

Federal Court



Cour fédérale

Date: 20151008

Docket: T-1761-14

Citation: 2015 FC 1148

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 8, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JACQUES ÉMOND

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The applicant is seeking judicial review of a decision dated June 6, 2014, by Correctional Service Canada (CSC) denying his third-level grievance of a intraregional transfer request under the *Corrections and Conditional Release Act*, SC 1992, c 20 (Act) to be closer to his resources.

II. Facts

[2] The applicant, Jacques Émond, is a full-patch member of the Hell's Angels Sherbrooke chapter, and since August 27, 2012, has been serving a federal sentence of six years and three months for conspiracy to commit murder. The applicant was assigned a medium security classification and was sent to the Archambault Institution, a medium security institution, following his arrival at the Regional Reception Centre in September 2012.

[3] On June 26, 2013, the applicant applied to be transferred to the Drummond Institution (medium security) or the Donnacona Institution (maximum security) to be closer to his resources (his family). The applicant's intraregional transfer application was denied in a third-level grievance. This is the judicial review of that decision.

III. Impugned decision

[4] In its decision (third-level grievance), dated June 6, 2014, CSC stated that it considered the applicant's prior responses and submissions, the applicable legislation and policies and the documents relevant to the applicant's case in the Offender Management System.

[5] CSC also considered the applicant's request, in his initial penitentiary placement, to be transferred to the Drummond Institution or the Donnacona Institution. But after discussions with the Division of Operations, Security Intelligence, at Regional Headquarters, and the authorities at the Regional Reception Centre and at the Archambault Institution, it was decided that the applicant's criminal profile fit the type of clientele present at the Archambault Institution.

[6] Furthermore, CSC considered an Assessment for Decision, dated July 8, 2013, which reads as follows: [TRANSLATION] “the population management plan indicates that the target institution for inmates connected to the Hell’s Angels is the Archambault Institution, and it should have priority, notwithstanding distance from resources”.

[7] In one paragraph, CSC summarized why it was denying the grievance, finding that the decision-making process was fair, reasonable and based on a review of all of the relevant information and in accordance with section 28 of the Act:

[TRANSLATION]

The Correctional Service of Canada (CSC) recognizes that affiliation with a security threat group is a significant risk, poses a serious threat to the safety and security of CSC operations and compromises the protection of society. In fact, your affiliation with the Hell’s Angels was considered in the review of your request [for a voluntary transfer] to the Drummond Institution. Moreover, your programming and intervention needs, management of co-convicted and incompatible inmates, cell availability, cultural and linguistic environments as well as your resources in the community were also considered. Thus, it was established that the [Archambault Institution] was the most appropriate environment, and will allow you to pursue your correctional planning.

(Respondent’s Record, Offender Grievance Response
(Third Level), JR-05)

IV. Issues

[8] The applicant presents the following two issues:

- (a) Did CSC breach its duty of procedural fairness with respect to disclosing information?
- (b) Was the CSC decision reasonable given the evidence in the record?

V. Position of the parties

[9] The applicant contends that CSC decided that he should be confined in the Archambault Institution based on the Regional Population Management Plan (Plan), which was never disclosed to the inmate, which would be a failure to disclose information (according to *May v Ferndale Institution*, [2005] 3 SCR 809, 2005 SCC 82; and, also according to *Mission Institution v Khela*, [2014] 1 SCR 502, 2014 SCC 24 (*Khela*)). Also, the applicant submits that under section 28 of the Act, accessibility to community, which includes family, is a criterion that CSC must take into account when selecting a penitentiary. The applicant also maintains that his personal situation was not taken into account and that he never received an explanation as to why his co-accused—who belong to the same criminal group—are at the Drummond Institution (according to *Lebon v Canada (Attorney General)*, 2012 FCA 132). Finally, the applicant argues that the Archambault Institution and the Drummond Institution offer the same degree and kind of custody and control and the same programs and services. It would thus be erroneous to state that only the Archambault Institution offers the programs and interventions that the applicant requires.

[10] In short, the applicant submits that the CSC third-level grievance decision is unreasonable and that CSC denied his transfer request on the basis of a non-existent placement plan. In doing so, it did not comply with the requirements.

[11] The respondent argues that CSC has expertise in matters of inmate classification, and that following the applicant's assessment, which included discussions with a number of groups, it

found that the Archambault Institution fit the inmate's profile. In short, CSC considered the safety of the public, legislation, directives, the profile and needs of the applicant and was entitled to concur that the transfer had to be denied because the Archambault Institution is more suitable for clientele such as the applicant.

VI. Standard of review

[12] CSC has expertise in matters of inmate transfers; therefore, the law is settled that decisions of fact and decisions of fact and law by CSC are reviewable on the standard of reasonableness (*Khela*, above at paras 75 and 76). Reasonableness is concerned 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 (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47).

