

Federal Court



Cour fédérale

Date: 20240501

Docket: T-1805-21

Citation: 2024 FC 663

[ENGLISH TRANSLATION REVISED BY THE AUTHOR]

Ottawa, Ontario, May 1, 2024

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

CHRISTOPHER LILL

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Lill, a federal inmate, is seeking judicial review of the denial of a grievance in which he alleged harassment or retaliation. I am allowing his application in respect of only one event covered by the grievance, namely Mr. Lill's involuntary emergency transfer to a medium-security institution. The reasons given by the decision maker do not demonstrate that he truly addressed Mr. Lill's allegations concerning the unjustified nature of his transfer. As for all the other events covered by the grievance, the decision is reasonable. Mr. Lill is asking me to

substitute my own assessment of the facts for the decision maker's, which is not the role of the Court on judicial review.

I. Background

[2] Mr. Lill has been serving a life sentence since 2007. He is currently incarcerated at Cowansville Institution, a medium-security facility managed by the Correctional Service of Canada [the Service].

[3] This application for judicial review relates to a grievance concerning a series of events that took place while Mr. Lill was in the minimum-security sector of Archambault Institution, where he had been transferred following the reassessment of his security classification in September 2018.

[4] Since his incarceration, Mr. Lill has made frequent use of the grievance procedure provided for in section 90 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [the Act]. In particular, at the beginning of March 2020, he presented a grievance concerning the behaviour of one of the managers of Archambault Institution, Mr. Bazinet. Mr. Lill has also initiated several proceedings in the Federal Court. One of them pertains to events that took place at La Macaza Institution in 2011. That case was decided after the events that are the subject of the present case: *Lill v Canada*, 2022 FC 580. At the time of the events forming the basis of the present matter, the warden of the minimum-security sector of Archambault Institution was Mr. Lalonde, who was also the warden of La Macaza Institution in 2011.

[5] Mr. Lill claims that after he filed the grievance against Mr. Bazinet in March 2020, he was subjected to harassment and reprisals by Archambault Institution management. He alleges that, over the next two months, he was suspended from his job as a painter, his requests were neglected, he was subjected to an unjustified investigation and threats in relation to a phone call he made to the Public Health Agency of Canada, and the institution's deputy warden took a picture of him without his consent.

[6] In May 2020, Mr. Lill submitted a final grievance relating to the facts mentioned in the previous paragraph.

[7] On June 25, 2020, Mr. Lill was urgently transferred to the medium-security sector of the Archambault Institution, with a view to increasing his security classification. However, over the next few days, Mr. Lill agreed to be transferred to the minimum-security Federal Training Centre 600 [the FTC]. His security classification was maintained.

[8] At the time, Mr. Lill wished to transfer to the Waseskun Healing Centre. His application was initially accepted. However, after receiving new information about Mr. Lill's behaviour at the FTC, the Waseskun Healing Centre changed its mind and refused his application.

[9] Mr. Lill then submitted an addendum to his grievance, in which he alleged that his transfer to the medium-security sector and the rejection of his application to the Waseskun Healing Centre constituted further acts of harassment or reprisal.

[10] On October 9, 2021, the Service's Assistant Commissioner, Policy denied Mr. Lill's grievance. Mr. Lill is now seeking judicial review of that decision.

[11] Mr. Lill also filed an application for judicial review regarding certain events at FTC which led to his security classification being increased and his transfer to Cowansville Institution. That application is the subject of a separate judgment: *Lill v Canada (Attorney General)*, 2024 FC 664.

II. Analysis

[12] I am allowing Mr. Lill's application in part. With respect to Mr. Lill's transfer to the medium-security sector of Archambault Institution, the Assistant Commissioner has not provided reasons demonstrating that he has addressed Mr. Lill's main arguments. His decision is therefore unreasonable in this respect. With respect to all the other issues raised by Mr. Lill, however, the Assistant Commissioner rendered a reasonable decision.

