Federal Court  Cour fédérale

Date: 20110721

Docket: T-432-09

Citation: 2011 FC 914

Ottawa, Ontario, July 21, 2011

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

SIMON KWOK CHEUNG CHOW

Applicant

and

ATTORNEY GENERAL FOR CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Senior Deputy Commissioner (SDC) of Correctional Service Canada (CSC), dated January 23, 2009, wherein the SDC denied a third-level grievance filed by the applicant in relation to a decision to involuntarily transfer the applicant's incarceration from Kent Institution to Edmonton Institution.

I. Background

[2] The applicant, born July 27, 1964, is currently serving a life sentence for first degree murder.

[3] In January of 2008, he was transferred from Matsqui Institution in Abbotsford, British Columbia to Kent Institution in Agassiz, British Columbia. Upon arriving at Kent Institution, the applicant was placed in administrative segregation on account of the fact that three inmates at the institution had been identified as being “incompatible” with him.

[4] In March of 2008, the applicant grieved a decision by the Segregation Review Board to continue his segregation. He argued that he should be informed as to the identity of the incompatible inmates so that he could attempt to reconcile with them.

[5] On April 15, 2008, an Assessment for Decision was completed by the applicant’s parole officer recommending that the applicant be transferred from Kent Institution to Edmonton Institution so that a “safe environment” could be provided for him. The officer indicated that both the Security Intelligence Department and the applicant’s Case Management Team had agreed that the applicant could not be moved into the open population at Kent Institution because of issues with incompatibles that could not be resolved. The parole officer further pointed out that although the applicant would deny it, he was nonetheless deemed to be a high ranking member of the “Big Circle Boys” gang.

[6] A Notice of Involuntary Transfer Recommendation was provided to the applicant on April 21, 2008. The notice explained that because the applicant's incompatibility issues could not be mediated, if the applicant stayed at Kent Institution he would need to remain in segregation for the long term. The notice went on to provide that since CSC was mandated to alleviate the applicant's placement in segregation as soon as possible, authorities were recommending an involuntary inter-regional transfer to Edmonton Institution, the next closest maximum security facility.

[7] On July 25, 2008, the applicant was provided with an opportunity to make written and oral rebuttal submissions. In his written submissions the applicant argued that, despite his many requests, he had not been provided with the identity of the inmates who were considered to be incompatible with him at Kent Institution. The applicant pointed out that a petition of all inmates in unit one at the institution revealed that no one there viewed him as being incompatible. In his oral submissions, the applicant argued that a transfer to Edmonton Institution would not be in his best interests as it would take him far away from his family, including his children. It would also be unsafe, he submitted, as he would not be "known" to the inmate population at Edmonton Institution and, as such, would be more vulnerable.

[8] In a note to file dated July 25, 2008, officials at Kent Institution indicated that the applicant's submissions reinforced their "beliefs that his gang associations are an inherent part of his incompatibility issues at Kent Institution." Officials viewed his reference to the petition as suspicious.

[9] By letter dated August 27, 2008, the applicant wrote to CSC officials informing them that he had determined, through various sources, which three inmates at Kent Institution were supposedly incompatible with him. He named three inmates and pointed out that a letter had been provided by one of them indicating that there was no issue as to incompatibility, and that the other two inmates were in the process of providing similar statements.

[10] On October 1, 2008, and on approval of the Prairie Region Transfer Board, officials in CSC's Reintegration & Programs group rendered a final decision approving the applicant's involuntary transfer from Kent Institution to Edmonton Institution in order "to provide a safe environment" for the applicant.

[11] On October 20, 2008, the applicant filled out a third level grievance form, appealing the October 1 decision. The applicant argued that he had not been provided with sufficient information and, as such, had been denied the ability to prepare an adequate response. In particular, the applicant argued that although he had asked multiple times, he was never provided with any detail as to the nature or identity of his incompatibles. The applicant also argued that CSC officials had failed in their obligation to attempt a mediated resolution of the supposed differences between him and the allegedly incompatible inmates.

[12] On December 4, 2008, the applicant was transferred to Edmonton Institution where he currently resides.

II. The decision under review

[13] By way of an Offender Grievance Response form, dated January 23, 2009, the SDC denied the applicant's third level grievance.

[14] The SDC commended the applicant for attempting to pursue a means of alternative dispute resolution, but indicated that it was CSC policy not to provide the names of incompatibles. He explained that in the interest of maintaining an inmate's privacy, certain information may appropriately be withheld. The SDC emphasized that the applicant had nonetheless been provided with sufficient detail to meaningfully respond to the proposed transfer and had, in fact, done so.

[15] The SDC pointed out that pursuing an inter-regional transfer was an appropriate means of alleviating the applicant's segregated status.

[16] Finally, the SDC noted that although the applicant had claimed he was no longer involved in gang-related activity, that claim had been contradicted in his transfer documentation.

III. Issues

[17] The issues arising for consideration on this application are:

a) Is the applicant entitled to rely on evidence that was not before the SDC?

b) What is the appropriate standard of review?

c) Did the SDC breach the applicant's right to procedural fairness?

d) Did the SDC err in his decision to deny the applicant's grievance?

IV. Analysis

a) Is the applicant entitled to rely on evidence that was not before the SDC?

[18] Counsel for the respondent takes issue with the applicant's reliance on a number of documents which she argues were not before the SDC. The majority of the documents at issue were attached as exhibits to the applicant's affidavit, sworn February 18, 2010, they are:

- Exhibits A, B, C, D: four email messages between CSC officials.
- Exhibit E: an inmate request form completed by the applicant in April 2008.
- Exhibit F: a letter from an inmate dated November 22, 2008.
- Exhibits G, H, I: correspondence between the applicant and an investigator with the Department of the Correctional Investigator of Canada.

[19] Generally speaking, on judicial review, a reviewing court will make its decision based on the material that was before the decision-maker. That is because the purpose of judicial review is to determine whether the decision-maker or tribunal committed a reviewable error in the way it dealt with the case before it. Additional evidence will only be relevant in this regard if it relates to an alleged breach of procedural fairness or an alleged error of jurisdiction (*Ontario Assn of Architects v Assn of Architectural Technologists of Ontario*, 2002 FCA 218 at para 30, [2003] 1 FC 331; *Nametco Holdings Ltd v. Canada (Minister of National Revenue)*, 2002 FCA 149 at para 2, 113 ACWS (3d) 927).

[20] The evidence in question does not appear in the certified record provided by CSC in January of 2010 and, as such, was not before the SDC when he rendered his decision. In this regard, it should be noted that the applicant does not take issue with the completeness of the certified record. Although the applicant does raise an issue of procedural fairness – namely, whether the SDC failed to provide the applicant with sufficient information – upon reviewing the evidence in question, I do not see that any of it is relevant to this issue. Given that none of the evidence in question is relevant to an issue of jurisdiction or procedure, and given that none it was before the SDC when he rendered his decision, I find that the additional evidence provided by the applicant is not relevant for the purposes of this judicial review and, as such, will not be considered any further.

b) What is the appropriate standard of review?

[21] When reviewing an inmate grievance decision, a standard of correctness will be applied to questions of law and procedural fairness (*McDougall v Canada (Attorney General)*, 2011 FCA 184 at para 24 [*McDougall*]; *Sweet v Canada (Attorney General)*, 2005 FCA 51 at paras 15-16, 332 NR 87). As such, with respect to the first main issue, whether the SDC breached the applicant's right to procedural fairness, the Court will review the decision using the non-deferential correctness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, [2008] 1 SCR 190 [*Dunsmuir*]).

[22] The remaining issue, being a question of mixed fact and law, will be reviewed against the reasonableness standard (*McDougall*, above at para 24). With regards to this issue, the Court will consider the existence of justification, transparency and intelligibility within the decision-making

process, as well as whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above at para 47).

c) Did the SDC breach the applicant's right to procedural fairness?

[23] The applicant's primary argument with respect to procedural fairness is that the SDC failed to provide sufficient information regarding the decision to transfer him to Edmonton Institution. As a result of this failure, the applicant submits that he was unable to properly prepare and file a grievance of the transfer decision.

[24] In particular, the applicant complains that he was not provided with the names of his alleged incompatibles and, as such, was unable to disprove or address CSC's safety concerns in this regard. The applicant argues that subsection 27(1) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*] required that the SDC provide him with "all the information to be considered in the taking of the decision" on the third level grievance. He submits that the SDC failed to meet this obligation.

[25] Indeed, the Supreme Court of Canada indicated, in *May v Ferndale Institution*, 2005 SCC 82 at para 95, [2005] 3 SCR 809, that subsection 27(1) of the *CCRA* "imposes an onerous disclosure obligation on CSC." Subsection 27(1) instructs that where an offender is entitled to make representations, the offender will be provided with all the information to be considered in the taking of the decision or a summary of that information:

Information to be given to offenders	Communication de renseignements au délinquant

27. (1) Where an offender is entitled by this Part or the regulations to make representations in relation to a decision to be taken by the Service about the offender, the person or body that is to take the decision shall, subject to subsection (3), give the offender, a reasonable period before the decision is to be taken, all the information to be considered in the taking of the decision or a summary of that information.	**27**. (1) Sous réserve du paragraphe (3), la personne ou l'organisme chargé de rendre, au nom du Service, une décision au sujet d'un délinquant doit, lorsque celui-ci a le droit en vertu de la présente partie ou des règlements de présenter des observations, lui communiquer, dans un délai raisonnable avant la prise de décision, tous les renseignements entrant en ligne de compte dans celle-ci, ou un sommaire de ceux-ci.

