Federal Court  Cour fédérale

Date: 20200304

Docket: T-275-19

Citation: 2020 FC 332

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, March 4, 2020

PRESENT: The Honourable Associate Chief Justice Gagné

BETWEEN:

BENOIT DESROSIERS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Benoit Desrosiers is currently serving a 25-year prison sentence for a second-degree murder of a sexual nature he committed in 1989. He is seeking judicial review of three decisions made by a Correctional Service of Canada [CSC] warden, in which she raised his security classification from “minimum” to “medium”, thereby causing his involuntary institutional

transfer from the Archambault Institution to the La Macaza Institution, as well as his temporary segregation. These steps were recommended by the applicant's case management team following a psychological assessment.

[2] The applicant is also challenging CSC's refusal to give his lawyer additional time to make written representations before his transfer.

II. Facts

[3] The facts below come from the applicant's affidavit and the parties' memorandums.

[4] The applicant has had various psychological and psychiatric treatments since his sentence began, and has followed a number of therapeutic programs.

[5] On September 1, 2017, a CSC psychologist performed a psychological assessment of the applicant in anticipation of his appearance before the National Parole Board, which was to review his application for an escorted temporary absence. The psychological report notes that the applicant has a tendency to make the desired impression on prison staff, while hiding continued problematic attitudes. The report also notes that the applicant continues to demonstrate problematic sexual behaviour, which places him at a moderate risk for sexual recidivism. The report ultimately concludes that, given the ineffectiveness of the many treatments the applicant has undergone to date, the applicant requires a more personalized, intensive treatment program that is not available at the Archambault Institution.

[6] Since the applicant had been expecting to be granted an escorted temporary absence, his case management team feared he would be filled with deep anger and exhibit psychotic disorganization. So as not to compromise the safety of the people around him, it therefore recommended that the applicant be segregated as of September 6, 2017.

[7] On September 11, 2017, the case management team completed its review of the applicant's security classification and recommended his transfer to a medium security institution. The report considered the following risk factors:

- institutional adjustment (low);
- escape risk (moderate); and
- public safety risk (moderate).

[8] The report recommended that the applicant be returned to La Macaza, the institution where he served his sentence from 2013 to 2015 and for which he had expressed a preference.

[9] On the same day, the applicant received his security reclassification scale and a notice of involuntary transfer. He was segregated and given two days (until September 13, 2017) to make written representations prior to his transfer.

[10] However, he was only able to reach his lawyer on September 13, 2017. Since CSC does not provide inmates' lawyers with the relevant documents, the applicant had to wait until his lawyer was able to visit him to give her the documents in person. On September 13, 2017, at 11:41 a.m., the applicant's lawyer requested an extension of time to submit her representations on the applicant's new security classification and his transfer. There is disagreement on the

question of whether CSC was informed before the expiry of the initial deadline that a meeting between the lawyer and her client had been set for September 19, 2017. In any event, this meeting was moved forward to September 15, 2017, at 1:00 p.m. The applicant gave his lawyer the documents at this meeting and submitted his own comments to CSC the following day.

[11] At 4:17 p.m. on September 14, 2017, CSC denied the request for an extension but nonetheless granted two days, until 4:00 p.m. on September 15, 2017, to make any written representations.

[12] Since the applicant's lawyer only met with the appellant in the afternoon of September 15, 2017, she obviously did not meet this deadline.

[13] On September 18, 2017, CSC issued its final decision on the applicant's security classification and transfer, taking into consideration the comments submitted by the applicant on September 13, 2017.

[14] On September 22, 2017, counsel for the appellant nonetheless submitted her written representations, in which she challenged both the denial of her request for an extension and the raising of the applicant's security classification, which led to his transfer.

[15] CSC responded to the representations on October 16, 2017, explaining and upholding the decisions made with respect to the applicant.

[16] The appellant's lawyer therefore filed three grievances, and on December 21, 2018, the CSC Assistant Commissioner dismissed the grievances concerning the refusal of the extension and the overall increase of the applicant's security classification, while allowing the portion of the grievance concerning the review of the applicant's escape risk. He ordered CSC to prepare a memorandum stating that the applicant's escape risk had been reviewed in accordance with the directive.

III. Impugned decisions

A. *Refusal to grant a 10-day extension*

[17] On September 14, 2017, CSC denied the request for a 10-day extension submitted by the applicant's lawyer on September 13, 2017, on the ground that the applicant had received the relevant documents on September 11, 2017, and that it was inappropriate to prolong the applicant's administrative segregation unnecessarily. It nonetheless gave her until 4:00 p.m. on September 15, 2017, to submit written representations.

B. *Response to the applicant's final grievance*

[18] In making its final decision on the applicant's grievances, CSC reviewed the applicant's lawyers' representations, the applicable legislation and policies, and the relevant documents in the applicant's file. CSC concluded that the explanations given by the applicant's case management team for increasing his public safety rating complied with Commissioner's Directive CD 710-6, *Review of Inmate Security Classification*. CSC also concluded that the

applicant's right to counsel had been respected because the warden was not required to grant additional time for the filing of representations.

[19] However, CSC believed that the explanations provided for raising the applicant's escape risk rating did not comply with Directive CD 710-6 and therefore allowed this portion of the grievance. According to CSC, the applicant's case management team only relied on assumptions given that there was no history of escape in the applicant's file. As a remedy, it ordered the warden of the Archambault Institution to enter a memorandum in the applicant's file providing for a review of his escape risk in accordance with Directive CD 710-6.

[20] Despite this correction, CSC concluded that the decision to raise the applicant's security classification to "medium" was still valid and that it was justified by the increase of his public safety rating to "moderate", in accordance with paragraph 18(b) of the *Corrections and Conditional Release Regulations* [the Regulations]. Consequently, his transfer to a medium security institution was also valid under section 28 of the *Corrections and Conditional Release Act* [the Act].

IV. Preliminary issue

[21] The respondent is challenging the admissibility of some of the allegations and exhibits submitted to the Court by the applicant, on the ground that they were not before the decision-maker when it made its decision.

[22] The respondent is principally asking the Court not to consider the memorandum included in the applicant's file by CSC in response to his grievance. The respondent submits that if the applicant was unhappy about the contents of this memorandum, he should have simply challenged it in a grievance.

[23] It is true that the memorandum postdates the decision under review. However, since it is the remedy chosen by CSC to correct the warden's error, it is part of the impugned decision. Asking the applicant to file a new grievance if he is unhappy about this memorandum would not be consistent with the concerns for economy and efficiency within the prison grievance system or with the proper administration of justice.

[24] As for exhibits P-1 to P-10, P-13, P-15, P-16, and P-25, which are not part of the certified CSC record, and regarding which the applicant has made no submissions, the Court will not consider them.

V. Issues and standards of review

[25] This application for judicial review raises the following issues:

A. *Did the warden violate the principles of natural justice and procedural fairness by refusing to grant the applicant a 10-day extension to submit his representations?*

B. *Did CSC err in dismissing the applicant's grievances?*

[26] According to the Supreme Court of Canada's recent judgment in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paragraphs 23 and 24, the starting point for determining the standard of review with respect to the merits of an administrative

decision is that of reasonableness. Since the Supreme Court did not comment on how to analyze alleged violations of the principles of natural justice and the duty of procedural fairness, the law as it stands continues to apply, and if the Court concludes that there was a violation, it must intervene, set the decision aside and refer the matter back to the administrative decision-maker.

VI. Analysis

A. *Did the warden violate the principles of natural justice and procedural fairness by refusing to grant the applicant a 10-day extension to submit his representations?*

[27] Relying on *May v Ferndale Institution*, [2005] 3 SCR 802 at paragraph 25, the applicant argues that he can only be deprived of his residual liberty in compliance with the principles of fundamental justice safeguarded by section 7 of the *Canadian Charter of Rights and Freedoms* [the Charter]. His segregation, the raising of his security classification and his transfer are all infringements of his residual liberty for which he should not have been deprived of his right to counsel (*British Columbia (Attorney General) v Christie*, [2007] 1 SCR 873 at para 25).

[28] According to the applicant, CSC had a duty to effectively give him all relevant documents to allow him to submit his representations with the help of his lawyer. He refers the Court to the Superior Court of Quebec's decision in *Paquet c Thibault et al*, 2016 QCCS 785, which provides that it is not enough for CSC to inform inmates of the reasons explaining a transfer or a review of their security classification, and that the duty to give information under section 27 of the Act must allow inmates to validly and effectively exercise their right to make representations.

[29] However, the four-day period after the applicant was given the documents did not allow him to give the documents to his lawyer on time, thereby depriving him of his right to make representations with her help.

[30] To begin with, in accordance with sections 12 and 13 of the Regulations, the applicant was entitled to make representations only with respect to the planned transfer.