A. *Standard of Review and Nature of Issues in Dispute*

[13] As a preliminary matter, I note that the merits of the Assistant Commissioner's decision must be reviewed according to the standard of reasonableness. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*], the Supreme Court of Canada stated that, with rare exceptions, courts must show deference upon judicial review and examine whether the administrative decision-maker made a reasonable decision, not whether that decision was correct. Since *Vavilov*, this Court has applied the

standard of reasonableness when reviewing decisions made pursuant to the grievance process provided for by the Act.

[14] At the hearing, Mr. Lill argued that the standard of correctness applied because his residual liberty was at stake. However, even in the context of *habeas corpus* proceedings, the decision to transfer an inmate to another institution is reviewed according to the standard of reasonableness: *Mission Institution v Khela*, 2014 SCC 24 at paragraph 65, [2014] 1 SCR 502 [Khela]. I have difficulty understanding why a different standard would apply on judicial review.

[15] In his memorandum and oral argument, Mr. Lill raised a number of arguments that he linked to procedural fairness. As I pointed out at the hearing, some of these arguments relate more to the merits of the decision. This is the case, for example, with allegations that the Assistant Commissioner failed to consider certain pieces of evidence, omitted to mention evidence in his reasons, or failed to provide sufficiently detailed reasons. The analysis of these arguments is integrated into the analysis of the reasonableness of the decision.

B. *Reasonableness of Decision*

[16] In essence, Mr. Lill's grievance alleged that he had been harassed and retaliated against because he had filed various other grievances and brought an action in damages against the Service. He provided a detailed description of a series of incidents that, in his opinion, constituted harassment or reprisals.

[17] It was therefore up to the Assistant Commissioner to examine these incidents and determine whether they constituted harassment or retaliation against Mr. Lill. Commissioner's Directive [CD] 081, *Offender Complaints and Grievances*, defines harassment as follows:

Harassment: any improper conduct by one or more employees, offenders, visitors or volunteers, that is directed at and offensive to another person, and that the individual knew or ought reasonably to have known to cause offence or harm. It comprises any objectionable act, comment or display that demeans, belittles, or causes personal humiliation or embarrassment, and any act of intimidation or threat. It includes harassment within the meaning of the *Canadian Human Rights Act*.

Harcèlement : tout comportement inapproprié de la part d'un ou de plusieurs employés, délinquants, visiteurs ou bénévoles à l'égard d'une autre personne, et dont l'auteur ou les auteurs savaient ou auraient raisonnablement dû savoir qu'il serait offensant ou préjudiciable. Le harcèlement comprend tout acte, propos ou exhibition répréhensible qui diminue, rabaisse, humilie ou embarrasse une personne, ou tout acte d'intimidation ou de menace. Il comprend également le harcèlement au sens de la *Loi canadienne sur les droits de la personne*.

[18] CD 081 does not define the concept of retaliation, but it is clear that it is a measure taken because a prisoner has exercised a legal remedy.

[19] In this context, the Assistant Commissioner had to examine each incident alleged by Mr. Lill and determine whether it amounted to harassment or retaliation. In this respect, it must be borne in mind that Mr. Lill had the burden of proof. In the following pages, I examine, for each incident, the facts alleged by Mr. Lill, the decision of the Assistant Commissioner and the arguments put forward by Mr. Lill to support his claim that the decision was unreasonable.

(1) Suspension of Employment as a Painter

[20] Around mid-March 2020, Mr. Lill refused to work as a painter because of his fears of contracting COVID-19 while performing the duties of his employment. On March 30, he was suspended from his employment for refusing to report to work without a valid excuse. On April 15, the Correctional Intervention Board confirmed this decision at a meeting Mr. Lill attended.

[21] In his grievance decision, the Assistant Commissioner concluded that Mr. Lill's suspension did not constitute harassment, since the suspension had been justified without reference to the grievances Mr. Lill submitted.