[26] However, subsection 27(1) is specifically made subject to subsection 27(3) which sets out exceptions. Subsection 27(3) indicates that, except in relation to decisions on disciplinary offences, where there are reasonable grounds to believe that disclosure of information would jeopardize the safety of any person, the security of a penitentiary, or the conduct of an investigation, the Commissioner may authorize withholding as much information as is strictly necessary to protect the jeopardized interest:

Exceptions	Exception
27. (3) Except in relation to decisions on disciplinary offences, where the Commissioner has reasonable grounds to believe that disclosure of information under subsection (1) or (2) would jeopardize	**27.** (3) Sauf dans le cas des infractions disciplinaires, le commissaire peut autoriser, dans la mesure jugée strictement nécessaire toutefois, le refus de communiquer des renseignements au délinquant s'il a des motifs raisonnables de croire que cette communication mettrait en
(*a*) the safety of any person,	danger la sécurité d'une personne ou du pénitencier ou
(*b*) the security of a penitentiary, or	

(*c*) the conduct of any lawful investigation, the Commissioner may authorize the withholding from the offender of as much information as is strictly necessary in order to protect the interest identified in paragraph (*a*), (*b*) or (*c*).	compromettrait la tenue d'une enquête licite.

[27] The SDC justified non-disclosure of the applicant's incompatibles by indicating that it was CSC policy that the names of incompatibles not be shared. The SDC explained that, "under particular circumstances, such as in the interest of maintaining the privacy of another individual, specific information may be withheld."

[28] I agree with the SDC that, in the circumstances of this case, he was not required to disclose the identities of the applicant's incompatibles. Paragraphs 27(3)(*a*) and 27(3)(*b*) of the *CCRA* allow for non-disclosure of details that would jeopardize the safety of any persons, or the security of a penitentiary. It is not difficult to envision a scenario whereby the safety of the incompatible inmates, or even the security of the penitentiary more generally, would be jeopardized by the disclosure of this type of identity information. This is especially the case when, as here, officials are dealing with an inmate who is believed to be a high-ranking gang member whose "gang associations are an inherent part of his incompatibility issues".

[29] It must also be kept in mind that decisions made for the sake of the proper administration of an institution do not require the same degree of disclosure as decisions of a disciplinary nature (*Blass v Canada (Attorney General)*, 2002 FCA 220 at para 20, 306 NR 182). Justice Louis

Marceau in *Gallant v Canada (Deputy Commissioner, Correctional Service Canada)*, [1989] 3 FC 329 at para 28, 92 NR 292 (FCA) explained the rationale behind this distinction:

> …it is wrong to put on the same level all administrative decisions involving inmates in penitentiaries... Not only do these various decisions differ as to the individual's rights, privileges or interests they may affect, which may lead to different standards of procedural safeguards; they also differ, and even more significantly, as to their purposes and justifications, something which cannot but influence the content of the information that the individual needs to be provided with, in order to render his participation, in the making of the decision, wholly meaningful. In the case of a decision aimed at imposing a sanction or a punishment for the commission of an offence, fairness dictates that the person charged be given all available particulars of the offence. Not so in the case of a decision to transfer made for the sake of the orderly and proper administration of the institution…

[30] The decision to transfer the applicant to Edmonton Institution was made after it was determined that releasing him into the open prison population at Kent Institution would pose a risk to his safety. The objectives motivating the decision were, thus, two-fold: 1) to facilitate the applicant's release from segregation, and 2) to ensure the applicant's safety. This type of a decision does not require the same degree of disclosure as would a decision of a disciplinary nature.

[31] Ultimately, the central question which must be determined is whether the applicant was provided with sufficient information in order for him to be able to participate meaningfully in the process of determining whether he should be transferred and to oppose it (*Canada (Attorney General) v Boucher*, 2005 FCA 77 at para 28, 347 NR 88). The applicant was provided with the Notice of Involuntary Transfer Recommendation as well as the Assessment for Decision, both of which set out a summary of the reasons behind the transfer decision. The applicant was informed that he had three incompatibles in Kent Institution's open population, that the Security Intelligence

Department and his Case Management Team were of the opinion that the incompatible issues could not be mediated, that he could not remain in segregation long-term as it would hamper his successful reintegration and participation in his correctional plan, and that a transfer was the only option available to enable release from segregation.

