Federal Court  Cour fédérale

Date: 20121206

Docket: T-1418-11

Citation: 2012 FC 1440

Ottawa, Ontario, December 6, 2012

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

MICHAEL AARON SPIDEL

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Michael Aaron Spidel [the Applicant] brings this application for judicial review (the Application) pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. At issue is a third level grievance decision dated July 25, 2011 in which a delegate of the Commissioner of Correctional Services of Canada [the Commissioner and CSC] denied the Applicant's grievance. The Applicant is self-represented and appeared in person to present his submissions.

[2] Commissioner's Directive [CD] 566-1 *Control of Entry to and Exit from Institutions* is the CSC policy which establishes standards for controlling the removal of items from CSC institutions. The relevant provision of CD 566-1 states:

> 39. Visitors and volunteers shall normally not remove items from the institution during socials or group activities. If items are to be removed, prior authorization from the Institutional Head or their designate shall be given.

BACKGROUND

[3] On June 30, 2010, officials at CSC's Ferndale Institution [Ferndale] issued a Communiqué to inmates [the Policy] which stated in part:

> To ensure compliance with CD 566-1 *Control of Entry to and Exit from Institutions*, please be advised that effective immediately, inmate visitors are no longer permitted to enter Ferndale Institution except at the designated visiting or PFV [Private Family Visit] times. As well, no items are permitted to be brought in or taken out except when pre-authorized in writing by the Warden. This is not a change but enforcement of existing policy. [my emphasis]

[4] The Applicant was an inmate at Ferndale when the Policy was issued. However, on August 13, 2010 he was sent to the Mission Institution. Thereafter, he was transferred to Kwickwexwelhp Minimum-Security Healing Village [Kwickwexwelhp] in Harrison Mills, British Columbia. At the time of the hearing of the Application in July of 2012, the Applicant was out of custody on conditional release in the community.

[5] On July 16, 2010, while at Kwickwexwelhp, the Applicant submitted a grievance to which he attached letters and other materials alleging that the Policy had been applied so that it altered the existing practice at Ferndale of allowing inmates to send legal documents to their legal counsel or to

the courts through a community contact person [a Community Contact], such as a spouse. Those individuals would pick up the documents at Ferndale and then deliver or fax them to recipients outside the institution. After the Policy was issued, inmates were allegedly prohibited from conveying legal documents through a Community Contact. According to the Applicant the Policy meant, in practice, that inmates were required to use less convenient and/or higher cost methods of sending legal documents such as fax, courier and mail.

[6] The Applicant's grievance was denied at the first level by Warden Bill Thompson, on August 24, 2010 and on February 24, 2011, the second level grievance was denied by the Assistant Deputy Commissioner of Institutional Operations.

[7] The Applicant's grievance was also denied at the third level. That decision, which is the one presently under review, was issued on July 25, 2011, [the Decision] by Acting Senior Deputy Commissioner Ross Toller [the ASDC].

THE DECISION

[8] The ASDC reviewed the background to the Applicant's grievance and noted that CSC is obliged to provide inmates with reasonable access to legal counsel and the courts pursuant to paragraph 1 of Commissioner's Directive 084 *Inmates Access to Legal Assistance and the Police*. He stated that staff at Ferndale had been consulted and had confirmed that, in the past, Community Contacts had been allowed to enter the institution outside visiting hours to pick up packages left by inmates and that the Policy had been issued to address that issue.

[9] The ASDC went on to find that "[a]lthough your wife is no longer permitted to pick up documents to mail outside the institution, you are still given reasonable access to the Courts." He identified three different ways that inmates at Ferndale could send out legal documents to "privileged correspondents", who included judges of Canadian courts, the registrars of those courts, and legal counsel. Inmates could send these documents through the mail or by courier or, in exceptional circumstances, institutional staff would facilitate sending the documents by fax.

[10] It appears that the ASDC's conclusion that the Applicant's wife was no longer permitted to pick up documents at Ferndale was incorrect. The Policy does not prohibit the use of Community Contacts, it merely states that "no items are permitted to be brought in or taken out except when pre-authorized in writing by the Warden." In oral submissions, Respondent's counsel confirmed that wives were permitted to take legal documents out of Ferndale if authorized to do so by the Warden.

THE ISSUES

[11] The Respondent raised a preliminary issue:

1. Should the Application be dismissed because the issues raised by the Applicant are moot?

[12] The Applicant raised the following issues:

1. Was the Decision unreasonable?
2. Did the ASDC breach the Applicant's *Charter* rights by acting in a manner that was contrary to law?

DISCUSSION

Issue 1 Should the Application be dismissed because the issues raised by the Applicant are moot?

