Federal Court Cour fédérale

Date: 20200110

Docket: T-29-19

Citation: 2020 FC 28

Ottawa, Ontario, January 10, 2020

PRESENT: The Honourable Madam Justice Fuhrer

BETWEEN:

GARY EUNICK

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Gary Eunick, was convicted of first-degree murder and attempted murder and began serving his life sentence without parole eligibility for 25 years in 2004 at Beaver Creek Institution, a medium-security facility [BCI-MED]. Mr. Eunick and an accomplice were found to have fired numerous times at two bar co-operators, one of whom died from his gunshot wounds, after not being admitted to a private party in their bar in 2002. Mr. Eunick's

appeals of his conviction and sentence have been dismissed; he nonetheless continues to deny any involvement in the offences.

[2] In July 2017, Mr. Eunick requested a voluntary transfer from BCI-MED to Joyceville Institution, a minimum-security facility [JI-MIN], in accordance with section 29 of the *Corrections and Conditional Release Act*, SC 1922, c 20 [CCRA] and section 15 of the *Corrections and Conditional Release Regulations*, SOR/92-620 [CCRR].

[3] That same month, in connection with Mr. Eunick's transfer request, his Case Management Team [CMT], comprised of himself, his acting parole officer and a correctional officer, prepared an Assessment for Decision [A4D] recommending reduction of his Offender Security Level [OSL] from medium to minimum and approving the transfer given his lack of ongoing involvement with a Security Threat Group [STG or gang], improved institutional behaviour and lack of management concern in recent years, incidence avoidance, and continued adherence to his correctional plan. Effectively, this meant maintaining the assessment of his Institutional Adjustment [IA] rating as low and reassessing his Escape Risk [ER] and Public Safety Risk [PSR] ratings as low, instead of moderate.

[4] On August 3, 2017, however, the Manager of Assessment Intervention [MAI] recommended Mr. Eunick's OSL remain at medium and his transfer request be denied, asserting he continued to pose a moderate ER because of the [perceived] unpredictability of his response to a pending judicial review of his parole eligibility timeline, and a moderate PSR based on his continued denial of involvement in the underlying offences and [misperceived] ongoing

affiliation with an STG or gang. The same day, the Correctional Intervention Board [CIB] agreed with the MAI's recommendation and forwarded the file to the BCI-MED Warden [Warden]. The Warden adopted the CIB's recommendation and denied Mr. Eunick's transfer request. Mr. Eunick appealed both his OSL and transfer denial through the internal grievance process, in accordance with CCRR ss 74-82. On November 28, 2018, his final [third-level] grievance was denied by the Special Advisor to the Correctional Service of Canada [CSC] Commissioner [Special Advisor] in the "Offender Final Grievance Response" [Grievance Decision].

[5] Mr. Eunick now seeks judicial review of the Grievance Decision, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. While the Special Advisor refers to and at times adopts the lower decisions, it is the Grievance Decision itself that is the subject of this review: *Thompson v Canada (Correctional Service)*, 2018 FC 40 at paras 18-20. Mr. Eunick also seeks costs for his application in accordance with the *Federal Courts Rules*, SOR/98-106.

[6] For the reasons that follow, this judicial review application is dismissed.

II. Grievance Decision under Review

[7] The Special Advisor summarized the CIB's rationale for the medium OSL, in particular its decision on Mr. Eunick's ER and PSR ratings and Mr. Eunick's submissions on these points. Noting Mr. Eunick's IA rating already was classified as low, the Special Advisor focussed only on his ER and PSR ratings, in addition to Mr. Eunick's assertion that JI-MIN's comments were provided without considering his updated Correctional Plan, and thus unfairly influenced the Warden's decision and hence the Grievance Decision.

Escape Risk Assessment

[8] Relying on Annex B of Commissioner's Directions [CD] 710-6 dated January 23, 2017, the Special Advisor found a moderate ER includes "one who presents a definite potential to escape from an institution that has no enclosure". Conceding the CMT, MAI and CIB concurred he had no escape-related behavior since arriving at BCI-MED and there was no evidence Mr. Eunick suffered from any acute mental health disorder that would contraindicate a transfer, the Special Advisor noted both the CMT and MAI found the 7-year proximity to Mr. Eunick's day parole eligibility date concerning, given his history of breaches and prior conviction for failure to comply with recognizance. The Special Advisor also noted both the CMT and MAI concluded Mr. Eunick's pending judicial review [of his life sentence under s 745.6 of the Criminal Code for a reduction in the number of years of imprisonment without eligibility for parole] could "significantly influence" his ER, as a negative decision could cause him to become upset enough to abscond from a minimum security facility. On this basis, the Special Advisor found it was reasonable to maintain Mr. Eunick's ER as moderate.

Risk to Public Safety Assessment

[9] Again relying on Annex B of CD 710-6 dated January 23, 2017, the Special Advisor found a moderate PSR includes situations where the offender has demonstrated some progress in addressing the dynamic factors, which contributed to prior violent behaviour, but where there are still current indicator(s) of moderate risk/concern. Conceding Mr. Eunick had continued to make improvements, the Special Advisor found Mr. Eunick continued to deny involvement in his index offences and continued to be affiliated with the STG he was involved with prior to the

offences. The Special Advisor acknowledged Mr. Eunick's STG affiliation was downgraded subsequently; so this affiliation no longer was a concern, but nonetheless found Mr. Eunick's ongoing denial of involvement in his index offences sufficient on its own to maintain his moderate PSR rating.

Comments from JI-MIN

[10] Conceding JI-MIN's comments were provided prior to its receipt of Mr. Eunick's Correctional Plan Update, the Special Advisor found the CMT, MAI, CIB and Warden all would have had access to Mr. Eunick's Correctional Plan Update, and considered its contents accordingly. As such, JI-MIN's comments would not have influenced their conclusions determinatively.

[11] Overall, the Special Advisor found Mr. Eunick's OSL was assessed in accordance with Annex B of CD 710-6 dated January 23, 2017 and CCRR s 18. Accordingly, both the OSL and the transfer denial were upheld.

III. Issues

[12] This judicial review application raises the following issues:

(1) Are the alleged Charter violations properly before this Court?

(2) Was the Grievance Decision procedurally fair?

(3) Was the Grievance Decision reasonable?

IV. Applicable Provisions and Policy

[13] See the Annex to the Judgment and Reasons for the applicable statutory, regulatory and policy framework.

V. New Framework for Determining and Applying Applicable Standard of Review

[14] On December 19, 2019, the Supreme Court of Canada [SCC] issued its much anticipated decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], adopting "a revised framework for determining the standard of review where a court reviews the merits of an administrative decision" - having as the starting point "a [rebuttable] presumption that reasonableness is the applicable standard in all cases" - and providing "better guidance … on the proper application of the reasonableness standard": *Vavilov*, above at paras 10-11.

[15] Regarding reasonableness review, the SCC further stated in *Vavilov*, above at para 13:

> Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.

[16] In a nutshell, "[i]n conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified": *Vavilov*, above at para 15.

[17] The presumption of reasonableness is rebutted in the following situations summarized in *Vavilov*, above at para 69:

> In these reasons, we have identified five situations in which a derogation from the presumption of reasonableness review is warranted either on the basis of legislative intent (i.e., legislated standards of review and statutory appeal mechanisms) or because correctness review is required by the rule of law (i.e., **constitutional questions**, general questions of law of central importance to the legal system as a whole, and questions regarding jurisdictional boundaries between administrative bodies). …
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> [Bold emphasis added.]

[18] Regarding procedural fairness and reasonableness, the SCC held at *Vavilov*, above at para 81:

> … The starting point for our analysis is therefore that where reasons are required [see CCRR s 80(3) in the Annex, for example], they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts. It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.

[19] A principled approach to reasonableness review puts the reasons first, "…by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion": *Vavilov*, above at para 84. The focus of reasonableness review, therefore, must be on the decision, including the decision maker's reasoning process and the outcome. The reviewing court must consider only whether the decision, taking into account the rationale and outcome, was unreasonable, and must avoid substituting its own analysis or preferred decision: *Vavilov*, above at para 83. As noted by the

SCC, "[t]he burden is on the party challenging the decision to show that it is unreasonable. …the court must satisfied that any shortcomings or flaws … are sufficiently central or significant to render the decision unreasonable": *Vavilov*, above at para 100.

[20] The SCC found two types of fundamental flaws useful to consider: "[t]he first is a failure of rationality internal to the reasoning process"; and "[t]he second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it": *Vavilov*, above at para 101. In other words, to be considered reasonable, the decision must be based on rational and logical reasoning: *Vavilov*, above at para 102. The SCC defined a reasonable decision as "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" and held that "… a reviewing court [must] defer to such a decision": *Vavilov*, above at para 85. The SCC found "it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons…": *Vavilov*, above at para 86 [emphasis in original]. The decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility – and it must be justified in relation to the factual and legal constraints applicable in the circumstances: *Vavilov*, above at para 99. "[W]here reasons are provided but they fail to provide a transparent and intelligible justification …, the decision will be unreasonable": *Vavilov*, above at para 136. Written reasons, however, "must not be assessed against a standard of perfection": *Vavilov*, above at para 91. Rather, "they must be read holistically and contextually, for the purpose of understanding the basis on which a decision was made": *Vavilov*, above at para 97.

[21] In short, "judicial review is concerned with both outcome and process" in determining whether the challenged decision was unreasonable, having regard to the chain of analysis [was it internally coherent, rational and justified?] in relation to the facts and law that constrain the decision maker: *Vavilov*, above at para 87. With this framework and guidance in mind, I turn to the analysis of the challenged Grievance Decision, including the reasoning and outcome.

VI. Analysis

(1) Are the alleged Charter violations properly before this Court?