[13] However, with regard to determining a breach of the principles of procedural fairness, the correctness standard will always apply (*Khela*, above at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

VII. Analysis

A. *Statutory and jurisprudential framework*

[14] The protection of society is the paramount consideration of the Act (section 3.1 of the Act). However, that does not mean that CSC has absolute freedom with respect to the inmate

transfer process. CSC must consider the criteria listed in section 28 of the Act when determining in which penitentiary an inmate is to be confined. In this case, paragraph 28(b) of the Act is in issue:

Criteria for selection of penitentiary

28. If a person is or is to be confined in a penitentiary, the Service shall take all reasonable steps to ensure that the penitentiary in which they are confined is one that provides them with an environment that contains only the necessary restrictions, taking into account

(a) the degree and kind of custody and control necessary for

(i) the safety of the public,

(ii) the safety of that person and other persons in the penitentiary, and

(iii) the security of the penitentiary;

(b) accessibility to

(i) the person's home community and family,

(ii) a compatible cultural environment, and

(iii) a compatible linguistic environment; and

(c) the availability of appropriate programs and services and the person's willingness to participate in those programs.

Incarcération : facteurs à prendre en compte

28. Le Service doit s'assurer, dans la mesure du possible, que le pénitencier dans lequel est incarcéré le détenu constitue un milieu où seules existent les restrictions nécessaires, compte tenu des éléments suivants :

a) le degré de garde et de surveillance nécessaire à la sécurité du public, à celle du pénitencier, des personnes qui s'y trouvent et du détenu;

b) la facilité d'accès à la collectivité à laquelle il appartient, à sa famille et à un milieu culturel et linguistique compatible;

c) l'existence de programmes et services qui lui conviennent et sa volonté d'y participer.

[15] When it decides whether a transfer can be granted, CSC must consider the criteria in section 28 of the Act, as set forth in section 29 of that same Act:

Transfers

29. The Commissioner may authorize the transfer of a person who is sentenced, transferred or committed to a penitentiary to

(a) another penitentiary in accordance with the regulations made under paragraph 96(d), subject to section 28; or

(b) a provincial correctional facility or hospital in accordance with an agreement entered into under paragraph 16(1)(a) and any applicable regulations.

Transfèvements

29. Le commissaire peut autoriser le transfèrement d'une personne condamnée ou transférée au pénitencier, soit à un autre pénitencier, conformément aux règlements pris en vertu de l'alinéa 96d), mais sous réserve de l'article 28, soit à un établissement correctionnel provincial ou un hôpital dans le cadre d'un accord conclu au titre du paragraphe 16(1), conformément aux règlements applicables.

[16] Pursuant to section 27 of the Act, CSC has a duty to disclose information:

Information to be given to offenders

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.

Communication de renseignements au délinquant

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.

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).

[Emphasis added.]

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.

[17] The purpose of section 27 of the Act is to provide procedural protections in the context of transfer decisions under section 29. A failure to disclose information may render a transfer decision procedurally unfair:

Rather, s. 27 serves as a statutory guide to procedural protections that have been adopted to ensure that decisions under s. 29 and other provisions are taken fairly. When a transfer decision is made under s. 29 and an inmate is entitled to make representations pursuant to the CCR, s. 27 is engaged and decisions made under it are reviewable. If the correctional authorities failed to comply with s. 27 as a whole, a reviewing court may find that the transfer decision was procedurally unfair, and the deprivation of the inmate's liberty will not be lawful. [Emphasis added.]

(*Khela*, above at para 85)

[18] Finally, it goes without saying that not all breaches of section 27 will necessarily result in procedural unfairness (*Khela*, above at para 90; *Mobil Oil Canada Ltd. v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 (*Mobil Oil*)).

B. *Respect for the principles of procedural fairness to the applicant*

[19] The applicant argues that CSC breached its duty of procedural fairness in light of its failure to disclose the Regional Population Management Plan as required by subsection 27(1) of the Act.

[20] Indeed, the Court finds that CSC breached the principles of procedural fairness to the applicant only by failing to disclose information, concerning the Plan, without at least explaining, even briefly, the need to not disclose the information to the applicant for reasons set out in subsection 27(3) of the Act.

[21] Even though there was a breach of procedural fairness, the Court is not required to allow the application for judicial review when the result would be exactly the same (*Mobil Oil*, above; *Khela*, above).

[22] In this case, while it is possible that CSC will make the exact same finding when faced with the applicant's situation before the Court can make its decision, the Court has before it a case where the need for disclosure, or, at least, a brief explanation specifying the reason for non-disclosure is in itself essential.

VIII. Conclusion

[23] In light of the foregoing, the application for judicial review is allowed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is returned for redetermination by a differently constituted panel, the whole without costs.

“Michel M.J. Shore”

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT
SOLICITORS OF RECORD

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