Federal Court  Cour fédérale

Date: 20240227

Docket: T-325-23

Citation: 2024 FC 315

Ottawa, Ontario, February 27, 2024

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

ASHRAF BOUAB

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS FOR JUDGMENT

I. Overview

[1] The Applicant seeks judicial review of the decision of the Independent Chairperson [Chairperson] of the Warkworth Institution Disciplinary Court finding the Applicant guilty of the offence of failing or refusing to provide a urine sample when demanded, pursuant to paragraph 40(l) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*].

[2] I am dismissing this application because the Chairperson's decision is reasonable. The Chairperson was not satisfied that the Applicant's failure to provide a sufficient urine sample was involuntary. I find no reviewable error in the Chairperson's conclusion that the Applicant may have been able to "top up" his urine sample to the required level had he remained in the collection area for the entire two-hour period, as set out in paragraph 66(1)(d) of the *Corrections and Conditional Release Regulations*, SOR/92-620 [*CCRR*].

II. Background

[3] The Applicant is an inmate at Warkworth Institution, a medium-security facility. On November 22, 2022, he was summoned for a urine test as part of a random selection urinalysis program pursuant to paragraph 54(b) of the *CCRA*.

[4] The Applicant was unable to provide enough urine for a sample and left the collection area after approximately an hour and a half. The Applicant was charged with a disciplinary offence under paragraph 40(l) of the *CCRA* for failing or refusing to provide a urine sample when demanded. The Applicant pleaded not guilty to the charge.

[5] A disciplinary trial was held before the Chairperson on January 24, 2023. Both Officer Semple [Collection Officer] and the Applicant testified at the hearing.

[6] The Collection Officer testified that if an inmate provides an insufficient urine sample, namely if it does not meet the prescribed minimum amount under the relevant Correctional Service of Canada [CSC]'s Commissioner's Directive [CD], it is considered an automatic refusal. Inmates

are offered water and are provided the entire two-hour time frame to attempt to “top up” the sample.

[7] The Applicant testified that he had already used the washroom before he was told he was required to attend for urine testing. After remaining in the collection area for an hour and a half, drinking a few cups of water, and making efforts to provide a sample, he was not able to top up his initial urine sample. The Applicant decided to leave after discussing his options with the Collection Officer, stating that he was needed at work.

[8] At the conclusion of the hearing, the Chairperson rendered his verdict orally. The Chairperson found the Applicant guilty and imposed a $40 fine, with $10 imposed and $30 suspended for 60 days.

[9] The Chairperson held that had the Applicant remained in the collection area the entire two hours, the Chairperson would have had a “reasonable doubt”: Transcript of the January 24, 2023 Disciplinary Hearing at p 13, lines 24-25, 29-31 [Transcript]. The Chairperson explained that this was because the Applicant “made some good efforts but [he] was close but not there”: Transcript at p 14, line 14.

III. Issues and Standard of Review

[10] The Applicant raises two issues: (i) whether the Chairperson’s finding of guilt was reasonable; and (ii) the appropriate remedy if the application for judicial review is granted. Given

my determination that the Chairperson's decision is reasonable, I need not consider the question of remedy.

[11] There is no dispute that the standard of review applicable to decisions by an Independent Chairperson made in accordance with sections 40 and 43(3) of the *CCRA* is reasonableness: *Rana v Canada (Attorney General)*, 2023 FC 1014 at para 18; *Bibeau v Canada (Attorney General)*, 2022 FC 1748 at para 6; *Cliff v Canada (Attorney General)*, 2022 FC 930 at para 3.

[12] A reasonable decision is "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": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85 [*Vavilov*]; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 8 [*Mason*]. A decision should only be set aside if there are "sufficiently serious shortcomings" such that it does not exhibit the requisite attributes of "justification, intelligibility and transparency": *Vavilov* at para 100; *Mason* at paras 59-61. Furthermore, the reviewing court "must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable": *Vavilov* at para 100.

