Federal Court  Cour fédérale

Date: 20210203

Docket: T-439-20

Citation: 2021 FC 112

Ottawa, Ontario, February 3, 2021

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

PATRICK DANIEL FISCHER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] In 2001, Mr. Fischer was convicted of murder in the first degree, and since then he has been incarcerated. In September 2018, he was transferred from Kent Institution, a maximum-security institution, to Mission Institution, a medium-security institution. Among his personal possessions he took to Mission Institution was a PlayStation One and its game controller, cables, and memory card. Mr. Fischer was told by officials of Mission Institution that PlayStation

memory cards are restricted items. The memory card was confiscated and he was not allowed to possess or use it in his cell.

[2] Mr. Fischer complained under the offender complaint and grievance process established by the Correctional Service of Canada [CSC]. His grievance was denied at all levels, including the final decision made November 25, 2019, by the Special Advisor to the Commissioner. That is the decision under review.

[3] The decision is quite brief, and the relevant part is as follows:

> CD 566-12, establishes the allowances and limitations for inmate-owned gaming systems in a correctional setting. Annex D, paragraph 11 lists the peripherals and accessories for computers and game systems that are prohibited. The list of prohibited items includes “removable or portable mass storage devices".
>
> Security Operations, Correctional Service of Canada, National Headquarters, were consulted and advised that all memory cards capable of storing information in a persistent manner are considered removable or portable mass storage devices, regardless of the type of data captured, the storage capacity, or whether or not they are used on an authorized device. A memory card for a gaming system, including a PlayStation, is considered a removable or mass storage device and is, therefore, prohibited as per the above-noted policy.

[4] The Respondent frames the substantive issue before the Court as follows:

> The issue before the Court is not the wisdom or merits of the CSC’s policies, but whether the decision maker reasonably interpreted the relevant policies in rendering the Decision.

[5] The policy interpreted and applied by the decision-maker is Commissioner’s Directive 566-12 Personal Property of Offenders [the Directive]. Specifically, the decision-maker

interpreted and relied on paragraph 11 of Annex D to the Directive under the heading "Prohibited Computer Peripherals and Electronic Games" which reads as follows:

> 11. All items that meet the following restrictions and/or standards are prohibited:
>
> - laser printers
> - scanners
> - modems (including null modems and fax modems), network cards, wireless hardware devices that can be used to communicate with other computers or peripherals of any type, either in the institution or outside of the institution
> - removable or portable mass storage devices
> - portable computing devices, including laptops, notebooks, palmtops or other miniaturized computing devices
> - add-on FireWire (1394) or USB ports that are not part of the motherboard
>
> TV tuner cards
>
> - electronic game consoles with communication capabilities such as, but not limited to, PlayStation 2, GameCube, X-Box, Plug and Play preloaded game controllers and DreamCast
> - wireless keyboards or any other wireless devices which can electronically transmit information or data (e.g. wireless networking, Bluetooth, paired USBs, etc.)
> - any other computer peripherals or electronic games that have been identified as a security threat by the Information Technology Security
> - any USB device other than a keyboard or a mouse.
>
> [emphasis added]

[6] I agree with the Respondent that the Court's review of the decision is to be done on the standard of reasonableness. The Supreme Court of Canada in *Canada (Minister of Citizenship*

and Immigration) v Vavilov, 2019 SCC 65 [*Vavilov*] at paragraph 16, instructs that there is "a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions." At paragraph 87, the Supreme Court explains that "a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome."

[7] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, the majority at paragraph 31, explains that when conducting a reasonableness review, a court should start with the reasons, looking to see if there is a coherent and rational chain of analysis based on the facts and law.

[8] Here the chain of analysis has only four links:

1. Security Operations, Correctional Service of Canada, National Headquarters [Security] says that all memory cards capable of storing information in a persistent manner are considered removable or portable mass storage devices, regardless of the type of data captured, the storage capacity, or whether or not they are used on an authorized device.

2. A memory card for a gaming system, including a PlayStation, is considered a removable or mass storage device.

3. Annex D to the Directive prohibits "removable or portable mass storage devices."

4. Therefore, the memory card is a prohibited item.

[9] The Respondent's submission on reasonableness of the decision is brief. It submits that the decision-maker "holds the interpretative upper hand" and the CSC's Security confirmed that PlayStation memory cards fall under the policy prohibiting "removable or portable mass storage devices."

[10] A proper interpretation of the Directive requires that its words be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Directive, the object of the Directive, and its intention.

[11] The approach taken here by the decision-maker looks at the phrase "removable or portable mass storage devices" in isolation from the Directive's other provisions, and appears to have accepted without question the view of Security. The decision-maker fails to consider the facts surrounding Mr. Fischer's possession and use of the memory card, and further fails to consider the impact of the decision on Mr. Fischer.

[12] As an aside, the Court notes that in the "consultation" with Security, it may not have received all relevant information. Indeed, the document from Security included in the Record does not even refer to Mr. Fischer's grievance. The name and identifier is redacted (which likely would not have been done had it been Mr. Fischer) and it states that the office has reviewed the information provided relating to an inmate "grieving the decision to deny his request to purchase a Playstation 1 memory card" [emphasis added]. The only reasonable conclusion is that the advice was directed to a different grievance and a different situation.

[13] It was evident to the Court through Mr. Fischer's written and oral submissions that he finds the removal of the PlayStation memory card to be unfair and inconsistent treatment by CSC. The following facts form the foundation of and support his view.

A. Mr. Fischer had a PlayStation and memory card in his cell at Kent Institution since 2002, when he was first incarcerated. This is confirmed by his Inmate Personal Property Record dated February 4, 2002, which lists among his personal property, "1 PlayStation memory card."

B. Prior to his transfer to Mission Institution, he was granted authorization to obtain replacement property for anything that had become old, broken, or worn out in the 19 years of his incarceration. He purchased another PlayStation memory card using the inmate property purchasing procedure in place. His unchallenged evidence is that the process "has to undergo several levels of approvals from different department heads before the purchase is approved and an order placed for the item requested." Approval was granted and he received the ordered memory card, which was issued to him for his use in his cell.

C. Annex B to the Directive headed "National List of Personal Property for Men Inmates" lists among the authorized inmate's personal effects "1-Game system – Game Boy, PlayStation 1, Nintendo or any other game computer (console or hand-held) that does not have data or other communication capability and is available commercially on the market" [emphasis added].

[14] Mr. Fischer submits that because the memory card was lawfully in his possession when he transferred to Mission Institution, its removal contravenes paragraph 11(a) of the Directive, which provides as follows:

> Inmates will normally be allowed to retain the following items providing they are consistent with the National Lists of Personal Property for Men / Women Inmates, unless indicated otherwise for reasons of safety, health or security, and the security level of the institution:
>
> a. items, which were in the inmates' lawful possession at the time of admission or readmission to their placement institution, or in their lawful possession on transfer…

[15] It is also submitted that the decision under review contravenes paragraph 18 of the Directive which reads:

> 18. Authorized items currently in an offender's possession that are not on the National Lists of Personal Property for Men/Women Inmates will remain in their possession for the life of the items. However, if any item presents a risk to the security of the institution, staff, or inmates, or is not compliant with CD 345 - Fire Safety or the Fire Safety Manual, it will be removed and stored with the inmate's stored effects or disposed of according to policy. The reason for such action will be documented and the inmate will be advised in writing.

[16] In the decision under review, the Respondent accepted that Mr. Fischer had "followed the appropriate steps to purchase the memory card." The only reasonable finding is that it was therefore an "authorized item" in his possession. It is not listed specifically on the National List of Personal Property for Men, if one accepts that the memory card is not a part of the PlayStation One gaming system, referred to in the list.

[17] Before analyzing the reasonableness of the decision, I first will address two submissions advanced by the Respondent which if accepted could lead to the dismissal of the application. First, it is submitted that the application for judicial review issued on April 1, 2020, is not timely. Second, that the matter referenced in the application is "trivial" and should not attract this Court's intervention.

[18] In support of the timeliness submission, the Respondent filed an affidavit of the Assistant Warden of Management Services of Mission Institution. She describes the "standard practices" at Mission Institution regarding receipt and delivery to inmates of grievance decisions. On that basis, she says, "Upon reviewing all the information available, it is my belief that the Grievance Response was hand delivered to Mr. Fischer no later than December 12, 2019" [emphasis added]. If that were the date of receipt, then this application is untimely.

[19] Mr. Fischer filed his own affidavit in support of the application in which he says: "After receiving the decision to deny my Final Level Grievance on March 12, 2020, I am pursuing the next step in this dispute" [emphasis added]. If that is the date of receipt, then this application is timely.

[20] Mr. Fischer was not cross-examined on his affidavit. I prefer his evidence which is based on personal knowledge to that of the Respondent, which is based on belief. Accordingly, the submission on timeliness is rejected.

[21] The second submission of the Respondent is that “Judicial review of prison matters is to be exercised with caution, and the Court must not interfere in ‘trivial or merely technical incidents’.” The Respondent relies on *Ross v Canada*, [2001] FCT 1396 at para 24 (aff’d 2003 FCA 296, but not on this point) [*Ross*], citing *Martineau v Matsqui Institution*, [1980] 1 SCR 602 [*Martineau No 2*].

[22] I find that the authorities cited are distinguishable from the facts before the Court. Moreover, the Respondent overstates the holding in those cases.

[23] Both authorities dealt with applications to review prison discipline. In *Martineau No 2,* the applicant was sentenced by the Matsqui Institution Disciplinary Board to 15 days in the special corrections unit for a disciplinary offence described as being "flagrant or serious." The Court said the appeal “raises in general terms the question of the supervisory role, if any, of the Federal Court, Trial Division, in respect of disciplinary boards within Canadian penitentiaries.” In that context, Justice Dickson reached several conclusions, one of which at page 630, is the following:

> It should be emphasized that it is not every breach of prison rules of procedure which will bring intervention by the courts. The very nature of a prison institution requires officers to make "on the spot" disciplinary decisions and the power of judicial review must be exercised with restraint. Interference will not be justified in the case of trivial or merely technical incidents. The question is not whether there has been a breach of the prison rules, but whether there has been a breach of the duty to act fairly in all the circumstances. The rules are of some importance in determining this latter question, as an indication of the views of prison authorities as to the degree of procedural protection to be extended to inmates.

[24] Justice Kelen in *Ross*, found that Mr. Ross had not been denied a fair hearing which was the issue advanced on review. On that basis, the application was dismissed. In *obiter*, Justice Kelen noted that he would have also dismissed it based on *Martineau No 2*, as the disciplinary matter involved was trivial. Mr. Ross was found guilty of making papier-maché model airplanes and jewellery without the appropriate "hobby permit" as required by the penitentiary and was fined $25.00. The hearing officer imposed the fine before giving Mr. Ross an opportunity to speak to its appropriateness. However, he quickly realized that error and gave Mr. Ross an opportunity to address it.

[25] Unlike these authorities, the matter before the Court is not disciplinary in nature. Even if these authorities could be said to apply to non-disciplinary inmate cases, the removal and loss of use of personal property after some 18 years, and for the remainder of one's sentence is significantly different. I do not find it to be a trivial matter.

[26] For the following reasons, I find that the decision under review is unreasonable.

[27] The Respondent acknowledges that Security is not the decision-maker. At paragraph 33 of its memorandum, it writes:

> To be clear, the CSC's Security Operations division at National Headquarters is not the decision maker, but rather an administrative source of facts upon which the decision maker relied, in part, in making the Decision. The Security Operations' confirmation of the fact that memory cards such as the Applicant's do indeed fall under the policy against "removable or portable mass storage devices" <u>is determinative of the issue</u>, whether or not the Applicant agrees with this policy. [emphasis added]

[28] The interpretation provided by Security is not determinative, nor can it reasonably be said that it was but a part of what the decision-maker relied on in reaching the Decision. It was all that the decision-maker relied on.

[29] The decision-maker conducted no analysis and gave no interpretation of "removable or portable mass storage devices" in the context of the Directive as a whole or in paragraph 11.

[30] The National List of Personal Property for Men Inmates set out at Annex B to the Directive specifies that inmates are permitted a game system. Mr. Fischer points out that unless one can save one's progress in a game, the PlayStation One is virtually useless. He attests that there are very few games playable in a single sitting. The fact that an inmate is permitted to have a game "system" in the cell strongly points to it including the memory card.

[31] Paragraph 11 of Annex D to the Directive does prohibit "removable or portable mass storage devices" but does that include the PlayStation memory card? I think the only reasonable interpretation of the provision is that it does not.

[32] Paragraph 11 of Annex D has a heading. "The chief use of headings is to cast light on the meaning and scope of the provisions to which they relate:" (see Ruth Sullivan, *Sullivan on the Construction of Statutes* (2014), at p. 394). The heading is "Computer Peripherals and Electronic Games / Périphériques et jeux électroniques interdits."

[33] The Decision states “Annex D, paragraph 11 lists the peripherals and accessories for computers and game systems that are prohibited.” It does not. As is indicated by the heading, it lists computer peripherals and electronic games that are prohibited.

[34] All of the items listed in paragraph 11 are “computer peripherals” save for the one item dealing specifically with “electronic games.” That item states that “electronic game consoles with communication capabilities such as, but not limited to PlayStation 2, GameCube, X-Box, Plug and Play preloaded game controllers and DreamCast” are prohibited. It is notable that “removable or portable mass storage devices” are peripherals to computers. The Decision’s interpretation is that they are also peripheral to PlayStation, an electronic game. However, the heading to that paragraph shows that it was not intended to speak to electronic game peripherals but only to computer peripherals.

[35] On this analysis, there is only one reasonable interpretation of the phrase “removable or portable mass storage devices” in paragraph 11 and that is that it refers only to computer peripherals.

[36] The Decision is also unreasonable because the decision-maker failed to consider the impact of paragraphs 11(a) and 18 of the Directive. Having found that Mr. Fischer was authorized to purchase the memory card, and given that he had been authorized to have it in his cell with his PlayStation One for 18 years, his possession of it appears to have been lawful. Under either or both provisions, he ought to have been permitted to retain it unless it was a safety

risk. Given that there was no such finding of a risk for 18 years in a maximum-security institution, there can be no reasonable suggestion of such a risk in a medium-security institution.

[37] For these reasons, the Decision cannot stand. Given the Court's finding that the only reasonable interpretation of the phrase "removable or portable mass storage devices" does not include a PlayStation One memory card, the Respondent will be ordered to return the memory stick to Mr. Fischer immediately. There is no purpose served in returning the matter to a different decision-maker when there is only one decision that can be reached.

[38] Mr. Fischer is entitled to his reasonable out-of-pocket expenses, which I fix at $150.00.

JUDGMENT in T-439-20

THIS COURT'S JUDGMENT is that:

1. The application is allowed, and the decision under review is set aside;

2. The Respondent is ordered to return immediately to Mr. Fischer his PlayStation One memory card, and permit him to retain and use it in his cell, as he has been so allowed since his incarceration; and

3. Mr. Fischer is entitled to costs from the Respondent, fixed at $150.00.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-439-20
STYLE OF CAUSE:	PATRICK DANIEL FISCHER v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO, MISSION INSTITUTION, AND VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JANUARY 20, 2021
JUDGMENT AND REASONS:	ZINN J.
DATED:	FEBRUARY 3, 2021

APPEARANCES:

Patrick Daniel Fischer	APPLICANT ON HIS OWN BEHALF
Nima Omidi	FOR THE RESPONDENT

SOLICITORS OF RECORD:

- Nil -	SELF-REPRESENTED APPLICANT
Attorney General of Canada Department of Justice Public Safety, Defence and Immigration Vancouver, BC	FOR THE RESPONDENT