

Federal Court



Cour fédérale

Date: 20130317

Docket: T-937-13

Citation: 2014 FC 260

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, March 17, 2014

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

FRANÇOIS MÉNARD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision at the third level of the grievance procedure established under section 74 of the *Corrections and Conditional Release Regulations*, SOR/92-620 [the *Regulations*] and section 90 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [the *Act*]. The decision in this case was issued on March 18, 2013, by the Senior Deputy Commissioner of the Correctional Service of Canada [the CSC]. In her decision, the Senior Deputy Commissioner denied the applicant's grievance and refused to remove a note from his file

indicating that he had been associated with the Hell's Angels and was known as their [TRANSLATION] "special" doctor.

[2] For the reasons set out below, this application for judicial review will be dismissed.

Factual background

[3] The applicant was sentenced to life imprisonment with no possibility of parole for 12 years for second degree murder and received a second sentence of 17 years' imprisonment to be served concurrently with a possibility of parole half-way through his sentence for manslaughter.

[4] In May 2005, after the applicant's first conviction, the CSC performed the necessary assessments to determine his applicable security classification, which was necessary in order to transfer him to an appropriate penitentiary. To do so, the CSC gathered information from various sources including the Sûreté du Québec [the SQ]. On May 25, 2005, the CSC informed the applicant in writing that he had been identified as [TRANSLATION] "an associate of the Quebec Hell's Angels, known as the Hell's Angels' 'special' doctor" in a document entitled "Referral Sheet—Identification of Membership or Association with a Criminal Organization". According to that sheet, the SQ was the source of this information. Specifically, the information obtained from the SQ indicated that a reliable source had identified the applicant as the Hell's Angels' special doctor, that the SQ had observed the applicant spending time with one or more known members or associates of the Hell's Angels on a regular basis, that there was tangible written, electronic and

photographic evidence showing or suggesting that the applicant was a member or associate of the Hell's Angels and that he himself had admitted being a member or associate of the Hell's Angels.

[5] After receiving this document, the applicant denied in writing any association with the Hell's Angels except for the fact that he had treated some members of the group as a doctor, just as he had also treated other members of society like lawyers and members of the Knights of Columbus.

[6] On May20, 2008, the CSC decided that the applicant would no longer be considered as affiliated with the Hell's Angels. This decision was provided to the applicant in a document entitled "Referral Sheet—Termination of Membership or Association with a Criminal Organization". In that sheet, the CSC gave the following reasons to support the applicant's "disaffiliation" with respect to the Hell's Angels:

[TRANSLATION]

For almost three years, Ménard has been in a restricted contact area; he no longer lives in the area where most of the gang's sympathizers are located. No telephone contact or email between the parties. Checks with the SQ and the SPVM were done, and there is no information confirming ties between Ménard and the Hell's Angels.

[7] Although it no longer considered him affiliated with the Hell's Angels, the CSC nonetheless continued to refer to the applicant's past affiliation with the group in other documents in his prison record. That is why the applicant is still concerned about the issues identified in this application, even though he is no longer considered to be affiliated with the criminal organization.

[8] On May 23, 2012, the applicant filed a complaint with his parole officer asking that his prison record be corrected and that the reference to his association with the Hell's Angels be removed in the places where it appeared in his record. He also sought disclosure of the information the CSC had obtained from the SQ that led the CSC to conclude, in 2005, that the applicant was affiliated with the Hell's Angels.

[9] On June 7, 2012, the applicant received a response to his complaint stating that the CSC could not go back in time and change documents that were prepared based on the information available at the time. In addition, in its response the CSC invited the applicant to also communicate directly with the SQ to obtain the information and clarifications sought because the CSC, which has [TRANSLATION] "no authority over them", was unable to do it.

[10] Subsequently, the applicant filed a grievance at the first level of the grievance procedure established under section 74 of the *Regulations*. On August 2, 2012, his grievance was denied, stating that the information concerning his affiliation with the Hell's Angels in 2005 was not erroneous and would not be deleted. In addition, the response indicated that the CSC could not give the applicant a statement from a reliable source in order to protect the source. As for the report received from the SQ, the CSC stated that it did not have the report at the institution. With respect to his admission, the CSC confirmed that it did not have any documents in that regard.