[22] The Assistant Commissioner's decision is reasonable. Mr. Lill contested his suspension in accordance with established procedure. The committee tasked with reviewing Mr. Lill's challenge concluded that the suspension was justified. The Assistant Commissioner was entitled to rely on the committee's conclusions and to infer that, if the suspension was justified, it did not constitute harassment. Nor, I might add, does it constitute retaliation, for the same reasons.

(2) Responding to Requests

[23] In his grievance, Mr. Lill complained that the management of Archambault Institution had issued a directive to staff to give evasive answers to his requests. In his decision, the Assistant Commissioner concluded that no such directive had been given. Before this Court, Mr. Lill does not explain why the Assistant Commissioner's finding would be inconsistent with

the evidence. In this respect, certain written requests in the file simply sought to challenge the decision of the committee tasked with reviewing Mr. Lill's termination as a painter. I find that the Assistant Commissioner's decision on this aspect of the grievance was reasonable.

(3) The Call to the Public Health Agency

[24] On May 4, 2020, Mr. Lill called the Public Health Agency of Canada to express his concerns about the Archambault Institution's response to the COVID-19 pandemic. Since the Agency's telephone number was not on Mr. Lill's list of authorized calls, an investigation took place the very next day. Officers insinuated that Mr. Lill possessed a contraband cell phone. Instead, he explained that he had made the call in the company of his lawyer. After Mr. Lill provided records of his lawyer's calls, it appears that no further action was taken.

[25] In his grievance, Mr. Lill claimed that these actions constituted harassment or retaliation. In his decision, the Assistant Commissioner found that the investigation was justified and that no threats had been made during the meetings in question. He therefore dismissed the grievance in this respect.

[26] In his written submissions, Mr. Lill stated that the officer who met with him made [TRANSLATION] "intimidating, humiliating and degrading" remarks about him and that he failed to prepare an observation report at the end of the meeting. He claimed that the analyst did not make sufficient efforts to establish the facts.

[27] The analyst forwarded an email to Archambault Institution, requesting further clarification of Mr. Lill's allegations regarding the May 5 meeting. The reply stated that Mr. Lill had not been threatened, nor had the issue of his possible transfer been discussed. Nothing in the guidelines obliged the analyst to take any further steps. The Assistant Commissioner therefore had contradictory evidence before him. It was up to him to determine what weight should be given to Mr. Lill's arguments and to the response received from the institution. As the Supreme Court indicated in *Vavilov*, at paragraph 126, a finding of fact is unreasonable only "where the decision maker has fundamentally misapprehended or failed to account for the evidence before it". In this case, the reasons given by the Assistant Commissioner show that he was aware that he was faced with contradictory accounts. Mr. Lill has not convinced me that it was unreasonable for the Assistant Commissioner to prefer the evidence from the institution.

[28] Furthermore, Mr. Lill has not convinced me that there has been a breach of CD 568-2, *Recording and Sharing of Security Information and Intelligence*, because no report was written regarding the May 5, 2020 meeting. As I mentioned above, all indications are that the staff of the institution were eventually satisfied with the explanations given by Mr. Lill and the call records provided by his lawyer. There was therefore no security risk warranting a report.

(4) Taking Photographs Without Consent

[29] In his grievance, Mr. Lill focuses on an event that took place on May 6, 2020. On that day, he was outside in the company of other inmates. The institution's deputy warden, Ms. Champagne, allegedly felt that they were not complying with COVID-19 distancing

instructions. She allegedly pointed her work cell phone at this group of inmates, supposedly to request the intervention of correctional officers to put an end to the situation.

[30] In his submission dated May 30, 2020, Mr. Lill essentially argues that Ms. Champagne took photographs of him without his consent, which is contrary to the Service's policies and would constitute a form of harassment. Other employees of the institution have allegedly acknowledged the existence of these photographs. In an undated addendum, Mr. Lill added that Ms. Champagne had admitted to the investigator from the Office of the Correctional Investigator [OCI] that she had pointed her cell phone at him, but had not taken a photograph.

