Federal Court Cour fédérale

Date: 20240905

Docket: T-1873-23

Citation: 2024 FC 1389

Ottawa, Ontario, September 5, 2024

PRESENT: Mr. Justice Norris

BETWEEN:

DAVID RODNEY FLEGEL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

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

[2] For the reasons that follow, this application will be allowed. As I will explain, the finding of guilt must be set aside because the Chairperson's determination that the demand that the applicant submit to urinalysis was lawful is unreasonable. While I would remit the matter for a new hearing, since no reasonable decision maker could conclude, on the evidence presented at the applicant's disciplinary hearing, that the demand was lawful, I would also direct that the charge be dismissed.

II. LEGAL FRAMEWORK

[3] The demand that the applicant submit to urinalysis was made pursuant to paragraph 54(a) of the *CCRA*. This provision states that a staff member may demand that an inmate submit to urinalysis "where the staff member believes on reasonable grounds that the inmate committed or is committing the disciplinary offence referred to in paragraph 40(k) and that the urine sample is necessary to provide evidence of the offence." Under paragraph 40(k) of the *CCRA*, an inmate who "takes an intoxicant into the inmate's body" commits a disciplinary offence.
Paragraph 54(a) also provides that the staff member must obtain the prior authorization of the institutional head to make such a demand.

[4] Paragraph 54(a) of the *CCRA* is subject to section 56 of that Act, which states that where a demand is made of an offender to submit to urinalysis pursuant to paragraph 54(a), "the person making the demand shall forthwith inform the offender of the basis of the demand and the consequences of non-compliance." It is also subject to subsection 57(1), which states that an inmate who is required to submit to urinalysis pursuant to paragraph 54(a) "shall be given an opportunity to make representations to the institutional head before submitting the urine sample."

[5] The applicant was charged under paragraph 40(l) of the *CCRA*. This provision states that an inmate who "fails or refuses to provide a urine sample when demanded pursuant to section 54 or 55" of the *CCRA* commits a disciplinary offence.

[6] Under subsection 43(3) of the *CCRA*, an inmate charged with a disciplinary offence shall not be found guilty of the offence unless the person conducting the hearing into the charge is "satisfied beyond a reasonable doubt, based on the evidence presented at the hearing, that the inmate committed the disciplinary offence in question."

[7] There is no dispute that, where the disciplinary offence is the failure or refusal to provide a urine sample when demanded, among the elements of the offence that must be proved beyond a reasonable doubt is that the demand that the inmate submit to urinalysis was a lawful one. As set out above, to be lawful, a demand under paragraph 54(a) of the *CCRA* must be based on reasonable grounds to believe that the inmate has committed or is committing the offence of taking an intoxicant into their body and that a urine sample is necessary to provide evidence of the offence.

III. BACKGROUND

[8] In August 2022, the applicant was a resident in House 22, a unit on the minimum security site at Joyceville Institution, a federal penitentiary.

[9] On August 25, 2022, the Deputy Warden of Joyceville authorized the collection of a urine sample from the applicant under paragraph 54(a) of the *CCRA*. In full, the grounds set out

in the written notification to provide a urine sample are as follows: "There were two recent incidents of tobacco smell in House 22 (Aug 15 & 21). Further, on Aug 23 there were two indications by the detector dog in House 22. Reasonable grounds urinalysis test requested to determine the extent of involvement in the institutional subculture."

[10] On August 25, 2022, Correctional Officer Salim was tasked by the Deputy Warden with demanding a urine sample from the applicant pursuant to this authorization. There is no issue that C/O Salim informed the applicant of the basis of the demand and the consequences of non-compliance, as required by section 56 of the *CCRA*. The applicant did not request an opportunity to make representations to the institutional head, as provided for by subsection 57(1) of the *CCRA*. After the demand was made, the applicant was given two hours to produce a sufficient sample, as required by paragraph 66(1)(d) of the *Corrections and Conditional Release Regulations*, SOR/92-620. When he failed to do so, the applicant was charged with committing a disciplinary offence under paragraph 40(l) of the *CCRA*.

[11] The hearing of the charge took place on April 18, 2023, before the Independent Chairperson of the Warkworth Institution Disciplinary Court. (While the offence was alleged to have been committed at Joyceville, the applicant had been transferred to Warkworth by the time of the hearing.) The applicant entered a plea of not guilty.

[12] C/O Salim testified at the hearing. He described his interactions with the applicant on August 25, 2022. He also confirmed that he had no personal knowledge of the facts supporting the demand that the applicant submit to urinalysis (that is, the reported smell of tobacco in the

unit on two recent occasions and the two "indications" by the drug detector dog). He had simply read what was stated in the written notification to provide a urine sample given to him by the Deputy Warden and he had acted on the authority of that document.

[13] C/O Salim confirmed that, to the best of his recollection, five inmates were residing in House 22 at the time. He believed the unit had a maximum capacity of six or seven inmates. He had been tasked with obtaining samples from the applicant and another inmate on August 25, 2022. He did not know whether another officer might have been tasked with obtaining samples from the other residents of House 22. No other evidence addressed this question.

[14] The Deputy Warden's written authorization to collect a urine sample from the applicant was in evidence before the Chairperson. No other evidence was presented to establish the grounds for authorizing the demand. The applicant did not testify.

IV. DECISION UNDER REVIEW

[15] The sole issue at the hearing was whether the requirement under paragraph 54(a) of the *CCRA* that the staff member who demanded that the applicant submit to urinalysis believe on reasonable grounds that the applicant has committed or is committing a disciplinary offence under paragraph 40(k) and that a urine sample is necessary to provide evidence of the offence was met. As set out above, paragraph 54(a) requires individualized grounds for demanding that an inmate submit to urinalysis. Absent such grounds, any demand made pursuant to that provision is unlawful. The applicant submitted that the grounds provided for the demand did not

amount to the requisite individualized grounds because other inmates also lived in House 22 and there was nothing to tie him personally to the two grounds offered in support of the demand: an odour of tobacco on August 15th and 21st and "indications" by the detector dog on August 23rd. Since the individualized grounds required by paragraph 54(a) were absent, the demand that he submit to urinalysis was not lawful and, as a result, he should be found not guilty of the offence charged.

[16] The Chairperson found the applicant guilty in a decision delivered orally at the conclusion of the hearing. The Chairperson stated that he was "convinced beyond a reasonable doubt that the demand was lawful, that there was [*sic*] reasonable grounds to make the demand." As set out in the transcript of the oral reasons, the Chairperson explained the basis for this determination as follows (*sic* throughout):

> I saw that the reasonable ground demand was the smell of tobacco in House 22. Officer Salim was quite candid as maybe five, perhaps maybe six inmates. What has been, of course, not just the smell of tobacco, but again, it was the indicating of a detector dog. So he had performed two urinalysis testing of two of the inmates can't confirm if others were tested. So I find as a matter of fact, that there had been appropriate testing of all the inmates and this officer was only tasked with two.

[17] The Chairperson was also satisfied beyond a reasonable doubt that the applicant had failed to provide a sufficient sample despite being given a sufficient opportunity to do so (this was not in issue in any event).

[18] Accordingly, the Chairperson was satisfied beyond a reasonable doubt that, on August 25, 2022, the applicant committed an offence under paragraph 40(l) of the *CCRA*. The

Chairperson ordered that the applicant pay a fine of $40 but suspended payment of the fine for 90 days.

V. ANALYSIS

[19] The parties agree that the Chairperson's decision should be reviewed on a reasonableness standard. Given its constitutional implications, there may be room for debate about whether reasonableness (as opposed to correctness) is the appropriate standard of review for the Chairperson's determination that the demand that the applicant submit to urinalysis was lawful: see *Société des casinos du Québec inc v Association des cadres de la Société des casinos du Québec*, 2024 SCC 13 at para 45 (*per* Jamal J) and paras 94-97 (*per* Côté J); and *York Region District School Board v Elementary Teachers' Federation of Ontario*, 2024 SCC 22 at paras 62-67. However, since this question was not addressed by the parties, and since I have concluded under the less stringent test of reasonableness that the decision does not withstand review, it is neither appropriate nor necessary to resolve it here.

[20] 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 (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85). A decision that displays these qualities is entitled to deference from a reviewing court (*ibid.*).

[21] For a decision to be reasonable, a reviewing court "must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that there is a line of analysis within the reasons that could reasonably lead the

tribunal from the evidence before it to the conclusion at which it arrived" (*Vavilov*, at para 102, internal quotation marks and citation omitted). As *Vavilov* states, "a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis" (at para 103). Further, a decision will be unreasonable "where the conclusion reached cannot follow from the analysis undertaken" or "if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point" (*ibid.*). Similarly, "the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise" (*Vavilov*, at para 104). In short, to uphold a decision as reasonable, a reviewing court "must ultimately be satisfied that the decision maker's reasoning 'adds up'"(*ibid.*).

[22] There is no dispute that the "reasonable grounds to believe" threshold set out in paragraph 54(a) of the *CCRA* has two main elements: (1) a sincerely held subjective belief on the part of the staff member who demands that an inmate submit to urinalysis that the inmate has ingested an intoxicant and that a urine sample is necessary to provide evidence of the offence; and (2) this belief is supported by objectively ascertainable facts or circumstances that credibly establish the probability that this is in fact the case. A reasonable grounds to believe threshold to authorize a search stands in contrast to the lower threshold of reasonable grounds to suspect. The latter deals with possibilities while the former deals with probabilities: see *R v Chehil*, 2013 SCC 49 at paras 22-28; *R v MacKenzie*, 2013 SCC 50 at para 38. A reasonable grounds to believe threshold is therefore more demanding than a reasonable suspicion threshold (*Chehil*, at para 27). But both require the existence of objectively ascertainable facts or circumstances

supporting the requisite state of mind, be it a belief or a suspicion: see *R v Kang-Brown*, 2008 SCC 18 at para 75.

[23] In my view, the Chairperson's finding beyond a reasonable doubt that the demand that the applicant submit to urinalysis was lawful suffers from a failure of internal rationality.

[24] As discussed above, a demand to submit to urinalysis under paragraph 54(a) of the *CCRA* requires a belief based on credible and objectively discernible facts or circumstances that it is probable that the inmate to whom the demand is directed has taken an intoxicant into their body and a sample is necessary to provide evidence of this. In short, to be lawful, a demand made under paragraph 54(a) of the *CCRA* must be based on individualized grounds.

[25] At the hearing before the Chairperson, the applicant argued that, since other inmates also lived in House 22 and there was nothing to link him to the odour of tobacco or to the positive indications by the detector dog apart from the fact that he lived in the house (something that was true of all the other residents, too), the evidence failed to establish a credibly-based probability that he (as opposed to someone else in the house) had committed or was committing an offence under paragraph 40(k) of the *CCRA*. As a matter of logic, given the evidence before the Chairperson, the applicant's argument is unimpeachable. It also finds support in jurisprudence that is directly on point: see *Beaudoin v William Head Institution*, 1997 CanLII 5866 (FC) at paras 9 and 11, a decision the applicant's counsel drew to the attention of the Chairperson at the hearing.

[26] The Chairperson attempted to bridge this obvious gap in the grounds for demanding that the applicant submit to urinalysis by finding as a fact that the same demand was made of all the other residents of House 22 as well. As I understand the Chairperson's reasoning, this would mean that the applicant had not been singled out for a demand, which in turn meant that the authorities did not need to establish a credibly-based probability with respect to him alone for the demand to be lawful. In other words, since the requirement for individualized grounds was met with respect to all the residents of the house, it was also met with respect to the applicant and, as a result, the demand was therefore lawful.

[27] The Chairperson's reasoning suffers from three fatal flaws. First, the decision rests on the fallacy of division: the Chairperson has inferred that since there were individualized grounds with respect to the residents of House 22 as a whole, there were individualized grounds with respect to each resident. Put another way, even if there was a credibly-based probability that *someone* who lived in House 22 had committed an offence under paragraph 40(k) of the *CCRA*, it does not follow that there is a credibly-based probability that the applicant is that person. This could only be established by evidence and there was none.

[28] Second, the Chairperson's reasoning simply begs the question. Even if it were the case that demands were made of all the residents of the house, the applicant was still subject to individualized targeting: he was required to submit to urinalysis. The problem of a lack of grounds for the individualized targeting of the applicant cannot be avoided by authorizing a demand of everyone who lived in the house instead of the applicant alone.

