

Federal Court



Cour fédérale

Date: 20230725

Docket: T-2106-22

Citation: 2023 FC 1014

Ottawa, Ontario, July 25, 2023

PRESENT: Madam Justice Walker

BETWEEN:

SAEED RANA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Saeed Rana, the Applicant, requests the Court's review of an oral decision of the Independent Chairperson (ICP) of Kent Institution. At the conclusion of a disciplinary hearing on August 30, 2022, the ICP found Mr. Rana guilty of the offence of possession of contraband in contravention of paragraph 40(i) of the *Corrections and Conditional Release Act*, SC 1992, c 20 (*CCRA*) and imposed a fine of \$45.

[2] Mr. Rana was an inmate at Kent Institution and was the sole occupant of his cell at the relevant time. The contraband in question were a cell phone and two charging cables that were found hidden in Mr. Rana's cell during a routine enhanced search on May 26, 2022. The investigating officer (Officer) laid the charge on June 3, 2022.

I. Disciplinary hearing

[3] Mr. Rana's disciplinary hearing took place on August 30, 2022, during which the ICP heard testimony from the Officer and submissions from Mr. Rana's advocate. The advocate declined to call Mr. Rana to give evidence.

[4] The Officer's evidence was:

- During a routine enhanced search of cells in Bravo unit on May 26, 2022, the Officer and their colleague noticed that the security screws on the suicide prevention hooks in Mr. Rana's cell looked like they had been tampered with. The officers used a security screwdriver to remove the fixture, behind which they located one small cell phone and two phone chargers.
- The Officer did not recall whether the items found had debris or dust on them or were clean, nor did the Officer know how long the items had been behind the wall.
- The Officer stated that Mr. Rana had been living in the cell for quite some time, "I would say over a year".
- The Officer did not recall whether there had been a prior routine enhanced search of Mr. Rana's cell but stated that it had been subject to other routine searches, as well as "Intel-based searches".
- The alterations on the security screws were plain and obvious and attracted the officers' attention fairly quickly when they entered the cell.
- When asked by the ICP, the Officer recalled that, during prior searches, officers had "found quite a bit in Mr. Rana's cell". The Officer had been involved in those searches.

- The Officer stated that officers at Kent Institution had observed a number of instances during the preceding 6 months to a year of the use by inmates of the suicide prevention hooks in their cells as concealment tools. The Officer had personally been involved in finding “probably 6 to 12 phones as well as vast quantities of drugs” behind security hooks.
- The Officer added that Mr. Rana had been found to be in possession of cell phones and drugs in the past.

[5] Mr. Rana’s advocate asked the Officer whether there had been an initial inspection of Mr. Rana’s cell when he moved in and whether any such inspection had been documented. The Officer could not speak to the question.

[6] The advocate submitted that, in order for Mr. Rana to be found guilty of the offence, the Institution has to establish that he had knowledge and control of the cell phone and chargers discovered in his cell. The advocate argued that it could not be established definitively that Mr. Rana had knowledge and control of the items because (1) there was no evidence that he had any tool that would have enabled him to remove the security hooks and conceal the items; and (2) there had been no search of his cell prior to his moving in. Therefore, there was no clear evidence as to whether the contraband was not already stored in the cell before Mr. Rana became the occupant.

II. Decision under review

[7] The ICP gave two principal reasons for their finding of guilt:

[8] Possession of a tool that would have enabled Mr. Rana to tamper with the security hooks:

The ICP first observed that there was a great deal of contraband and exchange of items between

inmates and that, if Mr. Rana had been held in his cell for a substantial period of time, the ICP would entertain dismissing the charge based on the absence of a tool. However, there was no evidence that Mr. Rana had been held in the cell for such a period of time with the result that a specialized tool could have been removed at any time.

