Federal Court  Cour fédérale

Date: 20161019

Dockets: T-2563-14
T-204-15

Citation: 2016 FC 1151

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 19, 2016

PRESENT: The Honourable Mr. Justice Martineau

Docket: T-2563-14

BETWEEN:

CHRISTOPHER LILL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-204-15

AND BETWEEN:

CHRISTOPHER LILL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] For the reasons that follow, the Court allows in part the applications for judicial review in dockets T-204-15 and T-2563-14, joint in this case, and sets aside the two decisions rendered on January 31, 2014, by the Acting Senior Deputy Commissioner, Lori MacDonald [the Acting Deputy Commissioner], in reconsideration of the decisions made in 2012 and 2013 by the Senior Deputy Commissioner, Anne Kelly [the Senior Deputy Commissioner]. The file of the applicant, Christopher Lill, is referred back for redetermination so that all of his grievances are allowed according to the terms and conditions set out in the Court instructions. Without costs.

[2] In this case, the applicant is contesting the legal validity and/or reasonableness of the successive refusals of the Deputy Commissioners to allow and/or grant him the remedies sought in four grievances against the following actions by the Correctional Service of Canada [CSC]:

a) Grievance V30R00018783 contesting the placement and maintenance of the applicant in involuntary administrative segregation (**Docket T-204-15**); and

b) Grievance V30R00018786 contesting the reassessment of the applicant's security classification and grievances V30R00018784 and V30R00018785 contesting his involuntary transfer to a maximum-security institution (**Docket T-2563-14).**

[3] The applicant is serving a life sentence for first-degree murder with no eligibility for parole for 25 years. Following a reassessment of his security classification, the applicant was

admitted to La Macaza, a medium-security institution [the institution], on September 28, 2010. On October 21, 2011, a violent incident involving another inmate [the other inmate] occurred at the institution. According to the incident report, prepared on October 25, 2011, the other inmate apparently set off the alarm in his cell in order to obtain health care. On October 24, 2011, the applicant was placed in involuntary administrative segregation for security reasons.

[4] Paragraph 31(3)(a) of the *Corrections and Conditional Release Act*, S.C. 1992, c.20 [the Act], enables the institutional head to order that an inmate be confined in administrative segregation if the institutional head is satisfied that there is no reasonable alternative to administrative segregation and he or she believes on reasonable grounds that the inmate has acted, has attempted to act or intends to act in a manner that jeopardizes the security of the penitentiary or the safety of any person and allowing the inmate to associate with other inmates would jeopardize the security of the penitentiary or the safety of any person. At that time, the alleged altercation with the applicant on October 21, 2011 was based solely on the other inmate's testimony. No officer or any other witness or video or audio surveillance could confirm the other inmate's claims.

[5] On October 31, 2011, during the fifth-working-day review of his involuntary segregation placement, the applicant informed the Administrative Segregation Committee of his understanding of the situation and said that he had been set up by the other inmate, who regularly complained about noise coming from the applicant's cell. Nevertheless, the administrative segregation order was maintained, and the applicant was informed that his security classification had been reassessed as maximum (decision by the committee on October 31, 2011, Exhibit P-4).

At the same time, the applicant was also informed that, as a result of that reassessment, he would be transferred to a maximum-security institution. On November 7, 2011, the applicant's security classification was officially increased to maximum.

[6] As a result, on November 30, 2011, the applicant was transferred to Port-Cartier Institution in Quebec, a maximum-security penitentiary, where he remained until September 27, 2012. At that time, since he still had a maximum security classification, the applicant was transferred to the Regional Mental Health Centre, a multi-level institution. In April 2013, the applicant was transferred to Atlantic Institution in New Brunswick, another maximum-security institution, where he remained until May 2, 2014. In the meantime, the four grievances filed by the applicant to contest the legality of these various actions by CSC (V30R00006318, V30R00006450, V30R00006464 and V3R00006570, cited above) had been processed.