[22] If properly alleged [*i.e.* in a timely manner], the approach to the standard of review set out in *Doré v Barreau du Québec*, 2012 SCC 12 continues to apply to questions of alleged limitations on rights under the *Canadian Charter of Rights and Freedoms* [*Charter*]: *Vavilov*, above at para 57. As noted by the Attorney General and confirmed by a review of the Certified Tribunal Record [CTR] in the instant matter, Mr. Eunick did not raise *Charter* arguments in his submissions in the internal grievance process, including before the Special Advisor. In *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 [*Forest Ethics*] at paras 43-46, the Federal Court of Appeal provides a succinct summary of why *Charter* arguments must be pleaded first at the administrative level:

> [43] ... Parliament has assigned the responsibility of determining the merits of factual and legal issues – including the merits of constitutional issues – to the Board, not this Court. Evidentiary records are built before the Board, not this Court. As a general rule, this Court is restricted to reviewing the Board's decisions through the lens of the standard of review using the evidentiary record developed before the Board and passed to it. See generally *Association of Universities and Colleges of Canada v. Canadian*

> *Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 (CanLII), 428 N.R. 297.
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> [44] Were it otherwise, if administrative decision-makers could be bypassed on issues such as this, they would never be able to weigh in. On a judicial review, administrative decision-makers do not have full participatory rights as parties or interveners. They cannot make submissions to the reviewing court with a view to bolstering or supplementing their reasons. They face real restrictions on the submissions they can make. See generally *Canada (Attorney General) v. Quadrini, 2010 FCA 246 (CanLII)*, [2012] 2 F.C.R. 3 at paragraphs 16-17. As a result, often their only opportunity to supply relevant information bearing upon the issue – such as factual appreciations, insights from specialization and policy understandings – is in their reasons.
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> [45] If administrative decision-makers could be bypassed on issues such as this, those appreciations, insights and understandings would never be placed before the reviewing court. In constitutional matters, this is most serious. Constitutional issues should only be decided on the basis of a full, rich factual record: *Mackay v. Manitoba*, 1989 CanLII 26 (SCC), [1989] 2 S.C.R. 357 at pages 361-363. ...
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> [46] The Supreme Court has strongly endorsed the need for constitutional issues to be placed first before an administrative decision-maker who can hear them: *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16 (CanLII), [2005] 1 S.C.R. 257 at paragraphs 38-40. Where, as here, an administrative decision-maker can hear and decide constitutional issues, **that jurisdiction should not be bypassed by raising the constitutional issues for the first time on judicial review**. Parliament's grant of jurisdiction to the Board to decide such issues must be respected. [Bold emphasis added.]

See also *Fabrikant v Canada*, 2012 FC 1496 at para 11, citing *R v Conway*, 2010 SCC 22 at para 79.

[23] Accordingly, Mr. Eunick should have raised his *Charter* allegations and arguments during the CSC grievance process, or at the very least before the Special Advisor, so that this

Court would have had the benefit of the CSC's specialized knowledge and expertise prior to considering the alleged Charter violations. More fundamentally, without a decision of the Special Advisor on these issues, there is nothing for this Court to review. As noted above in *Forest Ethics* at para 43: "[a]s a general rule, this Court is restricted to reviewing the Board's decisions through the lens of the standard of review **using the evidentiary record developed before the Board and passed to it**." [Bold emphasis added]

[24] Though the Federal Court of Appeal posited that the general rule could be relaxed in cases of urgency, or that a direct challenge to the constitutionality of the legislation may be possible so long as it does not circumvent the administrative process or otherwise amount to a collateral attack on the administrator's power to decide the issue, in my view such circumstances are not present in this matter: *Forest Ethics*, above at paras 46-47. In particular, the CTR contains no evidence of any urgency attached to Mr. Eunick's OSL classification or transfer request. Further, the Applicant's allegations of *Charter* breaches do not involve a direct challenge to the constitutionality of any of the provisions of the CCRA or CCRR. That said, should a future transfer request by Mr. Eunick be denied, he could plead *Charter* breaches before the CSC in that instance. The CSC's grievance process is considered an adequate alternative remedy to a court of competent jurisdiction and is capable of determining whether an inmates' constitutional rights were breached and granting a remedy if so: *Nome v Canada (Attorney General)*, 2016 FC 187 at para 22; *Ewert v Canada (Attorney General)*, 2018 FC 47 at paras 28 and 30; *Wood v Canada (Correctional Service)*, 2015 FC 44 at para 19.

(2) Was the Grievance Decision procedurally fair?

[25] As mentioned above, judicial review is concerned with both outcome and process. This Court is tasked with determining whether the challenged decision, the Grievance Decision in this case, was unreasonable, having regard to the Special Advisor's chain of analysis. In other words, was the decision internally coherent, rational and justified in relation to the facts and law that constrain the decision maker? When considering procedural fairness, this Court ultimately is concerned with whether the process in question was fair; procedural fairness takes colour from the context, and the same rights mandated in one context are not necessarily appropriate in another: *Mission Institution v Khela*, 2014 SCC 24 [*Khela*] at para 90. Put another way, "[t]he duty of procedural fairness in administrative law is 'eminently variable', inherently flexible and context-specific": *Vavilov*, above at para 77 [citing, among others, *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 at p 682, and *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 22-23].

[26] Mr. Eunick submits he was not made aware of either the MAI or CIB conclusions prior to the Warden's decision and without access to this information, he was unable to make representations of the proposed denial of his requested transfer. He further submits there "must have been other information considered by the CSC decision-makers that is not reflected on the record."

[27] The Attorney General argues the two submissions made by Mr. Eunick in August 2017 and September 2018 in the course of the grievance process demonstrate he was well aware the decisions of his CMT, MAI and CIB [collectively, the CSC decisions] and, therefore, "he has no grounds to … claim that a legitimate expectation to be given notice of them was somehow not

met." The Attorney General further points to Mr. Eunick's application to update his STG affiliation [to inactive] as evidence he knew this was a relevant factor in connection with his transfer request, and submits Mr. Eunick also reasonably knew his continuing denial of guilt in respect of his index offences would be considered, given he had maintained his position throughout his sentence. Moreover, the Attorney General asserts there is no evidence whatsoever to support Mr. Eunick's allegation that CSC must have relied on additional [undisclosed] information, and stresses the basis for each of CSC decisions is clearly set out in the respective decisions which Mr. Eunick has challenged through the final-level grievance process.

[28] Regarding the allegation that CSC relied on additional [undisclosed] information, I agree with the Attorney General that there is no evidence to support the allegation nor can it be inferred from the fact that the CSC decisions maintained Mr. Eunick's OSL classification at medium rather than adopting the A4D recommendations to lower the ER and PSR ratings and hence the overall OSL classification. The Grievance Decision summarizes the information the Special Advisor considered [Mr. Eunick's submission; relevant policy and legislation; pertinent documentation on his Offender Management System file] and it is clear from Mr. Eunick's August 2017 submission in particular that he had access to his information on file by reason of the statement: "There is also no information on file that my behaviour/attitude had deteriorated after exhausting both my appeals." As well, he quoted from his last psychological risk assessment which is dated several months prior to the Warden's decision.

[29] CCRA s 27(1) provides where an offender is entitled [by the CCRA Part I or CCRR] to make representations prior to a decision being taken by CSC, the decision maker must give the

offender [through direct disclosure or a summary of] all relevant information prior to the decision being taken. CCRA s 27(2), on the other hand, prescribes disclosure of the information underlying decisions only after the decision is made, so the inmate can "appeal" the decision through the internal grievance process: *Leblanc v Canada (Attorney General)*, 2006 FC 1337 at paras 20-22. Regarding "security classification" or OSL, CCRA s 30(2) obligates CSC to give "each inmate reasons, in writing, for assigning a particular security classification or for changing that classification." Similarly, in respect of voluntary transfer requests, CCRR s 15 obligates the Commissioner or a staff member to "consider the request and give the inmate written notice of the decision, within 60 days after the submission of the request, including the reasons for the decision if the decision is to deny the request." In neither case is the offender entitled, by statute or regulations, to make representations prior to the decision.

[30] I find the CSC was not obligated to disclose the MAI and CIB decisions in particular to Mr. Eunick prior to the Warden's decision to adopt the CIB's recommendations regarding Mr. Eunick's OSL classification and to deny his transfer request. As already noted, Mr. Eunick was both part of his CMT and its discussions and would have receive the issued A4D or at the very least been aware of its contents. This A4D discusses his prior criminal convictions, his STG affiliate status and efforts to de-affiliate himself, and Mr. Eunick's ongoing denial of involvement in his index offences, as factors relevant to its recommendations. Given this, and that the CCRA, CCRR and applicable CDs all reference OSL as a relevant factor for transfer decisions, this was not a situation where Mr. Eunick did not know the case against him. He reasonably knew his OSL would impact the transfer decision and that there was a possibility his

medium OSL classification could be maintained. Moreover, Mr. Eunick has not pleaded nor established he did not have the underlying CSC decisions prior to the Special Advisor's decision.

[31] As Mr. Eunick has not substantiated any of his procedural concerns, this ground is not successful.

(3) Was the Grievance Decision reasonable?

[32] As held in *Vavilov*, reasonableness is the presumptive applicable standard of review unless derogation is warranted either on the basis of legislative intent or the rule of law: *Vavilov*, above at paras 17, 69. A reasonable decision is one that is justified based on the applicable facts; absent exceptional circumstances, a reviewing court will not interfere with factual findings in the sense that it will refrain from reweighing and reassessing the evidence before the decision maker: *Vavilov*, above at paras 125-126. Failure to provide a transparent and intelligible justification, however, will render the decision unreasonable: *Vavilov*, above at paras 99, 136. Further, the Supreme Court has emphasized that "a decision will be unreasonable, and therefore unlawful, [where] an inmate's liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion": *Khela* at para 74.

[33] Expertise remains a relevant consideration in reasonableness review: *Vavilov,* above at para 31. Guidance about the place of institutional expertise in the reasonableness review is found at paras 92-94 of *Vavilov* as follows:

[92] … the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision — indeed, they may be indicative of a decision maker's strength within its particular and specialized domain. "Administrative justice" will not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.

[93] An administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that institutional expertise and experience to bear: see *Dunsmuir*, at para. 49. In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail.

[94] The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member.

[34] In sum, a decision maker's written reasons must be read closely to understand the basis on which a decision was made: *Vavilov*, above at para 97. Further "[a] reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable": *Vavilov*, above at para 99. Reasons that simply summarize submissions and repeat statutory/regulatory language followed by a peremptory conclusion will be of little assistance to a reviewing court in understanding the decision maker's rationale: *Vavilov*, above a para 102. As previously mentioned, however, the burden remains on the party challenging a decision to persuade the reviewing court that the decision is unreasonable.

[35] The Special Advisor summarized Mr. Eunick's submissions in support of his grievance and complaints regarding the CSC decisions. Given the significance of the OSL to the request for transfer to JI-MIN, both of which issues Mr. Eunick raised in his request for corrective action, the Special Advisor focussed on the ER and PSR assessments. As his CMT recommended no change in respect of Mr. Eunick's already low IA classification, and the MAI and CIB concurred, it was not mentioned further.

[36] Like the Warden, the Special Advisor must consider and weigh numerous factors when determining an inmate's OSL: CCRR s 17. Some of these factors focus on an inmate's past (static factors), including the seriousness of the offence, outstanding charges, and the inmates' social and criminal history, while others focus on present and forward-looking progress and risks (dynamic factors), including the inmate's institutional performance and behaviour, mental and physical health, potential for violent behaviour, and any continued involvement in criminal

activities. CSC maintains expertise in security and behaviour assessments, and thus determining the appropriate relative weight of these factors when arriving at an OSL. As such, this Court should intervene only where the decision is clearly irrational or evidently not in accordance with reason: *Vavilov*, above at paras 93-94; *Canada (Attorney General) v Boucher*, 2005 FCA 77 at para 16; *Kim v Canada (Attorney General)*, 2012 FC 870 at para 59.

[37] CD 710-6 provides the parameters for each relevant security rating:

Escape Risk

a. Low – the inmate:
   i. Has no recent serious escape and there are no current indicators of escape potential;
   ii. Has no significant history of breaches.

b. Medium – the inmate:
   i. Has a recent history of escape and/or attempted escapes OR there are current indicator(s) of escape potential;
   ii. Is unlikely to make active efforts to escape but may do so if the opportunity presents itself;
   iii. Presents a definite potential to escape from an institution that has no enclosure.

Public Safety Risk

a. Low – the inmate's:
   i. Criminal history does not involve violence;
   ii. Criminal history involves violence/sexually-related offence(s), but the inmate has demonstrated significant progress in addressing the dynamic factors which contributed to the criminal behaviour and there are no signs of the high risk situations/offence precursors identified as part of the offence cycle (where it is known);

iii. Criminal history involved violence, but the circumstances of the offence are such that the likelihood of reoffending violently is assessed as improbably.

b. Medium – the inmate's:

i. Criminal history involves violence, but the inmate has demonstrated some progress in addressing those dynamic factors which contributed to the violent behaviour;

ii. Criminal history involved violence but the inmate has demonstrated a willingness to address the dynamic factors which contributed to the violent behaviour;

iii. There are current indicator(s) of moderate risk/concern.

[38] The Special Advisor noted the definition of "Moderate ER" includes one who presents a definite potential to escape from an institution that has no enclosure, and found the following factors relevant to the ER analysis:

- No history of escape-related behaviour since the beginning of incarceration;
- Prior history of breaches and a conviction for failure to comply with recognizance from 2001;
- The CMT recommended OSL reduction given positive changes in behaviour;
- The period of time until Mr. Eunick's day parole eligibility date [7 years] concerned the CMT and MAI;
- Both the MAI and CIB concurred: a negative decision on Mr. Eunick's pending judicial review of his parole eligibility timeline could significantly influence behaviour negatively; this outcome was likely in light of his ongoing denial of involvement with his index offences; and a negative outcome could cause Mr. Eunick become upset enough to abscond from a minimum-security facility;

- The Institutional Head [IH] of BCI-MED concurred with the MAI and elaborated that ER would remain moderate because of Mr. Eunick's history of poor supervision performance and time left to parole eligibility date;
- There was no evidence of any acute mental health disorder that would contraindicate a transfer.

[39] In light of the above factors, there is sufficiently transparent and intelligible justification in my view for the Special Advisor to deny the grievance, thereby maintaining Mr. Eunick's moderate ER score. This is internally coherent and rational, having regard to CCRR s 18(b)(i) which contemplates a "medium" security classification or OSL for an inmate "who present[s] a **low to moderate probability of escape** and a moderate risk to the safety of the public in the event of escape" [bold emphasis added], and having regard to CD 710-6 and the parameters applicable to a medium ER. Though a relatively minor point and nothing turns on it, I note that "moderate" and "medium" appear to be used interchangeably for both the overall OSL and the constituent elements, IA, ER and PSR.

[40] Regarding the PSR analysis, the Special Advisor noted the definition of "Moderate Risk to PS" includes that the offender has demonstrated some progress in addressing the dynamic factors which contributed to violent behaviour and that there are current indicators of moderate risk/concern, and found the following relevant to the PSR analysis:

- The CMT, MAI and CIB concurrence that Mr. Eunick had made improvements during the course incarceration but continued to deny involvement in his index offences and there was still STG affiliation;

- Though the CMT concluded reduction in PSR was warranted, the MAI and CIB concluded continued denial of involvement in the index offences and STG affiliation were indicators of concern;
- The IH of BCI-MED concurred with the MAI and elaborated that PSR would remain moderate because of Mr. Eunick's continued denial of involvement in the index offences and his criminal involvement prior to the indexed offences.

[41] Moreover, the Special Advisor was alive to Mr. Eunick's concern that the CSC decisions erroneously noted his STG affiliation which subsequently was updated to inactive and found:

> "With regard to your status as an Active Member of an STG at the time of this OSL assessment, information on your file indicates that a SIO did look into your request to have your status updated and accordingly modified your affiliation status to an Inactive STG Member on 2017-08-28. With regard to the allegation that your Risk to PS was determined solely using incorrect STG information, the analysis in the 2017-07-19 A4D and the corresponding Referral Decision Sheet for OSL clearly indicates two (2) indicators of moderate risk/concern: your continued denial of involvement in your index offence and continued affiliation with the STG with which you were involved prior to your index offence. Your continued denial of involvement in your index offence was, **on its own, a significant indicator of progress still to be made against your Correctional Plan and an indicator of concern** as per Annex B of CD 710-6 (2017-02-13)."
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> [Bold emphasis added.]

[42] In my view, the Special Advisor provided sufficiently transparent and intelligible justification for denying the grievance, thereby maintaining a moderate PSR score. This is internally coherent and rational having regard to CCRA s 4(a) ["the nature and gravity of the offence, the degree of responsibility of the offender"], CCRR s 18(c)(i) which contemplates a "low" OSL only where the inmate demonstrates a low probability of escape <u>**and**</u> a low risk to the

safety of the public in the event of an escape, and having regard to CD 710-6 and the above-mentioned parameters applicable to a medium PSR.

[43] On a final note, though the reasons provided by the Special Advisor in the Grievance Decision are sparse, as contrasted with the summary of the submissions and CSC decisions, a consideration of the record as a whole permit me to understand the rationale for the Grievance Decision and conclude that it is justified in relation to the factual and legal constraints applicable in this matter.

VII. Conclusion

[44] The Applicant has not satisfied the burden on him of persuading this Court that the Grievance Decision was unreasonable and, therefore, I dismiss the instant judicial review application. As the Respondent has advised the Court that the Respondent is not seeking costs in this matter, no costs are awarded.

JUDGMENT in T-29-19

THIS COURT'S JUDGMENT is that the judicial review application is dismissed and no costs are awarded.

"Janet M. Fuhrer"
Judge

ANNEX

Applicable Statutory, Regulatory and Policy Framework

1. CCRA ss 3 and 4 set out respectively the overarching purpose of the correctional system and guiding principles. CCRA ss 3 and 4(a) provide:

3 The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by	**3** Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.
(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and	
(b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.	
…	…
4 The principles that guide the Service in achieving the purpose referred to in section 3 are as follows:	**4** Le Service est guidé, dans l'exécution du mandat visé à l'article 3, par les principes suivants :
(a) the sentence is carried out having regard to all relevant available information, including the stated reasons and recommendations of the	**a)** l'exécution de la peine tient compte de toute information pertinente dont le Service dispose, notamment les motifs et recommandations donnés

sentencing judge, the nature and gravity of the offence, the degree of responsibility of the offender, information from the trial or sentencing process, the release policies of and comments from the Parole Board of Canada and information obtained from victims, offenders and other components of the criminal justice system;	par le juge qui l'a prononcée, la nature et la gravité de l'infraction, le degré de responsabilité du délinquant, les renseignements obtenus au cours du procès ou de la détermination de la peine ou fournis par les victimes, les délinquants ou d'autres éléments du système de justice pénale, ainsi que les directives ou observations de la Commission des libérations conditionnelles du Canada en ce qui touche la libération;

2. CCRR ss 17-18 set out the factors to be considered in assessing an inmate's OSL. How an OSL assessment is conducted, including how the factors are assessed, are further canvassed in CD 710-6 (*Review of Inmate Classification – version January 23, 2017 applicable here)* and CD 710-1 (*Progress Against Correctional Plan – version August 2017 applicable here*) and their applicable Guidelines. CCRA s 30(2) requires reasons be provided when an inmate is assigned a particular security classification, or where that classification is subsequently changed.

17 For the purposes of section 30 of the Act, the Service shall consider the following factors in assigning a security classification to each inmate:	**17** Pour l'application de l'article 30 de la Loi, le Service attribue une cote de sécurité à chaque détenu en tenant compte des éléments suivants :
(a) the seriousness of the offence committed by the inmate;	**a)** la gravité de l'infraction commise par le détenu;
(b) any outstanding charges against the inmate;	**b)** toute accusation en instance contre lui;
(c) the inmate's performance and behaviour while under sentence;	**c)** son rendement et sa conduite pendant qu'il purge sa peine;
(d) the inmate's social, criminal and, if available, young-offender history and	**d)** ses antécédents sociaux et criminels, y compris ses antécédents comme jeune

any dangerous offender designation under the *Criminal Code*;	contrevenant s’ils sont disponibles et le fait qu’il a été déclaré délinquant dangereux en application du *Code criminel*;
(e) any physical or mental illness or disorder suffered by the inmate;	**e)** toute maladie physique ou mentale ou tout trouble mental dont il souffre;
(f) the inmate’s potential for violent behaviour; and	**f)** sa propension à la violence;
(g) the inmate’s continued involvement in criminal activities.	**g)** son implication continue dans des activités criminelles.
18 For the purposes of section 30 of the Act, an inmate shall be classified as	**18** Pour l’application de l’article 30 de la Loi, le détenu reçoit, selon le cas :
(a) maximum security where the inmate is assessed by the Service as	**a)** la cote de sécurité maximale, si l’évaluation du Service montre que le détenu :
(i) presenting a high probability of escape and a high risk to the safety of the public in the event of escape, or	**(i)** soit présente un risque élevé d’évasion et, en cas d’évasion, constituerait une grande menace pour la sécurité du public,
(ii) requiring a high degree of supervision and control within the penitentiary;	**(ii)** soit exige un degré élevé de surveillance et de contrôle à l’intérieur du pénitencier;
(b) medium security where the inmate is assessed by the Service as	**b)** la cote de sécurité moyenne, si l’évaluation du Service montre que le détenu :
(i) presenting a low to moderate probability of escape and a moderate risk to the safety of the public in the event of escape, or	**(i)** soit présente un risque d’évasion de faible à moyen et, en cas d’évasion, constituerait une menace moyenne pour la sécurité du public,
(ii) requiring a moderate degree of supervision and control within the penitentiary; and	**(ii)** soit exige un degré moyen de surveillance et de contrôle à l’intérieur du pénitencier;
(c) minimum security where the inmate is assessed by the Service as	**c)** la cote de sécurité minimale, si l’évaluation du Service montre que le détenu :
(i) presenting a low probability of escape and a low risk to the safety of the public in the event of escape, and	**(i)** soit présente un faible risque d’évasion et, en cas d’évasion, constituerait une faible menace pour la sécurité

	du public,
(ii) requiring a low degree of supervision and control within the penitentiary.	**(ii)** soit exige un faible degré de surveillance et de contrôle à l'intérieur du pénitencier.

30 (2) The Service shall give each inmate reasons, in writing, for assigning a particular security classification or for changing that classification.	**30 (2)** Le Service doit donner, par écrit, à chaque détenu les motifs à l'appui de l'attribution d'une cote de sécurité ou du changement de celle-ci.

3. CCRA ss 28-29 and CCRR s 15 set out the applicable process for an inmate requesting a voluntary institution transfer. This is elaborated on in CD 710-2 (*Transfer of Inmates – version May 15, 2017 applicable here*) and its applicable Guidelines:

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 the least restrictive environment for that person, taking into account	**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 les moins privatives de liberté pour celui-ci, compte tenu des éléments suivants :
(a) the degree and kind of custody and control necessary for	**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;
(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	**b)** la facilité d'accès à la collectivité à laquelle il appartient, à sa famille et à un milieu culturel et linguistique compatible;
(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.	**c)** l'existence de programmes et de services qui lui conviennent et sa volonté d'y participer ou d'en bénéficier.
29 The Commissioner may authorize the transfer of a person who is sentenced, transferred or committed to a penitentiary	**29** Le commissaire peut autoriser le transfèrement d'une personne condamnée ou transférée au pénitencier :
(a) to a hospital, including any mental health facility, or to a provincial correctional facility, in accordance with an agreement entered into under paragraph 16(1)(a) and any applicable regulations;	**a)** à un hôpital, notamment tout établissement psychiatrique, ou à un établissement correctionnel provincial, dans le cadre d'un accord conclu au titre du paragraphe 16(1), conformément aux règlements applicables;
(b) within a penitentiary, from an area that has been assigned a security classification under section 29.1 to another area that has been assigned a security classification under that section, in accordance with the regulations made under paragraph 96(d), subject to section 28;	**b)** à l'intérieur d'un pénitencier, d'un secteur auquel une cote de sécurité a été attribuée en vertu de l'article 29.1, à un autre secteur auquel une cote de sécurité a ainsi été attribuée, conformément aux règlements pris en vertu de l'alinéa 96d), mais sous réserve de l'article 28;
(c) to another penitentiary, in accordance with the regulations made under paragraph 96(d), subject to section 28.	**c)** à un autre pénitencier, conformément aux règlements pris en vertu de l'alinéa 96d), mais sous réserve de l'article 28.

15 Where an inmate submits a request for a transfer referred to in section 29 of the Act, the Commissioner or a staff member designated in accordance with paragraph	**15** Lorsque le détenu présente une demande de transfèrement visé à l'article 29 de la Loi, le commissaire ou l'agent désigné selon l'alinéa 5(1)b) doit, dans les 60 jours suivant

5(1)(b) shall consider the request and give the inmate written notice of the decision, within 60 days after the submission of the request, including the reasons for the decision if the decision is to deny the request.	la présentation de la demande, examiner celle-ci et aviser par écrit le détenu de sa décision et, s'il la refuse, indiquer les motifs de son refus.

4. CCRR ss 74-82 set out the internal grievance process and procedure available to an inmate who is dissatisfied with CSC staff's action or decision. CCRR ss 80-82 specifically cover Mr. Eunick's situation:

80 (1) If an offender is not satisfied with a decision of the institutional head or director of the parole district respecting their grievance, they may appeal the decision to the Commissioner.	**80 (1)** Lorsque le délinquant est insatisfait de la décision rendue au sujet de son grief par le directeur du pénitencier ou par le directeur de district des libérations conditionnelles, il peut en appeler au commissaire.
(2) [Repealed, SOR/2013-181, s. 3]	**(2)** [Abrogé, DORS/2013-181, art. 3]
(3) The Commissioner shall give the offender a copy of his or her decision, including the reasons for the decision, as soon as practicable after the offender submits an appeal.	**(3)** Le commissaire transmet au délinquant une copie de sa décision et de ses motifs dès que possible après que le délinquant a interjeté appel.
80.1 A senior staff member may, on the Commissioner's behalf, make a decision in respect of a grievance submitted under paragraph 75(b) or an appeal submitted under subsection 80(1) if the staff member	**80.1** L'agent supérieur peut, au nom du commissaire, rendre une décision relativement à un grief présenté en vertu de l'alinéa 75b) ou à un appel interjeté en vertu du paragraphe 80(1) si, à la fois, il :
(a) holds a position equal to or higher in rank than that of assistant deputy minister; and	**a)** occupe un poste de niveau égal ou supérieur à celui du sous-ministre adjoint;
(b) is designated by name or position for that purpose in a	**b)** est désigné à cette fin dans les Directives du commissaire

Commissioner's Directive.	soit expressément, soit en fonction du poste qu'il occupe.
81 (1) Where an offender decides to pursue a legal remedy for the offender's complaint or grievance in addition to the complaint and grievance procedure referred to in these Regulations, the review of the complaint or grievance pursuant to these Regulations shall be deferred until a decision on the alternate remedy is rendered or the offender decides to abandon the alternate remedy.	**81 (1)** Lorsque le délinquant décide de prendre un recours judiciaire concernant sa plainte ou son grief, en plus de présenter une plainte ou un grief selon la procédure prévue dans le présent règlement, l'examen de la plainte ou du grief conformément au présent règlement est suspendu jusqu'à ce qu'une décision ait été rendue dans le recours judiciaire ou que le détenu s'en désiste.
(2) Where the review of a complaint or grievance is deferred pursuant to subsection (1), the person who is reviewing the complaint or grievance shall give the offender written notice of the decision to defer the review.	**(2)** Lorsque l'examen de la plainte ou au grief est suspendu conformément au paragraphe (1), la personne chargée de cet examen doit en informer le délinquant par écrit.
82 In reviewing an offender's complaint or grievance, the person reviewing the complaint or grievance shall take into consideration	**82** Lors de l'examen de la plainte ou du grief, la personne chargée de cet examen doit tenir compte :
(a) any efforts made by staff members and the offender to resolve the complaint or grievance, and any recommendations resulting therefrom;	**a)** des mesures prises par les agents et le délinquant pour régler la question sur laquelle porte la plainte ou le grief et des recommandations en découlant;
(b) any recommendations made by an inmate grievance committee or outside review board; and	**b)** des recommandations faites par le comité d'examen des griefs des détenus et par le comité externe d'examen des griefs;
(c) any decision made respecting an alternate remedy referred to in subsection 81(1).	**c)** de toute décision rendue dans le recours judiciaire visé au paragraphe 81(1).

5. CCRA ss 27 sets out CSC's disclosure obligations for various CSC decisions:

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

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).	enquête licite.

6. Mr. Eunick also alleged violations under sections 2, 7, and 8 of the *Charter*:

2. Everyone has the following fundamental freedoms:	**2.** Chacun a les libertés fondamentales suivantes :
(a) freedom of conscience and religion;	**a)** liberté de conscience et de religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;	**b)** liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
(c) freedom of peaceful assembly; and	**c)** liberté de réunion pacifique;
(d) freedom of association.	**d)** liberté d'association.
…	…
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
8. Everyone has the right to be secure against unreasonable search or seizure.	**8.** Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

7. Section 18.1 of the *Federal Courts Act* permits this Court to review the Grievance Decision judicially:

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	**18 (1)** Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and	**a)** décerner une injonction, un bref de certiorari, de mandamus, de prohibition ou de quo warranto, ou pour rendre un jugement déclaratoire contre tout office fédéral;
(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.	**b)** connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-29-19
STYLE OF CAUSE:	GARY EUNICK v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 9, 2019
JUDGMENT AND REASONS:	FUHRER J.
DATED:	JANUARY 10, 2020

APPEARANCES:

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Taylor G. Andreas	FOR THE RESPONDENT

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