[29] Finally, even if the Chairperson's reasoning was valid, which it is not, there was no basis whatsoever in the evidence for the Chairperson to find, as a matter of fact, that demands had been made with respect to all the residents of House 22. This was a matter of pure speculation on the part of the Chairperson.

[30] For the sake of completeness, the applicant also argues that the demand that he submit to urinalysis was unlawful for another reason as well. This is that C/O Salim lacked the necessary subjective belief concerning the grounds for the demand. I do not find the applicant's arguments on this point persuasive.

[31] While C/O Salim communicated the demand to the applicant, his role was simply to deliver the notification to provide a urine sample signed by the Deputy Warden. In the circumstances, to satisfy the subjective element of paragraph 54(a) of the *CCRA*, it was not necessary for C/O Salim himself to have any personal knowledge of the facts supporting the demand beyond what was written in the document he delivered to the applicant.

[32] I say this for two reasons. First, in the absence of any evidence to the contrary, the Deputy Warden, who is the one who personally authorized the collection of a urine sample, must be taken to have held the subjective belief that there were grounds to make a demand. And second, while C/O Salim's evidence on the point could certainly have been clearer, I am satisfied that his awareness of the grounds stated in the notification to provide a urine sample was sufficient to fix him with the requisite belief as well. In short, the rationale for the subjective element of the legal threshold, which is to ensure that state authorities are actually guided by the

limitations on their powers (*c.f. R v Caslake*, [1998] 1 SCR 51 at para 27), was met by the process of prior authorization by the Deputy Warden.

[33] Finally, since it was not challenged before the Chairperson or on this application (except in the applicant's reply submissions), I offer no comment on whether the statement in the notification to provide a urine sample that urinalysis was requested "to determine the extent of involvement in the institutional subculture" brought the authorization within the proper scope of paragraph 54(a) of the *CCRA*.

[34] Given the flaws I have found in the Chairperson's decision, the conclusion that the demand that the applicant submit to urinalysis was lawful cannot stand. As a result, the decision finding the applicant guilty of an offence for failing to provide a sample for urinalysis must be set aside.

[35] With respect to the question of remedy, in the particular circumstances of this case, I am satisfied that it would be unfair to the applicant to give correctional authorities another chance to try to make a better case for the lawfulness of the demand. Furthermore, in my view, no reasonable decision maker could conclude beyond a reasonable doubt, on the basis of the evidence presented to the Chairperson, that the demand that the applicant submit to urinalysis was lawful. In this sense, no useful purpose would be served by remitting the matter for redetermination (*Vavilov*, at para 142; see also *Sharif v Canada (Attorney General)*, 2018 FCA 205 at para 54). Nevertheless, it is necessary to return the matter to the disciplinary court so that the charge against the applicant can be disposed of (*Sharif*, at para 55).

Accordingly, while I would remit the matter for redetermination, I direct the Chairperson to dismiss the charge against the applicant.

VI. CONCLUSION

[36] For these reasons, the application for judicial review is allowed. The decision of the Independent Chairperson of the Warkworth Institution Disciplinary Court dated April 18, 2023, finding the applicant guilty of an offence under paragraph 40(l) of the *CCRA* is set aside. The matter is remitted for redetermination but the Chairperson is directed to dismiss the charge. Any fine paid by the applicant as a result of the finding of guilt shall be returned to the applicant without delay.

[37] In accordance with the agreement of the parties, the respondent shall pay the applicant costs in the all-inclusive amount of $2,040.00.

JUDGMENT IN T-1873-23

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Independent Chairperson of the Warkworth Institution Disciplinary Court dated April 18, 2023, is set aside.
3. The matter is remitted for redetermination by the Disciplinary Court but the Chairperson is directed to dismiss the charge.
4. Any fine paid by the applicant as a result of the finding of guilt shall be returned to the applicant without delay.
5. Costs are awarded to the applicant in the all-inclusive amount of $2,040.00.

"John Norris"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1873-23
STYLE OF CAUSE:	DAVID RODNEY FLEGEL v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	FEBRUARY 6, 2024
JUDGMENT AND REASONS:	NORRIS J.
DATED:	SEPTEMBER 5, 2024

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