[11] The applicant brought his grievance to the second level, reiterating his position. On September 13, 2012, his grievance was again denied, stating again that the applicant should apply to the SQ to obtain the information about him, that this information was considered between May 25,

2005, and May 20, 2008, and that if he believed the information was erroneous he should submit a request for correction to his parole officer.

[12] The applicant then brought his grievance to the third level of the grievance procedure. On March 18, 2013, his grievance was denied in the decision that is the subject of this judicial review. In that decision, the Deputy Commissioner first summarized the applicant's initial complaint, noting that he claimed to have never had a relationship with the Hell's Angels and had never been their [TRANSLATION] "special" doctor. She went on to review the history of the case and summarized the previous decisions made regarding his complaint as well as the decisions from the first and second levels of the grievance procedure. The Deputy Commissioner then referred to paragraph 2 of the Commissioner's Directive (CD) 568-3 (2008-07-11), *Identification and Management of Criminal Organizations*, which recognizes that an association with a criminal organization is a significant risk factor and a serious threat to the safe, secure, orderly and efficient management of penal institutions and is thus important information to obtain. The Senior Deputy Commissioner reiterated that the applicant's file did not raise reasonable grounds to believe that the validity and reliability of the information from the SQ was questionable. Accordingly, she concluded that the applicant's grievance should be denied. She provided other reasons for denying it, such as the fact that the applicant did not follow the proper procedure for obtaining a correction to his prison record and that his grievance was filed late.

[13] Because a review of the CSC's various responses did not identify exactly what information was in the records, counsel for the respondent filed an affidavit of a legal assistant that attached as an exhibit a letter from Daniel Mélançon, senior project manager at the CSC for the Quebec region.

In his letter, Mr. Mélançon confirmed that the CSC did not currently have any report from the SQ about the applicant's criminal affiliation. Accordingly, even if such documents existed, they were no longer in the CSC's possession. It therefore appears that the only documents the CSC currently has regarding the applicant's past criminal affiliation are limited to the sheets that were already given to the applicant, in which the CSC summarized the information provided by the SQ.

Issues and standard of review

[14] The parties set out two issues in their memoranda and in their counsel's oral argument:

1. Is the CSC required to provide the applicant with the information from the SQ concerning his association with the Hell's Angels?
2. Did the CSC's Deputy Commissioner err by refusing to remove from the applicant's prison record the reference concerning his affiliation with the Hell's Angels, which was provided to the applicant in the "Referral Sheet—Identification of Membership or Association with a Criminal Organization" dated May 28, 2005?

[15] Both these issues are reviewable on a reasonableness standard. In this regard, in *Tehrankari v The Attorney General of Canada*, 2012 FC 332 [*Tehrankari*], my colleague Justice Mosley concluded at para 22 that "the standard of review for interpretation of the [Act is] correctness, and that the standard would be reasonableness for the application of the law to the facts and for the decision as a whole". In *Scarcella v Canada (Attorney General)*, 2009 FC 1272 [*Scarcella*] at paragraph 14, Justice Snider also applied the reasonableness standard to a judicial review concerning the reliability of information the CSC had relied on in identifying an inmate as belonging to or associating with a criminal organization. Similarly, my colleague Justice Gagné in *Nagy v Canada (Attorney General)*, 2013 FC 137 [*Nagy*] also applied the reasonableness standard

on an application for judicial review questioning the soundness of a decision by the CSC following an offender's grievance that challenged the assignment of his security classification. In that case, as in this one, the applicant argued that the CSC's decision was based on erroneous information.

[16] A court called upon to apply the reasonableness standard must show deference and be concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (on this point, see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12; and *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61).

Positions of the parties

[17] The applicant argues that the Deputy Commissioner's decision is unreasonable because the CSC could not have concluded that the applicant was affiliated with the Hell's Angels if it had not received a report from the SQ in this regard that set out various information that the CSC summarized in certain documents in his prison record including the Referral Sheet—Identification of Membership or Association with a Criminal Organization, which was completed immediately after he was incarcerated. On this point, the applicant relies on sections 23 and 27 of the *Act*, which require the CSC to obtain reliable information about inmates' sentence or imprisonment and disclose that information to them.

[18] The relevant provisions of sections 23 and 27 of the *Act* read as follows:

Information

Service to obtain certain information about offender

23. (1) When a person is sentenced, committed or transferred to penitentiary, the Service shall take all reasonable steps to obtain, as soon as is practicable,

(a) relevant information about the offence;

(b) relevant information about the person's personal history, including the person's social, economic, criminal and young-offender history;

(c) any reasons and recommendations relating to the sentencing or committal that are given or made by

(i) the court that convicts, sentences or commits the person, and

(ii) any court that hears an appeal from the conviction, sentence or committal;

(d) any reports relevant to the conviction, sentence or committal that are submitted to a court mentioned in subparagraph (c)(i) or (ii); and

(e) any other information relevant to administering the sentence or committal, including existing information from the victim,

Renseignements

Obtention de renseignements

23. (1) Le Service doit, dans les meilleurs délais après la condamnation ou le transfèrement d'une personne au pénitencier, prendre toutes mesures possibles pour obtenir:

a) les renseignements pertinents concernant l'infraction en cause;

b) les renseignements personnels pertinents, notamment les antécédents sociaux, économiques et criminels, y compris comme jeune contrevenant;

c) les motifs donnés par le tribunal ayant prononcé la condamnation, infligé la peine ou ordonné la détention — ou par le tribunal d'appel — en ce qui touche la peine ou la détention, ainsi que les recommandations afférentes en l'espèce;

d) les rapports remis au tribunal concernant la condamnation, la peine ou l'incarcération;

e) tous autres renseignements concernant l'exécution de la peine ou de la détention, notamment les renseignements obtenus de la victime, la déclaration de la victime quant aux conséquences de l'infraction

the victim impact statement and the transcript of any comments made by the sentencing judge regarding parole eligibility.

et la transcription des observations du juge qui a prononcé la peine relativement à l'admissibilité à la libération conditionnelle.

Access by offender

Accès du délinquant aux renseignements

(2) Where access to the information obtained by the Service pursuant to subsection (1) is requested by the offender in writing, the offender shall be provided with access in the prescribed manner to such information as would be disclosed under the *Privacy Act* and the *Access to Information Act*.

(2) Le délinquant qui demande par écrit que les renseignements visés au paragraphe (1) lui soient communiqués a accès, conformément au règlement, aux renseignements qui, en vertu de la *Loi sur la protection des renseignements personnels* et de la *Loi sur l'accès à l'information*, lui seraient communiqués.

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 Part or the

(2) Sous réserve du paragraphe (3), cette

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.

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).

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.

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.

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[19] The applicant argues that if the CSC was unable to obtain or keep the SQ's report on his alleged criminal history, the Court should order it to obtain this relevant information from the SQ

under subsection 23(1) of the *Act* and to disclose it to him under subsections 23(2) or 27(1) and (2) of the *Act*.

[20] Conversely, if the CSC does not obtain this information, the applicant contends that all references to his alleged affiliation with the Hell's Angels should be removed from his prison record because there is no factual basis to support them. He adds that the Deputy Commissioner's refusal to do so is unreasonable.

[21] The applicant relies on the decisions in *May v Ferndale Institution*, [2005] 3 SCR 809 and *Demaria v Regional Classification Board*, [1986] FCJ No 493 A-185-86 to justify his right to this information. In those decisions, the CSC was ordered to disclose the information it had consulted in the decision-making process regarding the security classification of inmates.

[22] For his part, the respondent submits that the application should be dismissed because there is no obligation on the CSC to obtain information to support references in prison records. In this regard, the respondent relies on the *Tehrankari* decision, above, in which Justice Mosley found that there was no such obligation on the CSC. In addition, the respondent argues that the mere fact that the CSC referral sheets do not contain a detailed report from the SQ does not mean that the findings with respect to the applicant's past affiliation should be removed from his record. On this point, he relies on *Tehrankari* and *Scarcella*, in which it was decided that findings that rely on information obtained from bodies responsible for applying the *Act* are a sufficient basis for institutional decisions by the CSC.