[9] Whether Mr. Rana had care, knowledge and control of the contraband: The ICP found that the Officer's evidence clearly and unequivocally established that the space behind the suicide hooks was a popular place to conceal items. The ICP also referred to the Officer's success rate in locating similar contraband items in the past. The ICP then concluded that the cell phone and chargers were in Mr. Rana's cell and that he had care and control of the two items. Finally, the ICP noted the Officer's remarks on the apparent tampering and lack of caulking around the screws that led to her immediate review of the suicide hooks and removal of the contraband.

[10] Accordingly, the ICP was satisfied beyond a reasonable doubt that Mr. Rana had care, control and knowledge of the contraband found in his cell behind the suicide hooks. Following a review of Mr. Rana's history of prior convictions, his current pay level and release date, the ICP imposed a fine of \$45.

III. Admissibility of part of Mr. Rana's affidavit

[11] The Respondent submits that the Court should disregard the following underlined portion of the Applicant's affidavit because the information was not before the ICP:

At the hearing, the Independent Chairperson [ICP] relied on an allegation of possession of contraband, made by Kent Institution,

from approximately two years previously. I was not provided copies of these materials in advance.

[12] The general rule on judicial review is that the Court will not consider evidence that was not before the decision maker, subject to certain exceptions (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20). While I agree with the Respondent that the underlined information should not be considered in my assessment of whether the decision is reasonable, I will consider the information solely to the extent it highlights an alleged defect in the fairness of the disciplinary process.

IV. Analysis

A. *Was Mr. Rana denied procedural fairness?*

[13] Mr. Rana submits that he was denied procedural fairness through the disclosure process and disciplinary hearing. He states that the ICP unfairly admitted and relied on evidence from the Officer that referenced prior allegations against him related to possession of contraband. Mr. Rana refers to subsection 27(1) of the *CCRA* which requires an ICP to give an offender all information to be considered in the making of a disciplinary decision a reasonable period before the decision is to be taken. As the information regarding the prior allegations was not provided to him in advance of the hearing, Mr. Rana argues that the ICP breached his right to procedural fairness.

[14] In reviewing matters of procedural fairness, a reviewing court must ask “whether the procedure was fair having regard to all of the circumstances” (*Canadian Pacific Railway*

Company v Canada (Attorney General), 2018 FCA 69 at para 54 (*Canadian Pacific*)). The ultimate question for the Court in this application is whether Mr. Rana knew the case he had to meet and had a full and fair opportunity to respond to the charge (*Canadian Pacific* at para 56).

[15] Mr. Rana's argument of procedural fairness is not persuasive for two reasons. First, Mr. Rana was represented at the disciplinary hearing by an advocate from Prisoners' Legal Services, a project of the West Coast Prison Justice Society. The advocate made no objection at the hearing to the Officer's evidence or to the references to his institutional history. I agree with the Respondent that the failure to make any allegation of procedural unfairness at the first opportunity is fatal to Mr. Rana's allegation in this proceeding (*Bulatci v Canada (Attorney General)*, 2019 FC 1647 at para 19 (*Bulatci*), citing *Bouchard v Canada (Attorney General)*, 2018 FC 512 at para 11).

[16] Second, Mr. Rana's assertion that the ICP relied on the Officer's testimony regarding the contraband found in his possession during prior cell searches mischaracterizes the decision. The ICP made no reference to this portion of the Officer's testimony in finding Mr. Rana guilty of possession of contraband in this proceeding. Mr. Rana's submission that the ICP's reference to the Officer's prior successes may be interpreted to refer to contraband found in Mr. Rana's cell is speculative. In my view, the ICP only referred to Mr. Rana's institutional history in the sanction phase of their decision and did not act unfairly in so doing. Paragraph 34(c) of the *Corrections and Conditional Release Regulations*, SOR/92-520, requires the ICP to consider "all relevant aggravating and mitigating circumstances, including the inmate's behaviour in the penitentiary" in determining sanction.

