Federal Court  Cour fédérale

Date: 20210105

Docket: T-225-19

Citation: 2021 FC 12

Ottawa, Ontario, January 5, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

CHRIS WATTS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of a decision entitled "Offender Final Grievance Response," dated November 29, 2018 [the Decision], by the Assistant Commissioner, Policy [the Assistant Commissioner] of Corrections Services Canada [CSC], denying the Applicant's grievance, dated September 30, 2017, of a decision by CSC to involuntarily transfer him from British Columbia to Nova Scotia in August 2017.

[2] As explained in more detail below, this application is allowed, because the Decision does not engage with one of the principal bases for the Applicant's grievance. The Applicant asserted that the decision to transfer him was groundless, because it was based on an anonymous tip that he had threatened CSC staff, the accuracy of which the Applicant disputes. The Decision does not demonstrate that the Assistant Commissioner engaged with that assertion.

II. **Background**

[3] The Applicant, Chris Watts, is a federal offender who in 2015 completed a twelve-year sentence for manslaughter, sexual assault and sexual interference. The sentencing judge also imposed a long-term supervision order [LTSO] for a period of ten years following the completion of that sentence. The LTSO is subject to a number of conditions imposed by the Parole Board of Canada [the Board], including a residency requirement, i.e. that the Applicant must reside at a community correctional center [CCC] (a facility operated by CSC), a community residential facility [CRF] (a facility owned by a non-government agency under contract with CSC), or other residential facility (such as a private home placement) approved by CSC.

[4] As of May 2017, the Applicant was residing at the Chilliwack Community Correctional Center [Chilliwack], in Chilliwack, British Columbia. On May 4, 2017, the Applicant's LTSO was suspended, in the words of the Decision, "…after security intelligence information and staff safety concerns became known." A subsequent decision by the Board, dated July 10, 2017 [the Board Decision], which reviewed the terms of the LTSO, described this information as related to the Applicant allegedly making threats towards the manager and staff of Chilliwack.

[5] The Applicant disputes the information that he made such threats. However, because of this information, CSC did not consider a return to Chilliwack to be a suitable release plan. As Chilliwack is the only CCC in the Pacific Region, CSC explored the availability of CRFs. Community Assessments were performed in relation to CRFs in the various districts in the Pacific Region. However, no CRF was prepared to accept the Applicant. According to the Decision, placements in the Ontario Region or the Quebec Regions were also not considered viable options, because of threats previously made by the Applicant against law enforcement in the Ontario Region. CSC determined that the Atlantic Region was the only region willing to accept the Applicant, and a transfer to the Atlantic Region was therefore effected on August 1, 2017.

[6] As previously noted, the Applicant grieved this transfer decision, and the Decision denying his grievance is the subject of this application for judicial review.

III. **Issues**

[7] The Applicant raises several arguments in support of his challenge to the Decision. Broadly, these arguments give rise to two issues for determination by the Court:

A. Was the Decision to deny the Applicant's grievance reasonable?

B. Was the Decision to deny the Applicant's grievance made in a manner that was procedurally fair?

[8] As suggested by this articulation of the issues, the standard of review for CSC decisions involving findings of fact and mixed fact and law is reasonableness, while issues of procedural fairness are reviewable on a standard of correctness (see, e.g. *Fischer v Canada (Attorney General)*, 2013 FC 861 at para 22).

IV. **Analysis**

A. *Reasonableness of the Decision*

[9] The Applicant advances a large number of arguments, many of which challenge the accuracy of information contained in the records that CSC and the Board maintain in relation to his period of incarceration and subsequent conduct while subject to the LTSO. He argues that, over time, facts have been distorted or selectively captured in these records, and that these errors affect decisions about him made by CSC or the Board.

[10] However, as the Respondent (the Attorney General of Canada) submits, the present application for judicial review relates to only one decision, the November 29, 2018 Decision by the Assistant Commissioner to deny the Applicant's grievance of his transfer from British Columbia to Nova Scotia. Moreover, I agree with the Respondent that the Court's review of the Decision must take place within the boundaries of the issues that the Applicant raised in his grievance before the Assistant Commissioner. This precludes consideration of most of the arguments that the Applicant has raised before the Court.

[11] On the other hand, one of the touchstones for consideration of the reasonableness of the Decision is whether the decision-maker meaningfully engaged with the arguments that were raised. This principle is particularly relevant in the present matter where the Applicant raised a limited number of arguments in his grievance. As expressed by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 127-128:

> 127 The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.
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> 128 Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.
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> [Emphasis added]

[12] The document through which the Applicant submitted his grievance is an "Offender Complaint Presentation" dated September 30, 2017 [the Complaint], which succinctly states the details of his complaint as follows:

- Involuntary transfer from BC to NS
- Transfer based on anonymous "kite" is groundless
- My family is back in BC
- My court matter #27103 is ongoing back in Vancouver
- All my future plans are in Vancouver

[13] These points all focus on the Applicant's reasons for wishing to remain in British Columbia, with the exception of the Applicant's position that there are no grounds for the transfer, because it is based on an anonymous "kite." This point is a reference to the event that lead to the May 4, 2017 suspension of the Applicant's LTSO. At the time, the Applicant was residing at the Chilliwack CCC, having been released to that facility from the Mountain Institution [Mountain] on April 30, 2017. On May 4, 2017, CSC learned that, a few weeks prior to his release, Mountain staff had received a communication, from an anonymous source, that the Applicant had made threatening comments towards the Chilliwack manager and staff. Such a communication is commonly referred to as a "kite."

[14] The Applicants denies making any such threats. He asserts a suspicion that the source of the kite was an inmate who had also spent time at both Mountain and Chilliwack. The Applicant asserts that, after the Applicant moved from Chilliwack to Mountain, that other inmate who was then still residing at Chilliwack stole some of the Applicant's property. The Applicant argues that the other inmate, who was subsequently transferred to Mountain as well, invented the

allegation of the Applicant threatening Chilliwack staff to prevent the Applicant from being transferred back to Chilliwack and discovering the theft.

[15] Before the Assistant Commissioner made the Decision, a CSC Analyst interviewed the Applicant by telephone on November 13, 2018. The summary of that interview refers to the Applicant explaining "that the anonymous kite was from another resident who wanted him gone and that this other individual had previously stolen his property."

[16] The Complaint and this interview summary were before the Assistant Commissioner when making the Decision. Indeed, among the issues that the Decision notes the Applicant raised is a reference to his belief that he was transferred based on groundless anonymous kite information. However, the Decision demonstrates no consideration of this issue.

[17] In oral submissions on this issue, the Respondent refers the Court to the Decision's statement that a review of the Applicant's file determined that his community release was suspended on May 4, 2017, after security intelligence information and staff safety concerns became known. I also note a subsequent statement in the Decision that, due to new safety concerns at the Chilliwack CCC where the Applicant had recently resided, a return to that facility was no longer considered a suitable release plan. While these statements relate to the concern arising from the kite, they do not demonstrate any consideration of the Applicant's assertions that he did not make threats as alleged in the kite and that the kite was motivated by the other inmate's efforts to prevent detection of the theft of the Applicant's property.

[18] The Respondent argues that the Applicant's assertions did not address the staff safety concerns, because those concerns arose not only from the kite but also from an interview of the Applicant conducted by his parole officer after the kite was identified. The affidavit sworn by the Applicant in support of this application for judicial review attaches as an exhibit a document entitled Assessment for Decision [A4D], prepared by the parole officer and dated May 25, 2017, to advise the Board of the circumstances surrounding the suspension of the Applicant's LTSO and to make recommendations on the laying of a charge and changes to the LTSO conditions. The A4D includes information about the parole officer's interview of the Applicant and explains why, based on the interview, the officer was more confident about the reliability of the information that the Applicant had made the alleged threats.

[19] The difficulty with the Respondent's argument, to the effect that Assistant Commissioner was satisfied of the reliability of the information about the threats based on the parole officer's interview of the Applicant, is that there is no analysis of this sort in the Decision. Indeed, the A4D does not even form part of the Certified Tribunal Record, which contains the information that was before the Assistant Commissioner when making the Decision. The subsequent Board Decision, which was before the Assistant Commissioner, does note that the parole officer's concerns about the threats were strengthened by the interview. However, the parole officer's explanation as to how she reached this conclusion based on the interview, which is set out in the A4D, is not repeated in the Board Decision. More significantly, as noted above, the Decision under review contains no reference to dismissing the Applicant's concern about the reliability of the kite based on the interview with the parole officer.

[20] Returning to the guidance from *Vavilov* quoted earlier in these Reasons, I am conscious that a reviewing court cannot expect administrative decision-makers to respond to every argument advanced by a party. However, the issue of the reliability of the kite is sufficiently fundamental to the grievance that, in the absence of any analysis in the Decision, I cannot conclude that the Assistant Commissioner meaningfully grappled with that issue. The Decision therefore lacks the justification and transparency necessary to withstand the reasonableness standard of review. It must be set aside and returned to the decision-maker for reconsideration in accordance with these Reasons.

B. *Procedural Fairness*

[21] Before concluding, I wish to address one of the Applicant's procedural fairness arguments, to the effect that he was denied a fair process because he was not provided with a copy of the kite or an adequate summary thereof. The Applicant relies on s 27(1) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA], which provides as follows:

Information to be given to offenders	**Communication de renseignements au délinquant**
27 (1) Where an offender is entitled by this Part or the regulations to make representations in relation to a decision to be taken by the Service about the offender, the person or body that is to take the decision shall, subject to subsection (3), give the offender, a reasonable period before the decision is to be taken, all the information to be considered in the taking of	**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

the decision or a summary of that information.	renseignements entrant en ligne de compte dans celle-ci, ou un sommaire de ceux-ci.

[22] I note that s 27(1) is stated to be subject to s 27(3), which allows information to be withheld from an offender to the extent necessary to protect the safety of any person, the security of a penitentiary, or the conduct of any lawful investigation. However, the Respondent is not arguing that CSC invoked s 27(3) in connection with the kite.

[23] Rather, the Respondent argues that, while the Applicant has raised this procedural fairness argument in this application for judicial review, he did not raise it before the Assistant Commissioner as one of the grounds for his grievance. I agree with this submission. The exhibits attached to the Applicant's affidavit in this proceeding include an Inmate's Request dated July 11, 2017, in which he requested a copy of the kite. However, in his subsequent grievance, he did not raise CSC's failure to provide him with a copy of the kite or summary of this information. I therefore agree with the Respondent's positon that it cannot be a reviewable error for the Assistant Commissioner to have failed to address a procedural fairness issue that was not raised in the grievance.

[24] I am therefore making no findings on the procedural fairness of the process leading up to the grievance, and I am not addressing the arguments advanced by the parties on whether the A4D reflects sufficient disclosure to the Applicant of information surrounding the kite to meet the requirements of s 27(1). However, the result of my Judgment quashing the Decision is that the grievance will be reconsidered by the decision-maker, with the benefit of further submissions from the Applicant. I therefore raise for the Respondent's consideration whether it would be

advisable, before such submissions are made and considered by the decision-maker, that CSC provide the Applicant with at least a summary of information surrounding the kite, consistent with s 27(1) of the CCRA, to avoid concerns about this procedural fairness issue in connection with the re-determination of the grievance.

V. **Costs**

[25] Each of the parties seeks costs in the event of success in this application. The Applicant submitted at the hearing that he has incurred costs of at least a couple of thousand dollars in connection with this application, referring principally to printing costs of several hundreds of dollars.

[26] The Respondent seeks costs in a lump sum amount, although the Respondent's counsel did not have instructions on a figure to propose at the time of the hearing.

[27] As the Applicant has prevailed in this application, he should receive costs. I have no evidence before me as to actual expenses incurred. However, the award and quantification of costs, which are typically intended to represent partial compensation for the successful party, is in the discretion of the Court. I consider a lump sum award to be appropriate and fix that sum at $1000.00 all-inclusive.

JUDGMENT IN T-225-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed, the Decision is quashed, and the matter is referred back to the decision-maker for re-determination in accordance with the Court's Reasons.

2. Costs are awarded to the Applicant in the lump sum amount of $1000.00 all-inclusive.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-225-19
STYLE OF CAUSE:	CHRIS WATTS v ATTORNEY GENERAL OF CANADA
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