Federal Court  Cour fédérale

Date: 20190722

Docket: T-1515-18

Citation: 2019 FC 959

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, July 22, 2019

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

JEAN-PHILIPPE LEBLANC

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of the Assistant Commissioner [AC] of the Correctional Service of Canada [CSC], dated June 15, 2018 [Decision], denying the applicant's final level grievance and upholding a decision by Institutional Management at the Federal Training Centre [FTC] to increase the applicant's security classification from minimum to medium and approve an involuntary transfer [ITI] to Drummond Institution [DI].

[2] The applicant is asking the Court to:

1. declare both the Decision rendered on or around June 15, 2018, and Management's original decision dated February 22, 2018, to be unlawful;

2. order CSC to provide a written, complete and documented response that addresses all the relevant allegations raised in grievance No. V30R00048981;

3. set aside the FTC's Decision, dated February 22, 2018, to transfer the applicant and increase his security classification, as well as the refusal to amend this Decision following the applicant's representations on February 15, 2019, and confirmed by the Assistant Commissioner in his Decision dated June 15, 2018; and

4. order a review of the grievance by the appropriate authorities at CSC.

[3] The applicant argues that the Decision was unreasonable, because:

a. the reasons for the Decision did not deny an important and key element alleged in the Level 3 grievance procedure;

b. the Decision is based on an erroneous finding of fact, and the decision maker failed to consider information at its disposal; and

c. the decision maker erred by failing to conduct an independent *de novo* assessment of the applicant's grievance.

[4] For the reasons that follow, it is my opinion that the AC did not conduct an independent *de novo* assessment of the grievance filed by the applicant. The Decision will therefore be set aside, and the matter will be referred back to the AC so that the AC can conduct a *de novo* assessment in accordance with these reasons.

I. Background

[5] The underlying facts of the application are not contested by the parties.

[6] The applicant has been incarcerated since January 20, 2012, for the offence of second-degree murder and is serving a life sentence with eligibility for parole after seven years. Prior to his transfer, he was held in the minimum-security sector at the FTC, following a security declassification.

[7] On January 18, 2018, the applicant was temporarily placed in the FTC'S medium-security unit as an alternative to administrative segregation, because he was the subject of a security investigation. CSC had received information indicating that the applicant was involved in institutional trafficking, the consumption of prohibited substances, and intimidating and controlling behaviour toward certain fellow inmates. The information obtained was reported in a Security Intelligence Report [SIR].

[8] According to the SIR, one completely reliable source and two believed reliable sources identified the applicant as a tobacco dealer. CSC also noted that the applicant had experienced significant morphological changes and had gained significant muscle mass in a short period of

time. After checking the records for canteen purchases, CSC was not able to find any explanation for this drastic change, other than the purchase of two jars of protein over the last three months. CSC did not obtain any information to suggest that the applicant was on an athlete's diet, especially since he ate in the central kitchen in accordance with the national menu. CSC concluded that the applicant's involvement in the prison network gave reason to believe that he was using steroids. Steroids had also been seized in the common room of the FTC. Based on the information provided by four sources, including one classified as a completely reliable source and the remaining classified as believed reliable sources, CSC made connections between the seizure and the applicant, because he was involved in intimidation and the control of this common room.

[9] On February 2, 2018, the case management team [CMT] conducted a *de novo* assessment for the purpose of rendering a decision [Assessment] and recommended increasing the applicant's security classification to medium and placing him in Drummond Institution [DI], after he was rejected by Cowansville Institution [CI] because a co-accused was being held at that penitentiary. His placement at CI would therefore violate CSC policies (CD 705-7, Security Classification and Penitentiary Placement). The CMT's Assessment included a summary of the information contained in the SIR.

[10] On February 15, 2018, the applicant presented his submissions through his counsel. His counsel criticized CSC, stating that the Assessment was unlawful and unreasonable with respect to his escape risk and his institutional adjustment at the FTC. He once again requested that the applicant be placed at CI.