[17] The disciplinary process is flexible in terms of the presentation of evidence. An ICP must balance: (a) the need for “fast and efficient” disciplinary proceedings in order to ensure “order and discipline” in the correctional system; and (b) the requirement that the ICP act fairly in its proceedings, conforming to legislative and regulatory requirements (*Perron v Canada (Attorney General)*, 2020 FC 741 at paras 57-58). In the present case, I find that Mr. Rana knew the case against him and had a full and fair opportunity to respond to the charge at the hearing (*Nome v Canada (Attorney General)*, 2021 FC 1264 at para 57). Mr. Rana has not established a breach of his right to procedural fairness.

B. *Is the ICP’s decision reasonable?*

[18] The standard of review of an ICP’s decision finding an inmate guilty of a disciplinary offence is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 25 (*Vavilov*); *Bibeau v Canada (Attorney General)*, 2022 FC 1748 at para 3 (*Bibeau*)). Mr. Rana bears the burden of demonstrating that the ICP’s decision is not reasonable. To so do, he must identify one or more serious shortcomings in the decision such that it is not rational, logical and justified under the relevant law and facts (*Vavilov* at paras 102, 105).

[19] The legislative and jurisprudential framework applicable to the ICP’s determination of Mr. Rana’s guilt in respect of a disciplinary charge under paragraph 40(i) are well-established. Subsection 43(3) of the *CCRA* requires that the ICP must be satisfied beyond a reasonable doubt “based on the evidence presented at the hearing”, that Mr. Rana had knowledge and control of the cell phone and chargers found behind the security hooks in his cell (*Bulatci* at para 21, citing *Williams v Canada (Attorney General)*, 2006 FC 153 at para 10). The onus is on the institution to

prove Mr. Rana's guilt beyond a reasonable doubt (*Cliff v Canada (Attorney General)*, 2022 FC 930 at para 7 (*Cliff*)).

[20] Knowledge may be inferred from surrounding facts because an admission of actual knowledge is rare but the ICP must nonetheless be satisfied that the evidence supports an inference that Mr. Rana had knowledge of the contraband (*Bibeau* at paras 9, 16). Further, it must be the only reasonable inference that can be drawn from the evidence (*Bulatci* at paras 24-25).

[21] Mr. Rana submits that the ICP erred in convicting when guilt was not the only reasonable inference from the evidence and there was no evidence establishing his knowledge of the contraband. Mr. Rana argues that the ICP (a) incorrectly placed the onus on him to disprove the charge, specifically the possibility that he had a tool that could have been used to remove the suicide hooks, and (b) unreasonably relied on the Officer's anecdotal evidence that other inmates used suicide hooks to hide contraband. Mr. Rana emphasizes that there was no evidence before the ICP as to when his cell had last been subject to an enhanced search and no evidence that such a search was carried out before he became the occupant of the cell.

[22] As set out above, the ICP first rejected Mr. Rana's argument that there was no evidence he had possession of a tool, such as a specialized screwdriver, that permitted him to remove the cell phone and chargers from the cache behind the security hooks, "because that tool could have been removed at any time unless he had been secured in the cell for a substantial period of time prior to the search. And there's no evidence to support that".

[23] Second, the ICP addressed the requirement of knowledge, care and control of the contraband:

... I find that the officer's evidence very clearly and unequivocally establish[es] that this is been a very popular place to conceal items, as she just described in very copious detail how these items were located in the cell; their prior experience having located these types of items, whether it be drugs or contraband such as cell phone and cell phone chargers. She has somewhat of an interesting success rate with – I think she indicated upwards of about a dozen cell phones located.

I find that the officer's evidence is clear and unequivocal. I find is a matter of law that Mr. Rana did have care and control of this item. It was in his cell. He was the last person to have controlled it. ... The search ... in question is an enhanced search. This is what they go to, meaning they investigate these particular items being suicide hooks, ...

And finding that there appeared to be some tampering on the screws, and there was no caulking around it, this led to her immediate review and removal of these items.

[24] The Respondent submits that the ICP's decision is reasonable because the ICP understood and appreciated the Officer's evidence and the "degree of evidence cried for a response" from Mr. Rana. Both in their written submissions and at the hearing, the Respondent summarized the Officer's evidence and stated that the circumstantial evidence before the ICP led to only one reasonable inference, that of guilt.