[31] Moreover, under paragraph 27(d) of the Guidelines 710-2-3, *Inmate Transfer Processes*, inmates have two working days after the first meeting and after they have been given the information to make representations. Section 28 of the same Guidelines stipulates that an institutional head can grant an extension of up to 10 working days to the inmate.

[32] The applicant had four working days, until September 15, 2017, and he was actually only transferred after seven days, on September 18, 2017.

[33] The fact that inmates have a right to counsel when their lives, freedom or safety are at stake is not disputed. However, there is nothing to suggest that this has to extend to the right to representation before an administrative decision is made on an inmate's transfer to an institution that is better suited to the inmate's risk rating and the type of rehabilitation program the inmate's condition requires.

[34] That being said, the applicant had an opportunity to consult his lawyer and did so in a telephone conversation on September 13, 2017, and in a face-to-face meeting on September 15,

2017. Even though I sympathize with the applicant's lawyer, who was unable to respond within the short time granted, I cannot conclude that, in the circumstances of this case, and especially in the legislative and regulatory context applying to the transfer of inmates, the warden failed to respect any principle of natural justice whatsoever by refusing to grant the full extension requested by the applicant.

[35] As for the raising of the applicant's security classification, the Act does not afford him an opportunity to submit preliminary representations. Rather, it provides him with an *ex post facto* remedy in the form of a grievance, a remedy the applicant exercised.

[36] Consequently, the applicant failed to establish that the decision to refuse to grant him the maximum extension allowed under the Regulations was made in violation of his right to procedural fairness or that any other principle of natural justice was violated.

B. *Did CSC err in dismissing the applicant's grievances?*

(1) Raising of public safety rating

[37] The applicant argues that CSC's decision to raise his public safety rating to "moderate" is unreasonable because the psychological report leading to the review notes that the risk of sexual recidivism during escorted temporary absences is low. He adds that the risk would be even lower if he remained incarcerated in a minimum security institution.

[38] To begin with, it is important to note that an inmate's security classification must be reviewed before any transfer or potential escorted or unescorted temporary absence.

[39] The evidence reviewed by CSC in its assessment of the public safety risk includes the assessment for decision and a psychological assessment, which noted the following:

- The applicant has done many treatment programs and follow-ups.
- However, the diagnostic impressions indicate that, as in 2013, the applicant's therapeutic progress has stagnated.
- He refuses to discuss the issues related to his criminal behaviour.
- He tends to intellectualize what he says and to use terms he learned in the programs he has followed.
- He has made little progress with respect to the dynamic factors that contributed to his violent behaviour.

[40] These are relevant factors, as described in Annex B to Directive 710-6; in addition, there is his known history of violence, the nature and gravity of the offence for which he is serving his sentence, and his motivation to participate in his correctional plan and his progress in that respect.

[41] The applicant's case management team found that the applicant had made little progress and that a minimum security institution does not provide the type of sustained and personalized psychological intervention he needs. It also found that he would have a moderate risk of re-offending if he were released and a high one if he escaped.

[42] Commissioner's Directive 705-7, *Security Classification and Penitentiary Placement*, and Directive 710-6 stipulate that a moderate rating should be assigned when

- the inmate's criminal history involves violence, but the inmate has demonstrated some progress in addressing those dynamic factors which contributed to the violent behaviour;
- the inmate's criminal history involves violence but the inmate has demonstrated a willingness to address the dynamic factors which contributed to the violent behaviour; or
- there are current indicator(s) of moderate risk/concern.

[43] By comparison, a low risk rating should be assigned when the inmate's criminal history

- does not involve violence;
- involves violence/sexually-related offence(s), but the inmate has demonstrated significant progress in addressing the dynamic factors which contributed to the criminal behaviour and there are no signs of the high risk situations/offence precursors identified as part of the offence cycle; or
- involves violence, but the circumstances of the offence are such that the likelihood of reoffending violently is assessed as improbable.

[44] The applicant has a history of serious violent crime, namely a second-degree murder of a sexual nature. He has made some progress with respect to the dynamic factors that contributed to his violent behaviour, and he also seems to have expressed a willingness to turn himself around and to reduce the dynamic factors that contributed to his behaviour. However, his psychologist and his criminologist both found that he still has moderate rehabilitation issues that cannot be properly treated in a minimum security institution.

[45] To be given a low public safety rating, the applicant would have had to demonstrate "significant progress in addressing the dynamic factors which contributed to the criminal behaviour" and "no signs of . . . offence precursors". He failed to do so.

[46] The applicant therefore has not satisfied me that CSC's decision to give him a low public safety rating is unreasonable or that CSC's reasons do not make sense.