[7] First, the legal validity of the reassessment of the applicant's security classification and his involuntary transfer to a maximum-security institution was ultimately confirmed by the Senior Deputy Commissioner in November 2012. Second, with regard to the placement and maintenance of the applicant in involuntary administrative segregation following the incident on October 21, 2011, the Senior Deputy Commissioner allowed the applicant's grievance in part. The information available did not demonstrate that an exhaustive analysis had been conducted by the Preventive Security Department before ordering the applicant's placement in segregation. Furthermore, there was no officially recorded information identifying the applicant as the instigator of the altercation. The Senior Deputy Commissioner therefore ordered that the following general corrective measures be taken:

- That the institutional head be issued a reminder of the importance of ensuring that viable alternatives to segregation be considered and promoted; and

- That the institutional head remind preventive security officers about recording security information.

[8] The applicant filed applications for judicial review of these two decisions (dockets T-2295-12 and T-722-13), but following an out-of-court settlement between the parties, in 2014 the Acting Deputy Commissioner reconsidered the previous decisions made by the Senior Deputy Commissioner. It is the legal validity and reasonableness of those two decisions made in January 2014 that are at issue today.

[9] In a first decision, the Acting Deputy Commissioner noted that the institutional head had applied the two corrective measures prescribed by the Senior Deputy Commissioner and that, all things considered, the matter of the applicant's placement and maintenance in administrative segregation had become theoretical because two years had passed since that latter decision had been made. As a result, she found that the applicant's grievance did not require that additional corrective measures be taken.

[10] In a second decision, the Acting Deputy Commissioner also confirmed the decisions of the Senior Deputy Commissioner regarding the applicant's security reclassification and his involuntary transfer to a maximum-security institution. With regard to the applicant's security reclassification, the Acting Deputy Commissioner found that all of the information in the applicant's file and available at the time of the reassessment could and had been considered when administering the Security Reclassification Scale and the Assessment for Decision. She

also considered the applicant's adjustment difficulties, noted in his file, during his incarceration in the institutions mentioned above. In light of observations by institutional staff and the various incidents involving the applicant, the Acting Deputy Commissioner found that the information in the applicant's file, as of the date of the assessment, justified an increase in his security classification.

[11] With regard to the involuntary transfer to a maximum-security institution, the Acting Deputy Commissioner found that the related decision-making process had been carried out appropriately and was based on an assessment of all the relevant information. In this regard, she noted that the applicant was transferred to Port-Cartier Institution in response to the applicant's reassessed security requirements while facilitating his access to Aboriginal spirituality and a compatible linguistic environment. As a result, she rejected the applicant's grievances.

[12] In addition to seeking that the two decisions by the Acting Deputy Commissioner be set aside, the applicant is now seeking a general declaration of illegality of CSC's actions as well as a Court order to have all mentions of the alleged assault on October 21, 2011, of which he was exonerated, struck from his institutional file and his maintenance in segregation no longer be considered by the relevant authorities.

[13] According to the information provided by the two solicitors of record, the applicant is no longer incarcerated in a maximum-security institution, but rather in a medium-security institution (Cowansville Institution) since May 2, 2014. However, I do not find that this development is enough, in itself, to make the current requests theoretical, considering that the harmful effects of

the applicant's security reclassification following the incident on October 21, 2011 are likely to persist over time.

[14] Note, in passing, that in October 2014, the applicant initiated an action for damages against Her Majesty the Queen (docket T218914). The applicant is requesting a sum of $456,000 from the respondent for the time he was detained in administrative segregation (30 days, from October 31, 2011, to November 30, 2011) and in maximum-security institutions (882 days, from November 30, 2011, to May 2, 2014). The respondent is contesting the action, claiming that the sum requested is grossly exaggerated, whereas there is no indication of bad faith or negligence in the applicant's treatment following the incident on October 21, 2011. The proceedings have been suspended since May 25, 2015, until a final judgment is rendered with regard to these applications for judicial review.

[15] The applicant makes various arguments against the legal validity and/or reasonableness of the Acting Deputy Commissioner's two decisions, but there is no need to linger on them longer than is necessary. In fact, the respondent acknowledged from the outset that the Acting Deputy Commissioner's two decisions must be set aside because the corrective measures ordered are insufficient and/or the decisions are otherwise unreasonable. It seems that the only reason the respondent did not agree to the judgments allowing the two applications for judicial review is that the parties did not come to an agreement on the statements or remedies, the applicant insisting that this Court order that all mentions of the alleged altercation on October 21, 2011 be removed from his institutional file.

