Federal Court  Cour fédérale

Date: 20131024

Docket:T-82-13

Citation: 2013 FC 1071

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, October 24, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

SYLVAIN DUFRESNE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a repeat sexual offender who is under a long-term supervision order valid until February 15, 2020. During the period relevant to this case, he was subject to a six-month residency condition in a Community Correctional Centre (CCC). Because he had been seen in public with an individual who was smoking crack cocaine, his parole officer confined him to the CCC for the evening pending a disciplinary interview with the Parole Officer Supervisor (POS) the next morning.

[2] The applicant filed a complaint with Correctional Service Canada (Service), followed by first-, second- and third-level grievances, in which he alleged that he had been subjected to an unlawful detention in violation of paragraph 10(*a*) of the *Canadian Charter of Rights and Freedoms* (Charter) and Commissioner's Directive (CD) 580, *Discipline of Inmates*, because his officer had not informed him, within a reasonable period, of the reason for his confinement. At the third level, the applicant added a new ground for grievance: for the 18 hours of his confinement, he was not provided with any meals. The applicant submits that because CCCs do not provide food services, a policy should be established whereby offenders who are confined without authorization to sign out are entitled to an appropriate number of meals for the period of confinement.

[3] The applicant is seeking judicial review of the decision of the Senior Deputy Commissioner of the Service rejecting his third-level grievance. The Senior Deputy Commissioner found that the applicant's confinement was not a detention within the meaning of the Charter and that CD 580 did not apply to him because he was not a detainee within the meaning of the *Corrections and Conditional Release Act*, SC 1992, c 20 (Act), and the *Corrections and Conditional Release Regulations*, SOR/92-620 (Regulations). Finally, she refused to deal with any issue that had not been raised at the first level of grievance.

[4] Before this Court, the applicant reiterates that he was subjected to an unlawful detention, adding (i) that the principles of natural justice and procedural fairness had been violated in his case and (ii) that the Senior Deputy Commissioner should have addressed his grievance concerning the provision of meals in CCCs.

Issues and standard of review

[5] In his written and oral representations before this Court, the applicant raised a number of arguments that may be grouped as follows:

a. Was the applicant unlawfully detained?

b. Were the principles of natural justice and procedural fairness violated in the applicant's case?

c. Should the Senior Deputy Commissioner have dealt with the grievance concerning the provision of meals in CCCs?

[6] The parties did not take any position on what standard(s) of review should be applied to the impugned decision. The applicant simply alleges that the Senior Deputy Commissioner erred in law in her interpretation and application of the Act, the Regulations and the Charter, implying that the applicable standard of review is correctness.

[7] If this is the case, I do not share the applicant's view. In her decision, the Senior Deputy Commissioner had to consider whether the officer had acted properly in temporarily confining the applicant to the residence in the interest of public safety, and so the standard applicable to issues (i) and (iii) should be reasonableness (*Spidel v Canada (Attorney General)*, 2012 FCA 275).

[8] With respect to the issues involving natural justice and procedural fairness, the standard of correctness will be applied.

Analysis

[9] A preliminary remark is in order. Because the applicant is no longer subject to a residency condition, this application for judicial review can to some extent be considered moot. In its written submissions, the respondent did not raise any arguments relating to the mootness issue. Before the Court, the applicant indicated that he preferred that a decision be rendered on the merits. Given the lateness of the argument and the fact that the parties have appeared before the Court, a judgment will be rendered.

Was the applicant unlawfully detained?

[10] The Parole Board of Canada (Parole Board) is responsible for the long-term supervision of offenders under long-term supervision orders. Under section 134.1 of the Act, it has the discretion to establish any conditions that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender as a law-abiding citizen.

[11] In accordance with the residency condition established by the Parole Board, the offender was required to sleep at the CCC every night and register all of his outings and sign-out times, and his curfew was managed and determined by his parole officer. In short, he was required to follow all of her instructions.

[12] On February 20, 2012, the applicant took a walk along Sainte-Catherine Street in Montréal. As required, he registered his outing.

[13] At approximately 1:30 p.m., the monitoring officer, who was making an impromptu visit, noticed that the applicant was walking with an individual who was smoking crack cocaine. She contacted the applicant's parole officer to inform her of this.

[14] Upon receiving this information, the applicant's parole officer held a case conference with the POS to determine an appropriate intervention. During the conference, held at about 2:00 p.m. the same day, it was agreed that despite the fact that no conditions had been breached, a disciplinary meeting was in order to obtain more details and assess the possibility of upwardly revising the applicant's risk of recidivism.

[15] Upon his return to the CCC at about 5:20 p.m., the applicant was informed by the commissionaire responsible for monitoring the comings and goings of the offenders that he would not be permitted to sign out again before meeting with his parole officer the next morning. Over the course of the evening, the applicant unsuccessfully attempted to contact his parole officer to learn more about the precise reasons for his confinement.

[16] The next morning, the applicant met with his parole officer when she arrived at the CCC at about 8:50 a.m. She informed him that the POS would be meeting with him to talk about his previous day's walk. The disciplinary meeting finally took place at about 11:30 a.m. without the POS, who had been unable to make himself available. The parole officer provided the applicant with all of the information she had, and the applicant was given the opportunity to explain himself and provide his version of the events.

[17] The applicant acknowledged that from his parole officer's perspective, the situation could be seen as a cause for concern and that this was not a good association for him. He then left the CCC to attend his employment training, which he was able to do without any repercussions.

[18] The applicant submits that to make his confinement lawful, his parole officer should have provided him upon his return to the CCC with a written notice containing the grounds. The applicant is mainly relying on this Court's decision in *Bonamy v Canada (Attorney General)*, 2010 FC 153 (*Bonamy*) at paras 62-71, in support of the argument that Service officers cannot limit the movements of an offender as a disciplinary measure without the offender's consent. Instead, they must use the formal inmate disciplinary process set out at paragraphs 4 and 11(*a*) of CD 580 and the provision regarding the communication of information to offenders at section 27 of the Act.

[19] However, the disciplinary regime applicable to inmates in penitentiaries (sections 38 to 45 of the Act and sections 24 to 41 of the Regulations) does not apply to the applicant. The applicant is not an inmate, but rather a sex offender under community supervision, subject to the special regime of a long-term supervision order.

[20] It was pursuant to section 134.2 of the Act that his parole officer modified his sign-out schedule to confine him temporarily to the CCC pending a meeting to clarify a high-risk situation, in the public interest and for the protection of society. In fact, the applicant was subjected to a period of confinement of 4.5 hours, namely, from 6:30 to 8:30 p.m. (when he would normally be authorized to sign out) on February 20, 2012, and from 9:00 a.m. to shortly past 11:30 a.m. on February 21, 2012 (this delay being essentially attributable to the absence of the POS).

[21] Moreover, it is CD 715, *Community Supervision Framework*, and CD 719, *Long-Term Supervision Orders*, that apply to the applicant, not CD 580. A careful reading of these documents shows that Service officers must consider, first and foremost, the protection of the public. Because this is a case of community supervision, instructions must be adapted to an offender's particular circumstances and must be flexible to ensure the ongoing management of the risk he represents.

[22] The applicant's parole officer had the authority to confine the applicant to the CCC on the evening of February 20 and the morning of February 21 and was justified in so doing because she had received information regarding a potential increase in the risk that he represented for the public.

[23] The applicant also submits that his confinement must be considered a detention and his rights under sections 7, 10(*a*) and 11 of the Charter were therefore violated.

[24] First, for the period that the applicant was subject to a residency requirement, his liberty was already restricted and he could be considered lawfully detained. The applicant is subject to the conditions imposed by the Parole Board, and, as mentioned above, his sign-out schedule at the CCC was left to the Service officers' discretion.

[25] In *Normandin v Canada (Attorney General)*, 2005 FCA 345 at para 66, the Federal Court of Appeal held that detention in a CCC through a residency requirement imposed by the Parole Board is compliant with the Charter.

[26] Moreover, the temporary restriction of the applicant's liberty was not sufficiently long to warrant constitutional protection. This measure had no criminal or penal consequences for the applicant and applied only for a very short time. The Supreme Court decision in *Cunningham v Canada (Her Majesty the Queen in right of Canada and the Warden of Kingston Penitentiary)*, [1993] 2 SCR 143 at p 151, states the following:

> I conclude that the appellant has suffered deprivation of liberty. The next question is whether the deprivation is sufficiently serious to warrant *Charter* protection. The *Charter* does not protect against insignificant or "trivial" limitations of rights . . . . It follows that qualification of a prisoner's expectation of liberty does not necessarily bring the matter within the purview of s. 7 of the *Charter*. The qualification must be significant enough to warrant constitutional protection. To require that all changes to the manner in which a sentence is served be in accordance with the principles of fundamental justice would trivialize the protections under the *Charter*. To quote Lamer J. in *Dumas*, supra, at p. 464, there must be a "substantial change in conditions amounting to a further deprivation of liberty".

Were the principles of natural justice and procedural fairness violated in this case?

[27] The applicant contends that the inmate disciplinary process applies to his case and argues that his parole officer denied him procedural fairness. Again, the applicant is not an inmate, but rather an offender under community supervision, and the requirements listed above apply in terms of natural justice and procedural fairness.

[28] In the words of Justice Fraser Martin of the Superior Court of Quebec in *Condo v R* (18 September 2006), Montreal 500-36-004170-067 (SC):

> [11] . . . There is a world and a day of difference between the degree of procedural fairness which is to be applied when we are dealing with someone who is incarcerated or someone who is at liberty. That I think is the key to the whole question. It would be in very rare circumstances, that this Court would grant relief in a matter of

> *habeas corpus* with *certiorari* in aid when the situation relates to conditions established by a Parole officer which may in any event be revised on a day to day basis and which are also subject to revision at the expiry of a period of 90 days dating from your release from the penitentiary.
>
> [12] These are all elements or factors which must be built into the question of whether or not, procedural unfairness, if it exists, is sufficiently serious to trigger your *Charter* rights and hence open the door to this extraordinary remedy.
>
> . . .
>
> [14] Certainly *habeas corpus* alone would have failed because there is no detention *per se*. What is there? Yes, there is some limitation of freedom but of course there is some limitation of freedom in any event flowing from the very fact that you are under mandatory supervision [emphasis added].

[29] Section 14 of CD 715 does, however, state that "[the Service] respects the principles of fundamental justice and the duty to act fairly". In addition, section 27 of the Act applies to offenders and reads as follows:

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.
Idem	Idem
(2) Where an offender is entitled by this	(2) Sous réserve du paragraphe (3), cette

Part or the regulations to be given reasons for a decision taken by the Service about the offender, the person or body that takes the decision shall, subject to subsection (3), give the offender, forthwith after the decision is taken, all the information that was considered in the taking of the decision or a summary of that information.

personne ou cet organisme doit, dès que sa décision est rendue, faire connaître au délinquant qui y a droit au titre de la présente partie ou des règlements les renseignements pris en compte dans la décision, ou un sommaire de ceux-ci.

Exceptions

(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

(*a*) the safety of any person,

(*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*).

Exception

(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 danger la sécurité d'une personne ou du pénitencier ou compromettrait la tenue d'une enquête licite.

Right to interpreter

(4) An offender who does not have an adequate understanding of at least one of Canada's official languages is entitled to the assistance of an interpreter

(*a*) at any hearing provided for by this Part or the regulations; and

(*b*) for the purposes of understanding materials provided to the offender pursuant to this section.

Droit à l'interprète

(4) Le délinquant qui ne comprend de façon satisfaisante aucune des deux langues officielles du Canada a droit à l'assistance d'un interprète pour toute audition prévue à la présente partie ou par ses règlements d'application et pour la compréhension des documents qui lui sont communiqués en vertu du présent article.

[30] The applicant received enough information within a reasonable period to be able to make representations during the meeting with his parole officer. He was informed of the grounds for the meeting at about 8:50 a.m., and the meeting was held at about 11:30 a.m. The applicant understood prior to the interview that the Service would likely consider the previous day's walk [TRANSLATION] "a matter of concern" (see the parole officer's report, Applicant's Record at p 16). He was given an opportunity to provide his version of the facts and was simply advised to avoid associating with homeless persons, substance abusers and prostitutes.

[31] Furthermore, since the meeting did not result in any criminal, penal or even disciplinary consequences for the applicant, even if the applicant had been subjected to procedural unfairness (which is not the case), it would not warrant the intervention of this Court (*Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202).

Should the Senior Deputy Commissioner have dealt with the grievance concerning the provision of meals in CCCs?

[32] The Senior Deputy Commissioner's decision to refuse to deal with an issue that had not been raised at the two previous grievance levels was reasonable and consistent with CD 081, *Offender Complaints and Grievances*, which promotes the resolution of complaints and grievances at the lowest possible level. This issue should have been raised with the POS, who is responsible for the management of the CCC. It was not raised for the purposes of this file, but it seems to have been the subject of a separate second-level grievance dated April 15, 2010, that is not before this Court.

[33] Moreover, as counsel for the respondent pointed out at the hearing, the rules in force at the CCC at the time these facts occurred provided offenders with the possibility of a 15-minute outing

after their curfew for the purpose of purchasing necessities. They also authorized the preparation of meals in the kitchen until midnight and the delivery of take-out meals until 11:00 p.m. The record contains no evidence regarding the applicant's efforts to take advantage of any of these options.

Conclusion

[34] For the reasons above, I am of the view that the application for judicial review should be dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed.

2. Costs are awarded to the respondent.

"Jocelyne Gagné"
Judge

Certified true translation
Francie Gow, BLC, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-82-13
STYLE OF CAUSE:	SYLVAIN DUFRESNE v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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