Analysis

[23] First, with respect to the applicant's submission that the CSC is required to obtain a report from the SQ concerning his past affiliation with the Hell's Angels, I share the respondent's view: as the *Tehrankari* decision confirmed, such a requirement does not exist. In that case, Mr. Tehrankari's prison record, maintained by the CSC, contained a summary of 76 incidents of institutional misconduct that he was accused of during his detention at the Ottawa-Carleton Detention Centre. Mr. Tehrankari argued that the CSC was required to obtain this information from the Ottawa police and the Ottawa-Carleton Detention Centre so that he could dispute the allegations of misconduct, which he considered erroneous. Justice Mosley came to a different conclusion, stating the following at para 35:

Mr. Tehrankari is correct that s.24(1) of [the *Act*] does oblige CSC to "take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible." However, that does not mean that CSC must reinvestigate information obtained from reliable sources such as provincial ministries, police forces and the courts. The Offender Complaint and Grievance Procedures Manual indicates that matters under provincial jurisdiction, matters relating to convictions and sentencing by courts, matters relating to the administration of justice including courts and police forces, and matters relating to treatment by non CSC agencies are non-grievable within the institutional grievance process.

[24] Justice Mosley's conclusion applies in this case. The CSC is not required to obtain information from the SQ to support the references it made in his referral sheets to the information from the SQ dealing with the applicant's affiliation with the Hell's Angels. Furthermore, considering that the CSC has already provided the applicant with all the information it has, as Mr. Mélançon's letter indicates, there is no reason for the Court to order the CSC to provide more.

[25] With respect to his second submission, that the Deputy Commissioner's refusal to remove the information from his prison record was unreasonable, the applicant did not provide any evidence beyond a systematic denial of his affiliation with the Hell's Angels. Moreover, he admitted having treated a number of Hell's Angels' members over the course of his career as a doctor. Consequently, the Deputy Commissioner's decision to deny his grievance was not unreasonable because the applicant did not submit any evidence questioning the truth of the information received from the SQ, which was, in fact, confirmed by some of the evidence adduced at his trial and which was summarized in some of the CSC reports that the applicant filed as exhibits to his affidavit. Given the lack of evidence provided by the applicant and his admission that he had been the treating physician of a number of Hell's Angels' members, it was not unreasonable to find, as the Deputy Commissioner did, that the reference to the applicant's prior association with the Hell's Angels should not be removed from his prison record. In summary, this conclusion falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[26] In this regard, the situation is similar to the *Scarcella* case where Justice Snider noted the following at paragraph 23:

The problem with Mr. Scarcella's position is that there is no evidence that any further information was available or that the information considered was somehow erroneous. Mr. Scarcella could have adduced further evidence to show that, while he may have been associated or involved with a criminal organization, that was no longer the case. He did not do so. Given the nature of the information and the fact that nothing new was brought forward by Mr. Scarcella, I am satisfied that the SDC was entitled to rely on information before it as "accurate, up to date and complete". There was, on these facts, no obligation on the Service to go so far as to ask the police to re-investigate its initial opinions, or to conduct investigations on its own.

[27] Accordingly, this application for judicial review will be dismissed because the CSC is not required to seek additional information or documents from the SQ and the decision that there are no reasonable grounds to believe that the validity and reliability of the information from the SQ was questionable, is reasonable.

[28] However, I note, as counsel for the respondent acknowledged, that it remains open to the applicant to argue, considering the lack of supporting evidence, that no probative value should be assigned to the finding that he was at one time affiliated with the Hell's Angels if the CSC or any other organization attempts to rely on his prison record to establish that fact. Indeed, a decision on the part of the CSC or other organizations that relies solely on the information in the applicant's prison record to establish this prior association could well be unreasonable, as my colleague Justice Gagné found in circumstances that were, on balance, similar in the *Nagy* case.

[29] Exercising the discretion conferred on me, I make no order as to costs because this application seems to be, in part, the result of the CSC's ambiguous responses at the various levels of the grievance procedure. Indeed, this ambiguity forced counsel for the respondent to seek out and file the letter from Mr. Mélançon to confirm what information from the SQ the CSC actually had in its possession about the applicant's alleged past affiliation with the Hell's Angels.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review of the decision issued on March 18, 2013, by the Senior Deputy Commissioner of the Correctional Service of Canada is dismissed. No costs are awarded.

“Mary J.L. Gleason”

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT
SOLICITORS OF RECORD

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AND JUDGMENT:** GLEASON J.

DATED: MARCH 17, 2014

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