[16] In this case, it is not up to this Court to order that inaccurate or erroneous entries that may currently appear in the applicant's institutional file be struck out or corrected. This was not the objective of the applicant's grievances. Concerning the harm that an erroneous or inaccurate entry may have with regard to the applicant's residual liberty, I will simply remind the parties that, in the prospective risk assessment of the offender, the reliability of information is a function of its accuracy. Correctional authorities and the Parole Board need not consider relevant information that is inaccurate and therefore unreliable (*Zarzour v Canada*, 2000 CanLII 16791 (FCA), [2000] F.C.J. No. 2070 at paragraphs 27-28). That being said, the respondent does not object to this ruling being placed in the applicant's institutional file.

[17] Nevertheless, there is now every indication that the other inmate involved in the incident on October 21, 2011 seems to have falsely accused the applicant of assault. At first glance, the applicant's placement and maintenance in administrative segregation were therefore not based on truthful information that could demonstrate his involvement in the alleged assault. Moreover, due to a lack of evidence, the charges of simple assault brought against the applicant at the time and to which he pleaded not guilty were withdrawn by the Crown in May 2013.

[18] Additionally, it is clear upon reading the documentation submitted by the applicant that his alleged participation in the assault on October 21, 2011, was – at least initially – the main reason for the decision by correctional authorities to place and maintain the applicant in administrative segregation (see the transcript of the fifth-working-day review of the offender's status on October 31, 2011, Exhibit P-4). It remains to be determined whether the reassessment of the applicant's security classification and, thus, the decision to transfer him to a maximum-

security institution in November 2011 must be treated as separate actions that have no relation to the incident on October 21, 2011.

[19] That is not the case here. The two decisions contested by the applicant are unreasonable. The defects affecting the validity of the decision to maintain the applicant in administrative segregation irrevocably tainted the rest of the process of reassessing the security classification of the applicant, who did not request a voluntary transfer to a maximum-security institution. It is therefore appropriate to set aside the impugned decisions and refer the case back for redetermination. Both parties agree that the Court should exercise its discretion to prescribe appropriate instructions pursuant to subsection 18.1(3) of the *Federal Courts Act*, R.S.C., 1985, c. F−7.

[20] The problem is that nearly five years have already passed since the applicant sought appropriate remedy from the correctional authorities. As soon as October 2011, the applicant proposed a mediation session, claiming that the other inmate had falsely accused him of assault to get him placed in segregation because the applicant was making too much noise beside the other inmate's cell. However, two different decision-makers already made decisions in 2012 and 2014, with no correction that was satisfactory to the applicant being prescribed, even though both decision-makers found that the information available did not make it possible to demonstrate that the Preventive Security Department had conducted an exhaustive analysis before ordering that the applicant be placed in segregation. Furthermore, there was no officially recorded information identifying the applicant as the instigator of the altercation.

[21] In *Ouellette v Canada (Attorney General)*, 2008 FC 559, [2008] F.C.J. No. 701 at paragraph 27, the Court states:

> The Court's jurisdiction in judicial review applications is limited to the powers set out in subsection 18.1(3) of the *Federal Courts Act*. The Court has the power to determine whether the decision-maker erred in fact or in law, and, if such is the case, to set aside the decision and to refer the issue back to the federal board, commission or tribunal. In exceptional cases, the Court can give instructions as to the decision to render (*Rafuse v. Canada*, 2002 FCA 31, [2002] F.C.J. No. 91 (QL)), but this power is rarely exercised. This will be the case, for example, when the sole issue to be decided is a pure question of law which would dispose of the case, or in cases where the evidence on the record is so clearly conclusive that there is only one possible conclusion (*Simmonds v. Canada (Minister of National Revenue – M.N.R.)*, 2006 FC 130, [2006] F.C.J. No. 184 (QL), at paragraph 38). […]

[22] In this regard, the respondent argues that the following corrective measures should have been applied by the Acting Deputy Commissioner: 1) that the information about the incident on October 21, 2011, and the maintenance in segregation no longer be used or taken into consideration in future decision-making processes; and 2) that the security reclassification and involuntary transfer no longer be taken into consideration in future decision-making processes. Therefore, the respondent thinks that the case should be referred back for redetermination with instructions from the Court including these two additional corrective measures.