(2) Escape risk and remedy

[47] As noted previously, the Commissioner allowed the applicant's grievance regarding the review of his escape risk. As a remedy, he ordered the warden to draft and include in the applicant's file a memorandum in which the applicant's escape risk was to be reviewed in compliance with Annex B to Directive 710-6.

[48] The applicant submits that the memorandum dated January 18, 2019, is contrary to the principles set out in that directive and in *Mission Institution v Khela*, [2014] 1 SCR 502, where the Supreme Court stated as follows:

> [74] As things stand, a decision will be unreasonable, and therefore unlawful, if an inmate's liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion, although I do not foreclose the possibility that it may also be unreasonable on other grounds. Deference will be shown to a determination that evidence is reliable, but the authorities will nonetheless have to explain that determination.

[49] The applicant submits that the evidence used by the warden to reset his escape risk rating to moderate does not support her conclusion, and that her reasons again merely relied on

assumptions. He argues that he has no history of escaping and shows no signs suggesting that he might attempt to escape or that he became disorganized when segregated.

[50] The factors to be considered when reviewing an inmate's escape risk are mainly linked to the inmate's history of escape or attempted escape, even though decision-makers may also consider

- the length of the sentence and time remaining before eligibility for unescorted temporary absences; and
- any other concern or unusual circumstances having the potential to increase the escape risk.

[51] Directive 710-6 stipulates that on the basis of these factors and any other relevant consideration, a moderate escape risk rating is assigned when the inmate

- has a recent history of escape and/or attempted escapes OR there are current indicator(s) of escape potential;
- is unlikely to make active efforts to escape but may do so if the opportunity presents itself; or
- presents a definite potential to escape from an institution that has no enclosure.

[52] In its decision allowing the applicant's grievance in part, CSC writes as follows:

> [TRANSLATION]
> . . . [T]he explanation given to justify the raising of your escape risk rating does not satisfy the requirements established in Annex B to CD 710-6. Your [case management team] relied on assumptions to justify the increase even though there was no such history in your file. Even though the "unusual circumstances" factor should be considered when reviewing the escape risk, this factor alone is insufficient to assess the risk as being moderate. For this reason, this part of your grievance is allowed.

[53] It should be noted that when the January 18, 2019, memorandum was drafted, the circumstances in which the applicant found himself were no different from the ones of the previous analysis of his escape risk rating. Despite this, the warden made the same error as the one noted by CSC and based her decision solely on the time to be served before being eligible for absences and what she described as unusual circumstances.

[54] She therefore repeated the error identified by the CSC Commissioner and which the memorandum was to correct. CSC's final decision on the applicant's grievance is tainted by this memorandum. The memorandum therefore makes the decision unreasonable and justifies the Court's intervention with respect to the escape risk rating alone.

[55] To be clear, I believe that even in changing the escape risk rating to low, the decision of the CSC Commissioner to give the applicant an overall security classification of "medium" and to confirm his transfer to a medium security institution remains reasonable in the circumstances.

VII. Conclusion

[56] The warden's decision to refuse to grant a 10-day extension to the applicant is reasonable and consistent with Guidelines 710-2-3 on the transfer of inmates. The applicant had four days in fact during which he had an opportunity to consult his lawyer, who was able to submit representations to the CSC Commissioner dealing with the applicant's grievance.

[57] CSC’s decision regarding the applicant’s transfer and the assessment of his public safety risk rating as moderate is also reasonable and should be upheld. The same is true of the decision confirming the applicant’s transfer to a medium security institution.

[58] However, the decision maintaining his escape risk rating as moderate is unreasonable and should be set aside. The matter will be referred back to CSC for a new review of the applicant’s escape risk rating in compliance with Directive CD 710-6.

[59] In light of the mixed outcome, no costs will be awarded.

JUDGMENT in T-275-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed in part.
2. The Correctional Service of Canada's decision to maintain the escape risk rating as moderate is set aside, and the matter is referred back to the Correctional Service of Canada for a new review of the applicant's escape risk rating in compliance with Commissioner's Directive CD 710-6, *Review of Inmate Security Classification*.
3. The rest of the Correctional Service of Canada's decision is upheld.
4. No costs are awarded.

"Jocelyne Gagné"
Associate Chief Justice

Certified true translation
This15th day of April 2020.

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Nadia Golmier	FOR THE APPLICANT
Virginie Harvey Amélia Couture	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nadia Golmier Laval, QC	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT