mandatory interlocutory

injunction that would have compelled CSC to authorize his attendance at the 2016 Fair. In his June 7, 2016 decision refusing the relief sought, Justice Roy described both Dr. Yeager's desire to attend the Fair and the services he proposed to provide (*Madeley* at para 3). Mr. Costa, the decision-maker in this matter, also provided evidence in the *Madeley* matter (*Madeley* at para 10). Justice Roy's decision in *Madeley* forms part of the tribunal record in this matter.

[55] In addition, Mr. Costa's June 8, 2016 decision letter explicitly states that "[Dr. Yeager's] application for access to the John Howard Society Pre-Release Fairs to be held during the week of June 20 to 24 at various Federal Institutions in the Ontario region has been reviewed." It also refers to the "services you propose to offer offenders." This information can be presumed to have come from the application package, but even if it did not, it is clear based on a plain reading of Mr. Costa's decision and due to Mr. Costa's involvement in *Madeley* that the information contained in the application package was known to the decision maker. The fact that all of the application documents were not included in the record in circumstances where those documents are in Dr. Yeager's possession does not render the process unfair (*Federal Courts Rules*, r 317; *Access Information Agency Inc v Canada (Attorney General)*, 2007 FCA 224 at paras 7, 21). As the respondent notes, Dr. Yeager's purpose in attending the Fair was not controversial. There was no fairness breach.

Was there a requirement to allow Dr. Yeager to submit additional documentation?

[56] Dr. Yeager submits he should have been provided an opportunity to provide additional documentation to the decision-maker. In support of this position, he points to the FCA's decision in this matter, where the Court noted that the application process does not provide an opportunity

or require the filing of supplementary material. The FCA's comments are made in the context of considering the affidavit evidence (*Yeager FCA* at para 22).

[57] I disagree with Dr. Yeager's position. As noted by the FCA, there is no requirement upon an applicant to file supplementary material. Similarly, there is no obligation on a decision-maker to seek out supplementary information, particularly in the context of a process where the degree of procedural fairness owed is at the lower end of the spectrum.

Did the decision maker demonstrate a closed mind or bias?

[58] Dr. Yeager submits the decision gives rise to a closed mind or bias on the part of Mr. Costa as there is no evidence-based or justifiable basis for denying him admission to the Fair. He submits Mr. Costa failed to genuinely consider the context and purpose of the Fair. In support of this argument, Dr. Yeager advances the theory that he has been "blacklisted" by the respondent.

[59] As I have already concluded that the decision to deny access based on the purpose of the Fair was reasonable, I need not revisit the issue of whether Mr. Costa considered the context and purpose of the Fair. With respect to the argument that Dr. Yeager has been "blacklisted," I understand and appreciate that this is Dr. Yeager's perspective and view of the circumstances. However, there is a strong presumption of impartiality in respect of decision-makers. This presumption is not easily displaced; a real likelihood or probability of bias is necessary, and there is a high burden on the party alleging bias (*Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at paras 25–26).

[60] The record sets out, at least in part, the historical interactions between CSC and Dr. Yeager. That history discloses that where Dr. Yeager has sought access to CSC institutions, access has been granted in some circumstances and denied in others. The record does not disclose a closed mind on the part of CSC officials. Quashing the June 8, 2016 decision is not justified on this basis.

VII. Remedy

[61] In the reconsideration of this matter, Dr. Yeager sought a directed verdict requiring the respondent to grant him access to the Fair subject to security clearance considerations. He argues the remedy of a directed verdict is different from an order for *mandamus*, a remedy that I refused in my prior judgment and on which point the FCA found no error had been made. While I need not address remedy, I will note that the FCA has held that there is no practical difference between seeking *mandamus* and seeking a directed verdict (*Canada (Citizenship and Immigration) v Tennant*, 2018 FCA 132 at para 28; *Canada (Public Safety and Emergency Preparedness) v LeBon*, 2013 FCA 55 at para 13).

[62] In advancing arguments on remedy, Dr. Yeager was driven by his view that the respondent was acting in bad faith and that future applications would therefore lead to the same result, a refusal. I have concluded that the record simply does not support Dr. Yeager's view in this regard. The 2016 refusal does not prevent Dr. Yeager from setting out, in a future application, services he proposes to offer that align with the purpose of the Fair, should his expertise and interests encompass post-release services. The respondent would be required to assess any such application on its merits.

VIII. Conclusion

[63] The application is dismissed. The parties have advised the Court that they have agreed that costs to the successful party in the amount of $2500 inclusive of fees and disbursements are appropriate. I am satisfied that this amount is reasonable.

JUDGMENT IN T-1146-16

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. Costs are awarded to the respondent in the amount of $2500.00 inclusive of fees and disbursements.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1146-16
STYLE OF CAUSE:	MATTHEW G. YEAGER v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 7, 2019
JUDGMENT AND REASONS:	GLEESON J.
DATED:	MAY 31, 2019

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