[31] The Assistant Commissioner found no such photographs when analyzing the grievance. He concluded that Ms. Champagne had pointed her cell phone at Mr. Lill, but that she had not taken any photographs, and that she had acted in the performance of her duties since Mr. Lill was not complying with the safety rules associated with COVID-19. Hence, the Assistant Commissioner concluded that there had been no harassment.

[32] On judicial review, Mr. Lill's main argument is that the Assistant Commissioner failed to take into account Ms. Champagne's alleged admission to the OCI investigator that her act was a [TRANSLATION] "joke in bad taste". However, Mr. Lill made no mention of this issue, either in his initial presentation or in his addendum. His only claim was that, despite her denials, Ms. Champagne had indeed taken photographs of him. Mr. Lill cannot therefore claim that the Assistant Commissioner's decision was unreasonable for failing to address an argument that had not been presented to him. In my view, given the exhaustive nature of Mr. Lill's written

submissions, the Assistant Commissioner was not obliged to seek out additional information that might support the grievance.

[33] More generally, in light of the description of the event in the record, I find it difficult to understand how the situation could constitute harassment or retaliation. The Assistant Commissioner's conclusion is therefore reasonable.

[34] At the hearing, Mr. Lill stated that it was possible that correctional officers had put photographs of inmates on social media or used them for inappropriate purposes. However, he presented no evidence in this regard. In the grievance process, the burden of proof is on the inmate. He cannot discharge it by resorting to speculation.

(5) Search of Personal Effects

[35] In an addendum to his grievance, Mr. Lill also stated that during his transfer to the medium-security sector on June 25, 2020, correctional officers had searched two boxes containing legal documents related to his grievances and the proceedings he had initiated in Federal Court. He points out that four disks were missing when the boxes were returned to him.

[36] In response to these allegations, the Assistant Commissioner noted that the disks were seized because they were not included in Mr. Lill's list of personal effects, but that they were returned to him shortly afterwards. The Assistant Commissioner concedes that procedural shortcomings occurred during the transfer of Mr. Lill's personal effects. However, he concludes

that this situation is not related to the management of Archambault Institution and dismisses this part of the grievance.

[37] Mr. Lill has not persuaded me that this decision is unreasonable. Of course, he expressed his dissatisfaction with the transfer of his personal effects from the Archambault Institution to the FTC. However, he did not draw my attention to any evidence that the Assistant Commissioner had ignored. Nor did he demonstrate that the Assistant Commissioner had “fundamentally misapprehended” the evidence, as the Supreme Court put it in *Vavilov*. Even if the applicable procedures were not fully respected, there is no evidence that the correctional officers acted to humiliate, diminish or embarrass Mr. Lill. Nor is there any evidence that they were motivated by a desire to punish Mr. Lill for the recourses he exercised.

[38] At the hearing, Mr. Lill also mentioned that, when he was transferred, staff at the Archambault Institution had handled and damaged certain Indigenous medicine items that belonged to him. This situation is not mentioned in the grievance that gave rise to this application for judicial review, but is the subject of a separate proceeding before our Court. For this reason, I will not comment on it.

(6) Temporary Relocation to Medium-Security Sector

[39] On June 25, 2020, Mr. Lill was transferred on an emergency basis to the medium-security sector of Archambault Institution. This transfer was based on Guideline [GL] 710-2-4, *Movements Within Clustered/Multi-Level Institutions*, which states that an inmate may be transferred on an emergency basis if there are security-related reasons. The notice given to

Mr. Lill states that the transfer is justified by his resistance to authority, his idleness and refusal to work, the need to intervene with him to resolve various conflicts and his difficult relations with staff. It was concluded that Mr. Lill required a level of supervision that a minimum-security facility was unable to provide. In addition, a manager reportedly overheard Mr. Lill saying that he was going to [TRANSLATION] “get the hell out”, making him a flight risk.