[11] On February 22, 2018, after reviewing the applicant's representations and the documents at its disposal, Management of the FTC approved the CMT's recommendation, thereby increasing the applicant's security classification to medium and authorizing his transfer to DI.

[12] In accordance with Commissioner's Directive No. 081-1, an inmate may contest a decision concerning a security reclassification through the final level grievance process. The applicant submitted his grievance on February 23, 2018.

[13] In his written representations in support of his grievance, the applicant claims that the information provided by the CMT is false or manipulated for the specific purpose of penalizing him because he had insisted on a gradual release process. He explains that his morphological changes were due to the fact that he ate several portions during one meal because he was employed in the institutional kitchens of CSC. He maintains that his diet and his consumption of canteen fare are driven by a sports nutrition approach, since the products he consumes are high in protein. He also spends his time exercising in order to channel and externalize his emotions. He adds that a weight increase from 219 to 225 pounds during his incarceration at the FTC is not alarming, especially since he does not have the physical appearance of someone who is taking steroids.

[14] With respect to the charges of consuming prohibited substances, the applicant notes that he has never smoked or consumed drugs or tobacco and that he has not been the subject of any disciplinary or observation report. He relies on the negative urine test performed six weeks before his transfer to support his claim that he did not consume prohibited substances. He also cites his request to be tested again when he was informed of the allegations against him prior to

the decision rendered by Management at FTC. He added that given his numerous visits to the hospital following his cancer diagnosis, the doctor should have warned CSC of hormonal imbalances or any other abnormality when his blood was drawn for medical tests.

[15] With respect to the institutional trafficking, the applicant alleges that the common room is accessible to all inmates residing in those ranges and that without supporting evidence, CSC could not say, with any degree of certainty, that the substances found indeed belong to him. He contests, but does not address, the allegations of intimidation and tobacco trafficking.

[16] The applicant also contests his transfer to and placement at DI, stressing that he has already cohabited with his co-accused many times in the past and that there were never any problems. According to the applicant, there is therefore no reason to deny his placement at CI, given that his objective is to continue his studies within the limits of his prison context.

II. The Decision rendered by the AC

[17] The AC rendered his Decision on June 15, 2018. In the first paragraph of the Decision, the AC lists the documents consulted, namely, the applicant's presentation, the applicable laws and policies, and the relevant documents included in the applicant's file in the Offender Management System.

[18] The Decision essentially reiterates the findings documented by the CMT and Management of the FTC, in its decision dated February 22, 2018, namely, that (a) the applicant does not exhibit the characteristics and the conduct of an inmate with a minimum security

classification, by reason of his inflexible attitude, distrust and his lack of openness towards members of his CMT; and (b) the applicant's actions conflict with his statements when he is confronted with obstacles, and the applicant instead adopts a resistant attitude.

[19] Despite the applicant's denials, the AC relies on information obtained by CSC to conclude that the applicant was involved in trafficking tobacco within the institution and consumed steroids and demonstrated intimidating conduct. In the context of assessing his escape risk, the AC, like the CMT, considered the significant violence in the applicant's criminal record, the impulsiveness noted in the past and his lack of progress in terms of his reaction to dynamic factors that contribute to violent conduct.

[20] In response to the arguments concerning family visits, the AC explained that members of the applicant's family could still provide justification in order to be able to visit inmates at two different institutions at the same security level.

[21] Lastly, the AC states the following in conclusion:

> [TRANSLATION]
> In decision review for your ITI, dated 2018-02-22, the Warden stated that she had considered all the available information, including the submissions of your counsel and all your needs, before accepting the recommendation of your CMT.
>
> She emphasized the fact that CI was not able to accommodate you, owing to the presence of one of your co-accused, and that DI was in a position to meet all your needs, particularly those related to security, in accordance with the relevant section of the CCRA.
>
> In light of the foregoing, it has been determined at the national level that the recommendations of your CMT concerning the reassessment of your SC and your ITI to DI, as well as the related decisions, were in compliance with the CCRA, the CCRR and the

> CD. You also received sufficient reasons for these decisions. Consequently, your grievance is denied.