[32] I am of the opinion that the information disclosed to the applicant was sufficient to enable him to meaningfully participate in the process of determining whether he should be transferred. The applicant was able to make submissions relating to: possible alternatives to transfer, his willingness to mediate, potential safety concerns related to Edmonton Institution, and his concerns about being moved away from his family. So although the disclosure may have stopped short of revealing the identities of the applicant's incompatibles, I am nonetheless satisfied that the SDC satisfied the obligations of procedural fairness in this regard.

[33] The applicant also argues that his procedural rights were breached because CSC failed to conduct a review of information in the 24-hour period prior to his being transferred.

[34] Paragraph 35 of Commissioner's Directive 710-2, "Transfer of Offenders" (CD 710-2) requires the Institutional Head of the sending institution to ensure, within 24 hours prior to effecting a transfer, that communication has occurred between the sending and receiving institutions to confirm that there is no new information regarding risk and needs that would impact on the viability of the transfer.

[35] The applicant argues that "there is no evidence in the Record of any such required communication having taken place". While it is true that nothing in the certified record demonstrates that the required communication between Kent Institution and Edmonton Institution took place, this does not mean that it did not occur. The certified record contains only the documents that were before the SDC when he rendered his decision. It is quite conceivable that a confirmation received on December 3, 2008, indicating that there was no new information impacting the applicant's transfer to Edmonton Institution, would not warrant inclusion in the certified record.

d) Did the SDC err in his decision to deny the applicant's grievance?

[36] The applicant argues that the decision to deny his third level grievance was unreasonable.

[37] The applicant submits that the SDC failed to consider certain evidence which demonstrated that he did not have incompatibles at Kent Institution. He argues that he had eventually identified the three inmates at Kent Institution who were supposed to be incompatible with him. He indicated in his communications to CSC officials in July and August of 2008 that none of the three individuals were, in fact, legitimate concerns. One of them was released from Kent Institution in June of 2008, and the other two had provided written confirmation that there was, in fact, no issue of incompatibility.

[38] However, nothing on the record corroborates that the three inmates named by the applicant were, in fact, the same three inmates identified by CSC as being incompatible. Given that it would

be inappropriate for CSC to provide the applicant with the identity of the incompatible inmates, it is not surprising that the SDC did not comment on the specific individuals named by the applicant.

[39] The record before the SDC was that the Security Intelligence Department and the applicant's Case Management Team was of the opinion that incompatibles did exist in the Kent Population. In fact, the record reveals that a Security Intelligence Officer confirmed in January of 2009 (just prior to the SDC's decision) that there was a problem with incompatibles and that the applicant "could not be managed in the general population of Unit 1". Although it is true that the record did contain reference to a petition signed by all inmates in unit one at Kent Institution, this reference was viewed by officials, as noted in a memo to the applicant's file, as being "suspicious".

[40] The applicant may have preferred the SDC to have given his submissions on the question of incompatibles more weight. However, given that the SDC was acting on information from multiple reliable sources, I cannot find that his conclusion that the applicant did, in fact, have incompatibles at Kent Institution, was outside the range of possible, acceptable outcomes defensible in respect of the facts and law. It was not unreasonable.

[41] Further, the applicant contends that the SDC failed to fully consider the negative impact that the involuntary transfer would have on him. The applicant submits that he has become alienated from his support system - his young children and his common law spouse – as they live too far away to be able to visit him in Edmonton.

[42] The SDC indicated that the applicant's submissions in this regard had been considered as part of the decision-making process in accordance with CD 710-2. In a memo to the applicant's file, dated July 25, 2008, a CSC official noted the applicant's concerns as follows:

> He also raised the issue of proximity to his family. He indicated that his elderly mother would not be able to make the journey to Edmonton and it would be difficult for his girlfriend to travel with his two young kids.

The official concluded, however, that since all available options to alleviate the applicant's long term segregation had been considered, transfer to Edmonton Institution was the best remaining option to meet the requirement of returning the applicant "to the general inmate population… at the earliest appropriate time" as set out in subsection 31(2) of the *CCRA*. This conclusion was subsequently endorsed by another CSC official in a memo to file dated September 18, 2008.

[43] The SDC's treatment of the applicant's concerns in this regard was admittedly brief. However, it is nonetheless clear that he was satisfied with the consideration that had been provided by the staff at Kent Institution and Regional Headquarters for the Prairies. I find that it was not unreasonable for the SDC to conclude, given the obligation to alleviate the applicant's segregated status, and given the incompatibilities at Kent Institution, that involuntary transfer to Edmonton Institution, the next closest maximum security facility, was warranted.

[44] For the foregoing reasons, this application for judicial review is dismissed.

JUDGMENT

THIS COURT ADJUDGES that the application for judicial review is dismissed.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-432-09
STYLE OF CAUSE:	SIMON KWOK CHEUNG CHOW v ATTORNEY GENERAL FOR CANADA
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	July 7, 2011
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