[25] The difficulty with the Respondent's submissions and reliance on the Officer's evidence is that they do not reflect the substance of the ICP's decision.

[26] The ICP does not, in their decision, summarize the evidence of the Officer. The ICP does not refer to the fact that Mr. Rana had been the sole occupant of the cell for a substantial period

of time, that there had likely been other searches of his cell during his residence, or that this was the first time any tampering had been noted. Similarly, the ICP does not refer to the fact that the Officer characterized the tampering as plain and obvious.

[27] The ICP does not explain why the only inference that can be drawn from the evidence is Mr. Rana's guilt. There is no reference in the decision to the impact, if any, of the failure by the Institution to provide evidence of a search of Mr. Rana's cell at or immediately before he became its sole occupant. Therefore, there is no clear baseline as to the state of the cell and whether the contraband could have been hidden in the cell by a prior inmate. It may be that the intervening searches would have discovered any contraband but the Officer's evidence is not definitive and the ICP made no reference to the advocate's argument in this regard. The ICP states only that the cellphone and chargers were in Mr. Rana's cell and he was the last person who had control of them. Despite the Respondent's suggestion to the contrary, Mr. Rana was under no obligation to give evidence in his defence.

[28] The ICP appears to have placed some reliance on the Officer's prior success rate in discovering contraband but the Officer's successes in other searches are irrelevant to Mr. Rana's case. The fact that the ICP characterized the Officer's evidence as clear and unequivocal does not establish the underlying facts on which the only reasonable inference is that Mr. Rana knew about the cell phone and chargers behind the suicide hooks and had care and control of them.

[29] In summary, I find that the ICP's decision does not respond to the framework for a reasonable decision set out by the Supreme Court of Canada in *Vavilov*. It is conclusory in

nature, other than in referencing the evidence of some tampering and a lack of caulking around the hooks. The ICP does not explain the evidence or the chain of reasoning that led to the inference and conclusion that Mr. Rana had care, control and knowledge of the contraband found behind the suicide hooks in his cell (*Cliff* at para 17). Mr. Rana is left to speculate as to the elements of the Officer's evidence that led to his conviction. Although the Respondent describes the evidence from which, in its view, an inference of guilt could reasonably have been drawn, the ICP does not do so. It is not the Court's role to supplement the reasons given by the ICP for their decision (*Sharif v Canada (Attorney General)*, 2018 FCA 205 at paras 24, 27).

V. Conclusion

[30] For the reasons outlined above, I find that the ICP's Decision was not reasonable and, therefore, will allow Mr. Rana's application for judicial review and quash the ICP's oral decision of August 30, 2022. The matter is remitted to determine the question of Mr. Rana's guilt beyond a reasonable doubt on the record as already constituted.

[31] Costs will be awarded to Mr. Rana as the successful party. At the hearing, Mr. Rana requested costs in the amount of \$1,000.00 and the Respondent indicated that they do not oppose the request. I find the amount requested reasonable and will order the Respondent to pay \$1,000.00 in costs to Mr. Rana.

JUDGMENT IN T-2106-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The decision of the Independent Chairperson of Kent Institution is quashed and the matter remitted for determination on the record as already constituted.
3. The Respondent shall pay to Mr. Rana as costs the sum of \$1,000.00.

"Elizabeth Walker"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2106-22

STYLE OF CAUSE: SAEED RANA v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: HEARD BY VIDEOCONFERENCE

DATE OF HEARING: JULY 13, 2023

JUDGMENT AND REASONS: WALKER J.

DATED: JULY 25, 2023

APPEARANCES:

Melanie Begalka FOR THE APPLICANT

Kathleen Pinno FOR THE RESPONDENT

SOLICITORS OF RECORD:

Pender Litigation FOR THE APPLICANT
Barristers and Solicitors
Vancouver, British Columbia

Attorney General of Canada FOR THE RESPONDENT
Vancouver, British Columbia