[13] The Respondent submits that the raison d'être for the Application has disappeared because the Policy only concerns inmates at Ferndale. Since the Applicant is no longer an inmate at Ferndale, the Respondent says that the outcome of this judicial review will have no practical effect on him and that the Application should therefore be dismissed.

[14] The Applicant made no written submissions on the issue of mootness. However, at the hearing he indicated that the issue was not moot because he could be reincarcerated at Ferndale. As well, he suggested that standing and not mootness was the important issue. However, neither party made any submissions dealing with standing.

DISCUSSION

[15] The following two-part test for mootness was established by the Supreme Court in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 42:

a) Has the "tangible and concrete" dispute between the parties disappeared?

b) Ought the Court to exercise its discretion to hear the matter in any event?

[16] It is clear that the central issue raised by the Applicant during the grievance process – the effect of the Policy on his access to legal services and the courts – no longer represents a tangible and concrete dispute between the parties. The Policy, which applies to and affects only visitors and

inmates at Ferndale, does not apply to or affect the Applicant because he is no longer incarcerated at that institution. Accordingly, the Application is moot.

[17] The next issue is whether I should nevertheless exercise my discretion to hear the matter.

[18] At the hearing of this Application, the Applicant identified the following litigation in which he and/or other inmates at Ferndale were involved when the Policy was announced:

i. Mr. Spidel was before the Federal Court because he had been denied permission to stand in an inmate election.

ii. Mr. Mapara and Mr. Spidel had applied to the British Columbia Supreme Court for a writ of *habeas corpus*. Mr. Mapara was responsible for handling that proceeding.

iii. Mr. McDougall had an application before the Federal Court challenging Correctional Services Canada's national visiting policy.

[19] Mr. Spidel's allegation is that this case raises an access to justice issue. He acknowledges that the Policy does not block inmates' access to the courts but says that it obstructs such access. However, for the reasons which follow, I have concluded that the evidence adduced is not sufficient to support this allegation.

[20] The only evidence of the application of the Policy is a request for a gate pass for legal documents made by Mr. Mapara on July 4th and stamped "received" on July 5, 2010. The Warden was away over the July 1st long weekend and the request was therefore considered by Tannis Kinney, the Assistant Warden.

[21] The request read:

> I would like to make arrangements for some legal documents to be picked up by my wife, who is my authorized legal agent for my court matters before the Supreme Court of BC. These documents are expected to be ready for pick up on or before the 12th of July 2010 for delivery to the courts no later than July 13, 2010. Thank you in advance.

[22] The reply read:

> Mr. Mapara,
> I am replying on behalf of the Warden who is currently away. As I discussed with Mr. Spidel at the meeting you were unable to attend, there is a process in place for sending out legal documents. Documents can be sent through the mail or by courier. In exceptional circumstances documents can also be faxed. Staff are aware of the legal timeframes with respect to court documents and will assist in expediting the Institutional Transfer of Funds process so that timely delivery occurs. Further to our conversation this date, I spoke with Ms. Sokhansarj [a lawyer with the Department of Justice] and she advised that she was unaware of any further filing which would be required upon receiving the respondent's affidavit. As for dates, that should be clarified with your lawyer.

[23] Unfortunately, there is no evidence about whether on his return the Warden gave his consent and allowed Mr. Mapara's wife to collect the documents. Further, there is no evidence about whether, and if so how and when, Mr. Mapara's documents reached the Court.

[24] It is also significant that the Applicant filed his grievance independently, rather than submitting a group grievance. Such a grievance might have shown that obstructive conduct was being experienced by other inmates at Ferndale. Neither Mr. Mapara nor Mr. McDougall joined the Applicant in this proceeding. Section 45 of CSC Commissioner's Directive 81 – *Group Complaints or Grievances* provides that:

> 45. Complaints or grievances may be submitted by a group of grievers with respect to one or more common problems. The submission must be signed by all grievers involved. One griever must be designated to receive the answer for the group.

[25] In the absence of a group grievance there is no reason to believe that the Policy is causing problems for inmates who are still at Ferndale.

[26] For all these reasons, and notwithstanding the Applicant's speculation that he might someday return to Ferndale, I have concluded that I should not exercise my discretion to decide the merits of the Application.

[27] In these circumstances it is unnecessary to address the issues raised by the Applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that this Application for judicial review is hereby dismissed.

"Sandra J. Simpson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1418-11
STYLE OF CAUSE:	Michael Aaron Spidel v. Canada (Attorney General)
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	July 5, 2012
REASONS FOR JUDGMENT:	SIMPSON J.
DATED:	December 6, 2012

APPEARANCES:

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Liliane Bantourakis Department of Justice	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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