IV. Analysis

A. *The relevant legislative and policy scheme*

[13] Pursuant to paragraph 54(b) of the *CCRA* and section 63 of the *CCRR*, federal inmates may be subject to random urinalysis testing for the "purpose of ensuring the security of the penitentiary and the safety of persons by deterring the use of and trafficking in intoxicants in the penitentiary".

[14] Sections 11 to 14 of the CSC's Commissioner's Directive 566-10 entitled "Urinalysis Testing" [CD 566-10] set out the process for random urinalysis testing. A urine sample is defined in Annex A of the CD as "a quantity of unadulterated urine of at least 30 ml for drug analysis and 4 ml (full vial) for alcohol testing, supplied at one time, sufficient to permit analysis by an authorized laboratory."

[15] Paragraph 66(1)(d) of the *CCRR* requires that an inmate be given up to two hours to provide a urine sample. Subsection 66(2) of the *CCRR* provides that where an inmate fails to provide a sample in accordance with subsection 66(1), the inmate shall be considered to have refused to provide the sample.

[16] Pursuant to paragraph 40(l) of the *CCRA*, a failure or refusal to provide a urine sample when demanded under paragraph 54(b) of the *CCRA* constitutes a disciplinary offence. A hearing must be conducted in accordance with prescribed grounds to determine whether an inmate is guilty of the offence: *CCRA*, ss 43(1). Pursuant to subsection 27(2) of the *CCRR*, a hearing of a charge under paragraph 40(l) of the *CCRA* is conducted by an independent chairperson. The burden of proof applicable to disciplinary offences is proof beyond a reasonable doubt: *CCRA*, ss 43(3).

[17] Where an inmate is found guilty of a disciplinary offence, sanctions such as a loss of privileges or a fine may be imposed: *CCRA*, ss 44(1).

B. *The Chairperson's decision is reasonable*

[18] As explained below, I do not agree with the Applicant that the Chairperson's sole justification for his finding of guilt was that the Applicant left the collection area before the two-hour time period had elapsed. Unlike the decision in *Ismail v Canada (Attorney General)*, 2024 FC 310, in this case the Chairperson did not conclude that the Applicant's voluntary departure from the collection area before the two hours had elapsed "in and of itself" warrants a finding of guilt. Rather, the Chairperson determined that, had the Applicant remained the entire two hours, he may have very well been able to provide a sufficient urine sample by topping up what he initially provided. The Chairperson was thus not satisfied that the Applicant's failure to provide a sample was involuntary.

[19] Based on the relevant jurisprudence, failing or refusing to stay at the collection area for the two-hour collection period under paragraph 66(1)(d) of the *CCRR* does not automatically result in a finding of guilt. A decision-maker is required to consider any defences advanced by an inmate in determining whether the disciplinary offence has been proven beyond a reasonable doubt, in accordance with subsection 43(3) of the *CCRA*: *Ayotte v Canada (Attorney General)*, 2003 FCA 429 at paras 17-20; *Cyr v Canada (Attorney General)*, 2011 FC 213 at paras 20-22.

[20] Here, the Applicant argued that his failure to provide a sufficient urine sample was involuntary. Unaware that he would be providing a urine sample, the Applicant had used the

washroom in the morning. He testified that while he made best efforts by drinking water, he was unable to provide the required amount for a urine sample. The Applicant stated that he decided to leave the collection area approximately 20 minutes before the two-hour time period had elapsed because he had to go to work and knew he would not be able to provide a urine sample in the remaining time.

[21] I acknowledge that the Chairperson stated in his oral reasons that the Applicant's "departure was in fact voluntary and I do find you guilty of the offence as charged": Transcript at p 14, lines 1-2. However, in accordance with *Vavilov*, a decision-maker's reasons are to be read holistically and contextually to determine whether the decision-maker provided an intelligible, justified, and transparent rationale for their decision: *Vavilov* at paras 96-97.