[23] Even though this is a reconsideration case, bad faith or bias from the decision-maker – different in each case – are not raised by the applicant (*Lebon v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1500, [2012] F.C.J. No. 1600 at paragraphs 25-27, supra, 2013 FCA 55, [2013] F.C.J. No. 196). Nevertheless, the two parties agree that it would serve no practical purpose to have a third decision-maker start over and from the beginning with the

review of the applicant's grievances. Given the current status of the file, only one conclusion seems logically available, meaning that with regard to redetermination, the best interests of justice authorize the Court to order that the applicant's grievances be allowed for the specific reasons mentioned in the Court judgment (*Mymryk v Canada (Attorney General)*, 2010 FC 632, [2010] F.C.J. No. 779 at paragraph 33).

[24] Consequently, the decisions rendered on January 31, 2014, by the Acting Deputy Commissioner are set aside, and the file is referred back for redetermination with the following instructions:

a) Grievance V30R00018783 filed by the applicant concerning his placement in involuntary administrative segregation is allowed for the purpose of applying the following additional corrective measure: the information about the incident on October 21, 2011, and the maintenance of the applicant in involuntary segregation must no longer be used or taken into consideration by correctional authorities in any future decision-making process; and

b) Grievances V30R0001876, V30R00018784 and V30R00018785 filed by the applicant concerning the reassessment of his security classification and his transfer to a maximum-security institution are allowed for the purpose of applying the following corrective measure: the security reclassification on November 7, 2011, and the applicant's involuntary transfer to a maximum-security institution on November 24, 2011, must no longer be taken into consideration by correctional authorities in future decision-making processes.

[25] Lastly, the other conclusions the applicant is seeking in his applications for judicial review are denied, without prejudice to the applicant's right to request the correction of any entry in his file to the relevant correctional authorities and to pursue his action for damages against the Crown, if applicable. Moreover, this judgment does not cancel the corrective measures imposed by the Senior Deputy Commissioner in relation to grievance V30R00018783.

JUDGMENT

THE COURT'S JUDGMENT is that the applications for judicial review in dockets T-2563-14 and T-204-15 are allowed in part, according to the following conclusions:

1. The decisions rendered on January 31, 2014, by the Acting Deputy Commissioner be set aside;

2. The file be referred back for redetermination with the following instructions:

   a) Grievance V30R00018783 filed by the applicant concerning his placement in involuntary administrative segregation is allowed for the purpose of applying the following additional corrective measure: the information about the incident on October 21, 2011, and the maintenance of the applicant in involuntary segregation must not be used or taken into consideration by correctional authorities in any future decision-making process; and

   b) Grievances V30R0001876, V30R00018784 and V30R00018785 filed by the applicant concerning the reassessment of his security classification and his transfer to a maximum-security institution are allowed for the purpose of applying the following corrective measure: the security reclassification on November 7, 2011, and the applicant's involuntary transfer to a maximum-security institution on November 24, 2011, must no longer be taken into consideration by correctional authorities in future decision-making processes.

3. The other conclusions the applicant is seeking in his applications for judicial review are denied, without prejudice to the applicant's right to request the

correction of any entry in his file to the relevant correctional authorities and to pursue any action for damages against the Crown, if applicable. Moreover, this judgment does not cancel the corrective measures imposed by the Senior Deputy Commissioner in relation to grievance V30R00018783;

4. This judgment must be placed in the applicant's institutional file; and

5. Without costs.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2563-14
STYLE OF CAUSE:	CHRISTOPHER LILL v ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-204-15
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APPEARANCES:

Cynthia Chénier	FOR THE APPLICANT
Virginie Harvey	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Cynthia Chénier Counsel Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT