Federal Court Cour fédérale

Date: 20221216

Docket: T-1047-22

Citation: 2022 FC 1748

Toronto, Ontario, December 16, 2022

PRESENT: Mr. Justice Diner

BETWEEN:

PATRICK BIBEAU

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an Application for judicial review of a decision by the Independent Chairperson of the Beaver Creek Institution Disciplinary Board [Chairperson] who convicted Mr. Bibeau of the disciplinary offence of possession of an unauthorized item [Decision]. For the reasons that follow, I find that the Decision is reasonable.

II. Background

[2] Mr. Bibeau is a federal inmate at Beaver Creek Institution [Institution]. On February 15, 2022, a correctional officer [Officer] conducted a routine search of Mr. Bibeau's cell and found a kitchen knife inside a jacket hanging on the back of the door of the cell. The Officer also found a secret compartment in the ceiling of the cell in which there was, amongst other things, a plastic knife sheath that fit the knife found in the jacket.

[3] On March 2, 2022, Mr. Bibeau was charged with possession of an unauthorized item contrary to s. 40(j) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*Act*]. At his April 25, 2022 discipline hearing, the Chairperson heard testimony from the Officer, Mr. Bibeau, and submissions from his legal counsel. As part of Mr. Bibeau's evidence, his legal counsel, Mr. Casey, read a letter from another inmate at the Institution, Kyle Heath. Mr. Heath claimed the jacket and the knife inside belonged to him. Mr. Heath also stated in the letter that he had offered his explanation to Institutional staff shortly after Mr. Bibeau was charged, but that staff did not believe him.

[4] The Chairperson convicted Mr. Bibeau of the disciplinary offence of possession of an unauthorized item pursuant to s. 40(j) of the *Act* providing oral reasons at the hearing [Decision]. The Chairperson noted Mr. Bibeau admitted he had seen the jacket in his cell a few days before the search, and concluded he was wilfully blind to the knife.

[5] After hearing submissions on penalty, the Chairperson ordered a $15 imposed fine and a $10 suspended fine. Mr. Bibeau now challenges that Decision.

III. Standard of Review

[6] The sole issue in this case is whether the Decision of the Chairperson was reasonable, which both parties agree is the standard of review that applies to Independent Chairpersons decisions made pursuant to ss. 40 and 43(3) of the *Act* (*Cliff v Canada (Attorney General)*, 2022 FC 930 at para 3 [*Cliff*] citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25). This deferential standard requires that the Decision demonstrate reasoning that is rational, logical and justified under the relevant law and facts (*Vavilov* at paras 102, 105). In *Cliff* at para 8, Justice Fuhrer held:

> [Deference] means reviewing a decision of an independent chairperson in light of two 'primary objectives' – rendering 'fast and efficient' disciplinary proceedings in order to ensure 'order and discipline' in the correctional system; and acting fairly in conducting proceedings according to legislative and regulatory requirements (*Perron v Canada (Attorney General)*, 2020 FC 741 at paras 57-58).

IV. Analysis

[7] Possession of an unauthorized item under s. 40(j) of the *Act* is not a strict liability offence, meaning the institution has the onus to prove, beyond a reasonable doubt, that the accused is guilty (*Cliff* at para 7 citing *Charles v Attorney General of Canada*, 2017 FC 435 at para 6). That relevant provisions of the *Act* state as follows:

Disciplinary offences	**Infractions disciplinaires**

40 An inmate commits a disciplinary offence who	**40** Est coupable d’une infraction disciplinaire le détenu qui :
[…]	[…]
(j) without prior authorization, is in possession of, or deals in, an item that is not authorized by a Commissioner’s Directive or by a written order of the institutional head;	**j)** sans autorisation préalable, a en sa possession un objet en violation des directives du commissaire ou de l’ordre écrit du directeur du pénitencier ou en fait le trafic;
Decision	**Déclaration de culpabilité**
43 (3) The person conducting the hearing shall not find the inmate guilty unless satisfied beyond a reasonable doubt, based on the evidence presented at the hearing, that the inmate committed the disciplinary offence in question.	**43 (3)** La personne chargée de l’audition ne peut prononcer la culpabilité que si elle est convaincue hors de tout doute raisonnable, sur la foi de la preuve présentée, que le détenu a bien commis l’infraction reprochée.

[8] The applicable legal test for possession of an unauthorized item in prison under s. 40(j) is whether the accused has (i) knowledge, and (ii) control, of the unauthorized item beyond a reasonable doubt (*Cliff* at para 10; *Taylor v Canada (Attorney General)*, 2004 FC 1536 [*Taylor*] at para 10).

[9] With respect to knowledge, Justice Phelan held in *Taylor* at para 11 that “[a]ctual knowledge is usually established by inference from surrounding facts since there is seldom an admission of actual knowledge.” To establish control, it is necessary to determine whether the accused had exclusive use of and access to the cell where the unauthorized item was found, except for correctional staff (*Taylor* at para 14). However, any confusion about the basis upon which guilt has been found must be construed in the prisoner’s favour (*Taylor* at para 9).

[10] Having said that, the jurisprudence stipulates that the purpose of internal disciplinary proceedings are first and foremost to maintain order in prisons, such that those proceedings are conducted informally and swiftly, being administrative in nature, as opposed to criminal proceedings (even though prison disciplinary actions arise from circumstances that may give rise to criminal proceedings (*R v Shubley,* [1990] 1 SCR 3 at p 20; see also *Hendrickson v Kent Institution* (1990), 32 FTR 296)).

[11] Mr. Bibeau argues the Decision was unreasonable because the Institution has not established beyond a reasonable doubt, that he had knowledge of the knife. Mr. Bibeau submits he did not notice the jacket hanging on the back door of his cell and thus could not have had knowledge of the knife in the jacket pocket. Mr. Bibeau emphasizes that he repeatedly testified during the disciplinary hearing that he did not know the jacket was hanging from the back of the door of his cell.

[12] The AGC, on the other hand, argues the Institution has met its burden to prove, beyond a reasonable doubt, that Mr. Bibeau had knowledge and control of the knife. The AGC further submits Mr. Bibeau had exclusive use of and access to his cell as the single occupant, despite allowing Mr. Heath to enter his cell to play video games. The AGC argues Mr. Bibeau was indeed aware of the jacket, and wilfully blind to the knife, since he testified that the jacket could have been hanging on the door of his cell for “a couple of days or a week” prior to the search, but that he neither searched the jacket nor reported to anyone that it had been left in his cell.

[13] I am satisfied that the Chairperson adequately justified his reasons as to why Mr. Bibeau had knowledge and control of the knife.

A. *Knowledge*

[14] First, the Chairperson reasonably explained why Mr. Bibeau had knowledge of the jacket, because he testified that (a) it was hanging on the door of his cell from two days to a week prior to the search, (b) he noticed the fact that the jacket was an “institutional green”, and (c) he never owned that type of jacket. Mr. Bibeau also noted that his cell was small, approximately five by eight feet in dimension.

[15] Although Mr. Bibeau was inconsistent in his subsequent testimony, stating on several occasions that he did not notice that the jacket was there, including because there were “other things going on in [his] life” and was “not paying close attention to every little thing that is in [his] room”, I nonetheless find that it was open to the Chairperson to find that Mr. Bibeau’s initial response to how long the jacket had been hanging on the door of his cell, was more credible than the rest of his testimony denying having noticed the jacket. The Chairperson considered all of Mr. Bibeau’s testimony, and it was reasonable for him to assign more weight to Mr. Bibeau’s initial response. I am not persuaded by Mr. Bibeau’s explanation provided in this judicial review that his initial “two days to a week” response was a guess.

[16] Furthermore, where there is no direct evidence that an inmate has knowledge that an unauthorized item or contraband exists, the Chairperson may look to all relevant and surrounding facts to determine whether there is sufficient evidence to support the inference that an accused

had knowledge (*Williams* at para 12). Inferences may indeed be necessary given that inmates will not normally admit knowledge of contraband (*Taylor* at para 11; *Cliff* at para 10).

[17] Here, after weighing the evidence, the Chairperson found that Mr. Bibeau was wilfully blind to the unauthorized item. The Chairperson held that if Mr. Bibeau had stated unequivocally that he never saw the jacket, the outcome may have been different. However, he noted that:

> I find as a matter of fact and as a matter of law, Mr. Bibeau was wilfully blind as to what was in his cell. He assumed the risk, and as a result, I do find that he had knowledge and control of the jacket that belonged to Mr. Heath. …
>
> I find that Mr. Bibeau knew that this jacket was in his cell. He chose fit — chose to not look at the jacket. He was wilfully blind as to what was in the contents of the jacket. And I find that by his own actions he had knowledge and control of the knife in question.

[18] The Supreme Court held in *R v Sansregret*, [1985] 1 SCR 570 at paras 21-22 that: (i) wilful blindness arises when a person becomes aware of the need to make some inquiry but declines to do so because they do not wish to know the truth, and (ii) where there is wilful blindness, the law assumes knowledge on the part of the accused.

[19] Mr. Bibeau argues that he was not wilfully blind to the knife being in his cell, because there was no duty on his part to inquire about the jacket, even if he were to concede that he did see the jacket in his cell in the first place (which he does not). Mr. Bibeau submits it was unreasonable for the Chairperson to impose on him a duty to search the jacket and contends that he had no legal obligation to do so under the *Act*. Mr. Bibeau maintains he was not suspicious of the jacket, nor was there a reason for him to be. Relying on *R v Farmer*, 2014 ONCA 823 at

paras 24-26, he submits there was no "suppressing of a suspicion" or "deliberate ignorance" on his part, so he was not wilfully blind to the knife.

[20] Again, I cannot agree. Based on a holistic view of the facts, and in particular the testimony of Mr. Bibeau, the Chairperson reasonably concluded that he was wilfully blind to the contents of the jacket. In an institutional context, it is reasonable to expect an inmate who finds themselves in the possession of an object that does not belong to them, not to ignore it. This is consistent with the purpose and principles of the *Act*, which include to ensure the protection of society, correctional staff members and offenders (s. 3(a) of the *Act*).

[21] The evidence elicited at the disciplinary proceedings before the Chairperson was that Mr. Bibeau's cell was small. The jacket hung on a hanger next to the door. Mr. Bibeau had several choices to do something upon noticing the jacket after "two days to a week". He could have checked what was inside the jacket to ensure that there was no contraband. He could have given the jacket back to Mr. Heath, or inquire about its rightful owner. He could have also reported the jacket to the authorities. Instead, Mr. Bibeau chose to do nothing, turning a blind eye to the jacket hanging in his cell.

[22] In short, it was reasonable for the Chairperson to (i) infer knowledge of the jacket on the part of Mr. Bibeau based on the evidence, including Mr. Bibeau's testimony, the colour of the jacket and the size of his cell; and (ii) to conclude Mr. Bibeau was wilfully blind to the knife in the jacket pocket, since he ought to have taken some proactive measures, but made no effort to do so.

B. *Control*

[23] With respect to control, Mr. Bibeau contends Mr. Heath admitted to going in and out of Mr. Bibeau's cell to play video games, and that the jacket and knife belonged to him. Thus, Mr. Bibeau states that he did not have exclusive use of and access to his cell in order for the Institution to establish he had control over the knife. Mr. Bibeau relies on *Sidhu v Canada*, 2014 FC 624 at para 22 [*Sidhu*] to argue it was unreasonable for the Chairperson to find that Mr. Bibeau "assumed a risk" when he let Mr. Heath into his cell to play video games.

[24] The AGC argues Mr. Bibeau had control, because he had exclusive use of and access to his cell as the single occupant, despite allowing Mr. Heath to enter his cell to play video games. The AGC submits that the Chairperson accepted the jacket belonged to Mr. Heath, but reasonably concluded that Mr. Bibeau still had control over it as it had been left in his cell.

[25] I find that it was reasonable for the Chairperson to conclude that Mr. Bibeau had control of the items in his cell, including the jacket and the knife, because he had exclusive use of and access to his cell as the sole occupant. *Sidhu* is distinguishable from this case. In *Sidhu*, the Court held that the chairperson unreasonably inferred knowledge of the contraband on the part of Mr. Sidhu, because he ought to have known contraband could have been introduced into his cell when he assumed the risk of letting other inmates into his cell while he was not there.

[26] Here, on the other hand, the testimony that was elicited at the disciplinary hearing was that Mr. Bibeau "should be the only occupant in his cell" (from the charging officer who found

the contraband). Furthermore, the only person that Mr. Bibeau stated that had been into his room was Mr. Heath, in regard to whom he testified that it “wasn’t uncommon for him to come into my cell”.

[27] It was thus open to the Chairperson to be satisfied beyond a reasonable doubt that Mr. Bibeau had control of the knife, and that this, combined with his knowledge, constituted possession of an unauthorized item under s. 40(j) of the *Act*.

[28] While the Chairperson made additional findings regarding the sheath that fit the knife, and both parties addressed this evidence at the hearing, the Chairperson specifically noted that his comments regarding the hidden sheath were *obiter*. Accordingly, there is no reason to address the sheath.

[29] Finally, I commend the advocacy of Mr. Casey. Despite the outcome, he represented Mr Bibeau in an exemplary manner, providing arguments in a crisp and cogent manner, including providing relevant and helpful case law to the Court. This Court benefits from the model advocacy exhibited by Mr. Casey. I also thank Mr. Peterson, who also ably and efficiently advanced his client’s position.

V. Costs

[30] The AGC does not seek costs in this matter, and accordingly, none will be ordered.

VI. Conclusion

[31] For the reasons outlined above, I find that the Chairperson’s Decision was reasonable.

The Application for judicial review is dismissed without costs.

JUDGMENT in T-1047-22

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed

2. No costs are issued.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1047-22
STYLE OF CAUSE:	PATRICK BIBEAU v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
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