[22] When read as a whole, the Chairperson's reasons demonstrate that his finding of guilt was not based merely on the Applicant's early departure. Rather, the Chairperson considered the Applicant's defence, but was not convinced that the Applicant would not have been able to top up his urine sample in the remaining time. As the Chairperson noted, the Applicant had consumed water before going to the collection area, as well as several more cups of water while waiting in the collection area: Transcript at p 13, lines 20-25.

[23] The Chairperson stated that he would have had a reasonable doubt had the Applicant remained the entire two hours: Transcript at p 13, lines 29-31. Specifically, the Chairperson explained his reasoning to the Applicant as follows: "you made some good efforts but you were

close but not there": Transcript at p 14, lines 13-14. In other words, the Applicant's efforts were not enough to satisfy the Chairperson.

[24] During the hearing, the Chairperson specifically questioned the Collection Officer about whether an inmate is allowed to "top up" the required 30 millilitres urine sample within the two hour period. The Collection Officer confirmed that it does not have to be a continuous stream, that it can be topped up, and that inmates are made aware this is possible: Transcript at p 5, lines 9-30.

[25] Moreover, the following exchange between the Chairperson and the Applicant further conveys the Chairperson's rationale in finding the Applicant guilty:

> MR. ZAP: Make sense?
>
> ASHRAF BOUAB: Yeah, fair enough.
>
> MR. ZAP: So the moral of the story is if you'd waited an extra twenty minutes, I in all likelihood I may have found you not guilty sir.
>
> ASHRAF BOUAB: Okay.
>
> MR. ZAP: See? Sometimes patience is a virtue.
>
> ASHRAF BOUAB: It's true, but sometimes you know, you know your body, you know if nature calls or not that twenty minutes –
>
> MR. ZAP: And sometimes your body surprises you right? Let me give you a copy of this sir. Maybe surprise is the wrong word but in any event, thank you for coming down.
>
> Transcript at p 15, lines 1-14.

[26] I find that the Chairperson's decision, when read as a whole, is reasonable and explains the Chairperson's rationale for finding the Applicant guilty. The Chairperson reasoned that, had the Applicant remained for the entire two hour time period, he may have been able to provide a urine

sample in the requisite amount. The exchange above also demonstrates that the Applicant clearly understood the Chairperson's explanation for his decision.

[27] Finally, I do not accept the Applicant's argument that the Chairperson made factual findings that were legally incompatible with a finding of guilt. In my view, the Applicant relies on statements that are out of context: Applicant's Memorandum of Fact and Law at para 20. The relevant passage of the Chairpersons decision in its entirety reads as follows:

> I do take notice that Mr. Bouab did consume water before he went down to A and D, He had two or three cups. His evidence was clear and unequivocal. He did not embellish in any fashion, and quite frankly, I prefer Mr. Bouab's evidence over Officer Semple, but recognizing Officer Semple deals with hundreds of inmates every several months and had no immediate recollection. There's no question Mr. Bouab was cooperative throughout.
>
> Transcript at p 13, lines 1-10.

[28] This passage does not support that the Chairperson accepted the Applicant's evidence about his inability to provide a urine sample "without reservation": Applicant's Memorandum of Fact and Law at para 20. Rather, the Chairperson was clearly referring to the Applicant's evidence about his water consumption and his cooperation. Notably, the Collection Officer had initially testified that the Applicant had refused to attend to provide a sample, but then agreed that his observation report stated otherwise: Transcript at p 1, lines 21-32; p 3, lines 1-16.

[29] Ultimately, as set out above, the Chairperson was not satisfied that the Applicant's failure to provide a urine sample was involuntary.

V. Conclusion

[30] Based on the foregoing, I am dismissing the application for judicial review. The Chairperson's decision is reasonable and falls well within "the range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Vavilov* at para 86.

[31] At the conclusion of the hearing, the parties advised me that they did not require a costs order as they had reached an agreement.

JUDGMENT in T-325-23

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed without costs.

"Anne M. Turley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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