III. Issues

[22] The only issue is whether the AC's decision is reasonable.

IV. Standard of review

[23] The parties agree that the standard of review in this case is that of reasonableness. In *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], the Supreme Court of Canada explained that a standard of review analysis need not be conducted in every instance. Indeed, where the standard of review applicable to a particular question before the court is well settled by past jurisprudence, the reviewing court may adopt that standard of review.

[24] In *Hall v Canada (Attorney General)*, 2013 FC 933 [*Hall*] at paragraphs 21 to 23, Chief Justice Paul Crampton analyzed the standard of review applicable to findings of mixed fact and law established by the Commissioner in the context of the CSC grievance resolution process:

> [21] The first issue raised concerns the Commissioner's interpretation of his mandate pursuant to s. 80(2) of the Regulations. Where an administrative decision-maker is interpreting his or her own statute, or a statute closely connected to the decision-maker's function, with which he or she has particular familiarity, deference will usually result. This principle applies unless the interpretation of the statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., (i) constitutional questions, (ii) questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, (iii) questions regarding the jurisdictional lines between two or more competing specialized tribunals, and (iv) true questions of jurisdiction or *vires* (*Alberta (Information and Privacy*

> *Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 [*Alberta Teachers*], at para 30).
>
> [22] It is readily apparent that the Commissioner's interpretation of his mandate pursuant to s. 80(2) of the Regulations does not involve a constitutional question, a question of central importance to the legal system as a whole, or a question regarding the jurisdictional lines between two or more competing specialized tribunals. In my view, the Commissioner's interpretation of his mandate also is not one of the exceptional instances of statutory interpretation that may reasonably be characterized as involving a true question of jurisdiction or *vires* (*Alberta Teachers*, above, at paras 33-43). This is particularly so given the absence of any demonstration of why this Court should not review this issue on the deferential standard of reasonableness (*Alberta Teachers*, above, at para 39).
>
> [23] The second issue raised in this proceeding, concerning the reasonableness of the Commissioner's decision, is reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], at paras 51-53).

[25] Given that the standard of review applicable to a decision of the Commissioner is well recognized, the Court will focus on the justification, transparency and intelligibility of the decision-making process and will examine whether "the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir*, at paragraph 47). In this context, the Court must show deference to the AC's Decision and may not substitute its own conclusions. If necessary, however, it may look to the record for the purpose of weighing and assessing the reasonableness of the Decision.

V. Analysis

A. *Preliminary questions concerning the admissibility of evidence*

[26] One preliminary question concerns the admissibility of the evidence filed by the applicant, namely, Exhibit JL-2, the correctional plan dated February 1, 2018; Exhibit JL-3, the criminal profile report dated February 1, 2018; and paragraphs 12 and 13 of the applicant's affidavit. The respondent sought to strike out the two exhibits and the two paragraphs of the affidavit because they include information which had not been brought to the attention of the AC.

[27] At the beginning of the hearing, counsel for the applicant conceded that the two exhibits should be struck. However, he does not agree to the removal of paragraphs 12 and 13 of the applicant's affidavit.

[28] In paragraph 12 of his affidavit, the applicant declares that he had a meeting with his parole officer after receiving the Assessment increasing his security classification, in order to verbally contest the information contained therein. In paragraph 13, the applicant states that he told this same parole officer that [TRANSLATION] "he was in remission from cancer and had to undergo frequent blood tests". The fact is, this evidence was not available to the AC, so the AC cannot be faulted for failing to consider an element of information that was not available to him. Such evidence is not relevant in the context of a judicial review and should therefore be struck.

B. *Was the AC's Decision reasonable?*

[29] The applicant's arguments can be combined into a single one, namely, that the AC did not conduct an independent *de novo* assessment of the grievance, that the AC failed to consider

evidence included in his submissions and his representations dated February 18, 2018, and consequently, that the AC failed to render a Decision that was justified and reasonable.

[30] The respondent submits that the AC's Decision was reasonable, even though he does not explicitly refer to all the applicant's submissions. As this Court reminded us in *Rivest v Canada (Attorney General)*, 2017 FC 339 at paragraph 32, the applicant must prove that the decision maker ignored his representations. Unless there is clear and compelling evidence to the contrary, the administrative decision maker is presumed to have considered all the information on record.

[31] In his Decision, the AC was not under any obligation to review and comment on each and every argument raised by the applicant (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paragraph 53 [*Agraira*]). It is clear that the AC concluded that the Warden's decision was made in accordance with policy and after considering all available evidence. However, that was not the question before him. As the Chief Justice points out in *Hall* at paragraph 29, the question before him was whether "he, the Commissioner", considered that the grievance should be approved or denied "based on his own assessment of the record".

[32] In the Decision, the AC notes that he [TRANSLATION] "carefully analyzed" the applicant's grievance and that he consulted his presentation during his analysis. In the second paragraph, the AC summarizes the applicant's submissions as follows:

> [TRANSLATION]
> In your presentation, you contested the increase in your SC to medium, indicating that your case management team (CMT) provided questionable reasons to support its assessment. You also contested your ITI to DI, indicating that you would prefer to be transferred to Cowansville Institution (CI) in order to pursue your

> postsecondary studies and facilitate visits from family members, since your cousin is currently incarcerated there.

[33] However, the applicant provided numerous other explanations to address the allegations related to his morphological changes, his consumption of prohibited substances and his involvement in institutional trafficking, including the fact that he exercises regularly and eats more than one portion of food per meal, his medical condition, and the fact that CSC did not submit any evidence concerning his involvement in institutional trafficking. The AC makes no reference to the above and does not make any comments concerning these submissions, despite the fact that they are key.

[34] It is true that an administrative decision maker is presumed to have considered all the evidence and is not under any obligation to justify each and every submission made by the applicant (*Agraira*, at paragraph 53). However, the justifications and allegations in question lie at the heart of the Decision to increase the applicant's security classification and transfer him, and an explanation from the AC as to why those arguments were rejected is warranted. A reading of the Decision does not provide any indication that the AC considered the applicant's submissions regarding a number of essential issues, which is one of the badges of an unreasonable decision (*MacDonald v Canada (Attorney General)*, 2017 FC 1028 at paragraph 26).

[35] The AC instead analyzed whether the Decision rendered by Management of the FTC complied with the law, the regulations and policy. However, as indicated above, that was not the question before him.

[36] The right of appeal in the context of the grievance resolution process gave the applicant an opportunity to obtain a *de novo* assessment of his grievance. The AC could substitute his Decision for the Decision rendered by Management of the FTC and accept new evidence (*Tyrrell v Canada (Attorney General),* 2008 FC 42 at paragraph 38). Under section 2 of Commissioner's Directive 081, "Offender Complaints and Grievances", the AC is required to provide "complete, documented, comprehensible, and timely responses to all issues that are related to the subject of the original submission".

[37] The applicant shared new, potentially relevant information that needed to be considered afresh by the decision maker. The Decision does not include any information that would reasonably lead one to believe that the AC conducted an independent assessment of the submissions and justifications that the applicant provided in his grievance, or that the AC drew his own conclusions regarding their merits. However, these were fresh evidence, and the AC should have acknowledged this in his analysis. The Court's role is not to determine whether information that was not considered by the AC allegedly influenced the outcome.

VI. Conclusion

[38] In light of the entire record and a reading of the Decision, I agree that the AC did not in fact conduct an independent *de novo* assessment of the grievance filed by the applicant. The Decision is therefore unreasonable. It is therefore appropriate to set aside the Decision of the AC and refer the matter back to the AC so that he can conduct a *de novo* assessment of the applicant's grievance.

JUDGMENT in T-1515-18

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed.

2. The Decision of the Assistant Commissioner dated June 15, 2018, concerning the final-level grievance filed by the applicant is set aside.

3. The matter is referred back to the appropriate authorities for redetermination in accordance with these reasons.

4. Without costs.

"Roger R. Lafrenière"
Judge

Certified true translation
This 6th day of August, 2019.
Michael Palles, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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