[40] In an addendum to his grievance, Mr. Lill recounts these facts and argues that the totality of the circumstances suggest that the risk of escape was merely a pretext and that his emergency transfer to the medium-security sector was unjustified. As a corrective measure, he asks that this transfer be declared unjustified. In fact, in the days that followed, Mr. Lill’s parole officer admitted that the expression [TRANSLATION] “get the hell out” meant that he wished to be transferred to the Waseskun Healing Centre. Furthermore, the parole officer informed Mr. Lill that his security classification would not be increased if he agreed to be transferred to the FTC, another minimum-security facility.

[41] An Assessment for Decision [A4D] was completed over the next few days. In this document, staff state that the emergency transfer to the medium-security sector was justified on June 25 because of Mr. Lill’s statement, but that increasing his security classification was no longer warranted, as he was now [TRANSLATION] “in better spirits”. Instead, it was put forward that he should be transferred to the FTC because of his conflicts with staff at Archambault Institution.

[42] Mr. Lill argues that such a reversal demonstrates that his emergency transfer was unjustified and clearly retaliatory, either because of a lawsuit in the Federal Court involving the institution's warden, or because he had refused a job in the institution's kitchen.

[43] In his decision, the Assistant Commissioner writes as follows:

[TRANSLATION]

As indicated in the above chronology, you were moved to the medium sector of the AI on 2020-06-25, pending a reassessment of your security classification, as information suggested that you were at risk of escaping at that time. On 2020-06-26, a Notice of Involuntary Transfer/Movement Recommendation was given to you by a staff member, in accordance with the provisions of GL 710-2-4.

That said, when your security classification was reassessed, your minimum security classification was maintained and you were transferred to the FTC (600), since a return to the minimum sector at AI was not an option given your conflicts with staff members. This also complies with the provisions of GL 710-2-4. Since the policies were respected and your use of the complaints and grievance process or your refusal to work was not the reason for your temporary displacement, it cannot be concluded that you were subjected to harassment by AI management during this situation. This part of your grievance is therefore denied.

[44] These brief reasons do not show that the Assistant Commissioner genuinely grappled with the argument at the heart of Mr. Lill's grievance, namely the lack of justification for his transfer to the medium-security sector. By alluding to the risk of escape, the Assistant Commissioner did not call into question the assertions made on this subject in the A4D. He does not demonstrate that he took into consideration the elements mentioned above, which tend to show that no one really believed in the risk of escape and that the other reasons invoked were not of an urgent nature. The mere fact that the procedures laid down in the guidelines were followed

does not demonstrate that the decision was justified. While the guidelines allow for an emergency transfer of a prisoner in the event of a security risk, it was still necessary for the Assistant Commissioner to determine whether such a security risk actually existed. As the Supreme Court pointed out in paragraph 128 of *Vavilov*:

. . . 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.

[45] This aspect of the decision is therefore unreasonable. It must be set aside and referred back to the Assistant Commissioner for reconsideration. It may be that, in order to reach a decision, the Assistant Commissioner will need to gather more evidence than what the record contains. I do not wish to express any opinion on the outcome of this review.

(7) Refusal of Application to Waseskun Healing Centre

[46] The final element of Mr. Lill's grievance relates to the rejection of his application to the Waseskun Healing Centre. Mr. Lill was initially accepted on August 3, 2020. However, the Waseskun Healing Centre changed its mind and refused his application on August 20, 2020, after receiving new information. In particular, it was noted that since his transfer to the FTC in mid-July, Mr. Lill had been confrontational, had failed to meet his commitments and had required several interventions.

[47] In his grievance, Mr. Lill claims that this decision was taken just days after a case management conference in his Federal Court action, at which the warden of Archambault Institution was subpoenaed to testify. He also claims to have received a call from an official at

the Waseskun Healing Centre, who told him that new information had been passed on to him by a member of the Archambault Institution's staff.

[48] With regard to this issue, the Assistant Commissioner wrote the following in his decision:

[TRANSLATION]

As demonstrated in the above chronology, the recruitment team at the Waseskun Healing Centre has determined that your behaviour, since your arrival at FTC (600), was not in line with your behavioural contract. Consequently, the warden of the Waseskun Healing Centre has decided to refuse your application. At the national level, it has been determined that you have not demonstrated how the management of the AI played a role in the decision to refuse your application, as retaliation against you. In fact, as demonstrated in your file, the decision was made by the director of the Waseskun Healing Centre, while you were a resident of the FTC (600). This part of your grievance is therefore denied.

[49] At the judicial review stage, Mr. Lill essentially alleges that the Assistant Commissioner should have accepted his version of the facts, according to which it was a member of the Archambault Institution staff who had prompted the management of the Waseskun Healing Centre to change its mind. However, the evidence shows that the management of the Waseskun Healing Centre was already aware of the reservations expressed by Archambault Institution management at the time of the initial decision to accept Mr. Lill's application. It also demonstrates that it was because of Mr. Lill's behaviour at the FTC that the Waseskun Healing Centre subsequently changed its mind. In these circumstances, the Assistant Commissioner could reasonably conclude that this change of heart did not constitute retaliation on the part of Archambault Institution's management.

C. *Grievance 351*

[50] In presenting his grievance, Mr. Lill refers to other grievances he has submitted concerning various events that took place at Archambault Institution. In particular, he refers to grievance No. V3R00060351, which I will refer to as Grievance 351. (In his submission, Mr. Lill uses a different number, but he clearly refers to this grievance.) This grievance concerns the conduct of a correctional manager, Mr. Bazinet. According to Mr. Lill, this grievance is one of the reasons, if not the main reason, why Mr. Bazinet and other managers at Archambault Institution retaliated against him. He criticizes the Assistant Commissioner for failing to mention this grievance and to analyze its allegations.

[51] In his decision, however, the Assistant Commissioner refers to Grievance 351 in a table that summarizes Mr. Lill's allegations and the grievances or legal proceedings associated with these allegations. With regard to Grievance 351, he explicitly states: [TRANSLATION] "You are of the opinion that reprisals began following the presentation of your grievances." This shows that he fully understands the substance of Mr. Lill's allegations. To decide the case, however, it was not necessary to consider the substance of Grievance 351. Rather, the Assistant Commissioner had to consider whether, as a result of the presentation of Grievance 351 or other recourses, the management of Archambault Institution had retaliated against Mr. Lill. This is precisely the approach that the Assistant Commissioner took. The failure to undertake a detailed analysis of the merits of Grievance 351 does not, therefore, render the decision unreasonable.

III. Conclusion

[52] For the foregoing reasons, the application for judicial review will be allowed in part. The Assistant Commissioner's decision will be set aside only with respect to Mr. Lill's involuntary emergency transfer to the medium-security sector of Archambault Institution. The matter will be referred back to the Assistant Commissioner for a new decision. The decision stands as to the other issues raised.

[53] I will not award costs in this case. I am also rendering judgment on another application for judicial review brought by Mr. Lill: *Lill v Canada (Attorney General)*, 2024 FC 664. As some of the arguments put forward by Mr. Lill in the other application are well founded, and as the present application is allowed in part, but the applications are dismissed as to the remainder, I am of the opinion that no costs should be awarded.

JUDGMENT in T-1805-21

THIS COURT’S JUDGMENT is as follows:

1. The application for judicial review is allowed in part.
2. The decision rendered by the Assistant Commissioner, Policy, of the Correctional Service of Canada on October 9, 2021, is set aside only regarding Mr. Lill’s involuntary emergency transfer to the medium-security sector of Archambault Institution.
3. This matter is sent back to the Assistant Commissioner, Policy, for reconsideration.
4. The decision is upheld with respect to the other issues.
5. There is no award of costs.

“Sébastien Grammond”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1805-21

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