Date: 20070704

Docket: T-2175-06

Citation: 2007 FC 694

Ottawa, Ontario, July 4, 2007

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

DORA ARRIOLA LONDONO

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision dated November 16, 2006 of Paul Snyder, the Acting Assistant Deputy Commissioner of the Correctional Service of Canada, denying the applicant clearance to visit federal penitentiaries in Ontario.

[2] At the hearing, the respondent informed the Court that the actual decision denying clearance was made by Mr. Bob MacLean on September 20, 2006. It became clear to the Court that this decision was not communicated to the applicant. Moreover, the November 16, 2006 decision, which

the applicant thought was the decision and which the applicant submitted was inadequate for a number of reasons, was not the decision.

BACKGROUND

[3] The applicant was convicted of conspiracy to import narcotics in 1997. She was released on parole on June 2, 1999 and was granted full parole on November 11, 2000. She completed her sentence on August 21, 2006. She is currently employed by the Prisoners with HIV/AIDS Support Network (PASAN) as the Federal Community Development Coordinator. As such, she is responsible for providing prevention, education and support services to prisoners in federal penitentiaries in Ontario.

[4] The applicant first applied for institutional access clearance on February 23, 2005, which was before her warrant expiry date. On April 5, 2005, the Correctional Service of Canada (the Service) provided a negative recommendation with respect to the applicant's request. On May 29, 2006, her employer PASAN requested that the respondent reconsider her application for institutional access clearance. Once again, the Service recommended that the application be denied.

[5] As soon as her sentence ended on August 21, 2006, the applicant re-applied for institutional access clearance on August 21, 2006. This application was supported with an 11-page submission, a 5-page affidavit from the applicant, a 6-page statutory declaration from the Executive Director of PASAN, an opinion from a psychologist that the applicant's risk of re-offending is low, and over 100 pages of background documents.

THE DECISION

[6] The November 16, 2006 letter, which the applicant thought was the decision, stated that the application for regional clearance had been denied, did not provide reasons, and that the respondent had reviewed the past process which denied clearance implied that the respondent had not assessed the application as a new application.

RELEVANT LEGISLATION AND DIRECTIVES

[7] The legislation relevant to this application is the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the Act), particularly the following sections:

Definitions

2. (1) In this Part, […]

"visitor" means any person other than an inmate or a staff member. […]

Purpose of correctional system

3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by

(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and

(b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community. […]

Principles that guide the Service

4. The principles that shall guide the Service in achieving the purpose referred to in section 3 are

Définitions

2. (1) Les définitions qui suivent s'appliquent à la présente partie. […]

«visiteur » Toute personne autre qu'un détenu ou qu'un agent. […]

But du système correctionnel

3. Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois. […]

Principes de fonctionnement

4. Le Service est guidé, dans l'exécution de ce mandat, par les principes qui suivent :

a) la protection de la société est le critère

(a) that the protection of society be the paramount consideration in the corrections process; […]

(d) that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders;

(e) that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence;

(f) that the Service facilitate the involvement of members of the public in matters relating to the operations of the Service; […]

Correctional Service of Canada

5. There shall continue to be a correctional service in and for Canada, to be known as the Correctional Service of Canada, which shall be responsible for

(a) the care and custody of inmates;

(b) the provision of programs that contribute to the rehabilitation of offenders and to their successful reintegration into the community; […]

Commissioner

6. (1) The Governor in Council may appoint a person to be known as the Commissioner of Corrections who, under the direction of the Minister, has the control and management of the Service and all matters connected with the Service. […]

Living conditions, etc.

70. The Service shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are

prépondérant lors de l'application du processus correctionnel; […]

d) les mesures nécessaires à la protection du public, des agents et des délinquants doivent être le moins restrictives possible;

e) le délinquant continue à jouir des droits et privilèges reconnus à tout citoyen, sauf de ceux dont la suppression ou restriction est une conséquence nécessaire de la peine qui lui est infligée;

f) il facilite la participation du public aux questions relatives à ses activités; […]

Maintien en existence

5. Est maintenu le Service correctionnel du Canada, auquel incombent les tâches suivantes :

a) la prise en charge et la garde des détenus;

b) la mise sur pied de programmes contribuant à la réadaptation des délinquants et à leur réinsertion sociale; […]

Commissaire

6. (1) Le gouverneur en conseil nomme le commissaire; celui-ci a, sous la direction du ministre, toute autorité sur le Service et tout ce qui s'y rattache. […]

Conditions de vie

70. Le Service prend toutes mesures utiles pour que le milieu de vie et de travail des détenus et les conditions de travail des agents soient sains, sécuritaires et exempts de pratiques portant atteinte à la dignité humaine.

Rapports avec l'extérieur

71. (1) Dans les limites raisonnables fixées par règlement pour assurer la sécurité de

safe, healthful and free of practices that undermine a person's sense of personal dignity.

Contacts and visits

71. (1) In order to promote relationships between inmates and the community, an inmate is entitled to have reasonable contact, including visits and correspondence, with family, friends and other persons from outside the penitentiary, subject to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons. […]

quiconque ou du pénitencier, le Service reconnaît à chaque détenu le droit, afin de favoriser ses rapports avec la collectivité, d'entretenir, dans la mesure du possible, des relations, notamment par des visites ou de la correspondance, avec sa famille, ses amis ou d'autres personnes de l'extérieur du pénitencier. […]

[8] Also relevant to this application is the Commissioner's Directive on Visiting dated December 17, 2001, particularly sections 17 and 18:

Refusal or suspension of visit

17. The Institutional Head may authorize the refusal or suspension of a visit between an inmate and a member of the public where he or she believes on reasonable grounds that:

a) during the course of the visit the inmate or the member of the public would :

(1) jeopardize the security of the penitentiary or the safety of an individual; or

(2) plan or commit a criminal offence; and

b) restriction on the manner in which the visit takes place would not be adequate to control the risk.

18. Where a refusal or suspension of visit is authorized under paragraph 17:

a) the refusal or suspension may continue

Refus ou suspension des visites

17. Le directeur peut autoriser le refus ou la suspension d'une visite à un détenu par un membre de la collectivité lorsqu'il a des motifs raisonnables de croire :

a) que, au courant de la visite, le détenu ou le membre de la collectivité risque :

(1) de compromettre la sécurité de l'établissement ou de quiconque; or

(2) de planifier ou de commettre un acte criminel;

b) que le fait d'apporter des restrictions aux modalités relatives à la visite ne permettrait pas de réduire le risque.

18. Lorsqu'une interdiction ou une suspension de visite est autorisée en vertu du paragraphe 17 :

a) elle reste en vigueur tant que le risque vise demeure;

for as long as the risk referred to continues;

b) the Institutional Head shall inform the inmate and the visit promptly, in writing, of the reasons for the refusal or suspension and shall give the inmate and the visitor an opportunity to make representations with respect thereto. The title of the person to whom they should address their representations should be indicated; and

c) the extent of the information shared shall take into consideration limitations of the *Privacy Act*, namely to avoid the disclosure of any personal information to either party, unless the affected party agrees in writing to the disclosure.

b) le directeur doit rapidement informer par écrit le détenu et le visiteur des motifs de cette meure et leur fournir la possibilité de présenter leurs observations à ce sujet (le titre de la personne à qui adresser ces observations devrait être indique);

c) les informations fournies doivent respecter les restrictions imposées par la *Loi sur la protection des renseignements personnels*, notamment pour éviter que des renseignements personnels soient communiques à l'une ou l'autre des parties, à moins que la personne touchée ait consenti par écrit à la divulgation de l'information.

STANDARD OF REVIEW

[9] The standard of review applicable to a decision by the Commissioner of the Service to deny institutional access to a visitor was discussed by Justice von Finckenstein in *Edwards v. Canada (Attorney General)*, 2003 FC 1441 at paragraph 19:

> ¶19 Following the pragmatic and functional approach, it becomes clear that there are cross cutting factors in this case. On one hand, the lack of a privative clause in the Act suggests that little deference should be given to the decision of the Commissioner. On the other hand, the Commissioner is an expert with regards to the management of prisons and particularly with regards to the safety of inmates and visitors. In addition, while the case involves the individual rights of Mr. Edwards, it is also related to the Commissioner's obligation to consider the safety and welfare of the offender's family. Considering these factors and the fact that the issue is one of mixed law and fact, namely the application of the term "reasonable limits" to the circumstances of Mr. Edwards's case, the most appropriate standard of review is reasonableness simpliciter.
>
> [Emphasis added]

I agree with and adopt Justice von Finckenstein's analysis and conclude accordingly that the reasonableness standard governs this application for judicial review.

[10] A decision is unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. This means that a decision may satisfy the standard if it is supported by a tenable explanation even if it is not one that the reviewing courts find compelling: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247.

[11] With respect to the allegation that the respondent breached the duty of fairness owed the applicant, it is trite law that the standard of review is correctness.

ISSUES

[12] The applicant argues that the Service erred in denying her application for institutional access clearance on three grounds:

1. the respondent refused to treat the application of August 21, 2006 as a new application for clearance and instead treated it as a request for a review of the 2005 decision;

2. the respondent did not provide the applicant with an opportunity to respond before making its decision; and

3. the respondent erred in determining that the applicant was a security risk.

ANALYSIS

[13] When the applicant's first application for institutional access clearance was denied, the Service cited three main factors:

1. the applicant's proposed work in the institutions would violate her parole conditions;
2. the applicant's parole officer did not support her application; and
3. based on her criminal record, the applicant posed a safety risk.

The applicant argues that her subsequent application, submitted over one year later, was clearly a new application that reflected new circumstances and new evidence. By that time, the applicant was no longer subject to any parole conditions, and she provided new evidence in support of her position that she did not pose a safety risk. The applicant submits that the decision letter dated November 16, 2006 establishes that it did not treat her application as a new application, but rather as a request for reconsideration.

[14] The September 20, 2006 letter was written by Bob MacLean, Chair of the Regional Screening and Clearance Board for the Ontario Region. The letter dated November 16, 2006 was written by Paul Snyder, acting Assistant Deputy Commissioner for the Ontario Region.

[15] As I indicated at the outset, the Court is satisfied that the September 20, 2006 decision letter was never communicated to the applicant. The only letter communicated to the applicant was the letter dated November 16, 2006 which, I agree with the applicant, is not a decision letter, rather a review letter. Based on this review letter, the applicant had good grounds to consider that the

respondent had refused to treat the new application dated August 21, 2006 as a new application for clearance. Accordingly, this application for judicial review must be allowed on this ground alone.

[16] The applicant also argues that the respondent deprived her of the opportunity to respond to the Service's safety and security concerns. The applicant submits that the Act establishes a right to visit a penitentiary absent a risk to the safety or security of the institution that cannot be accommodated by placing reasonable restrictions on the visit. The applicant argues that the Service has an obligation to consider an application to visit a penitentiary and, if it intends to deny an application, it must inform the applicant of the reasons and give her an opportunity to respond.

[17] The requirement to provide the applicant with an opportunity to know the reasons for the denial of her regional clearance and an opportunity to make representations with respect thereto is codified in section 18 of the Commissioner's Directive on Visiting. Neither letter before the Court does this. Accordingly, this application must be allowed on this ground as well.

[18] With respect to the Service's determination that the applicant posed a risk and should therefore be denied the requested institutional access clearance, it is clear from the Threat Risk Assessment that the Regional Screening and Clearance Board took into account the following factors:

1. The applicant was an ex-offender convicted of importing drugs into Canada with her husband;
2. The applicant had only recently finished completing her sentence;

3. The applicant was not supported by the Institutional Head or department for re-entry into the penitentiary institutions;

4. The applicant travelled to Columbia, a known source country for drugs; and

5. The applicant's employer, PASAN, promotes a purpose and belief inconsistent with the Service's mandate under the Act

and concluded that the applicant is considered a "medium threat".

[19] The Service treated the Treat Risk Assessment as confidential and did not provide the applicant with a copy. Accordingly, the applicant would not have known, but for this Federal Court case, that this threat risk assessment existed. The Service is not obliged to disclose confidential documents regarding its assessment of the security of individuals seeking to visit a penitentiary. However, the service should provide visitors being denied access a generalized basis for their reasons with respect to security. Now that the applicant has full disclosure of the Threat Risk Assessment, the applicant will, in due course, be able to provide a response.

CONCLUSION

[20] The applicant was not provided with the decision denying her 2006 application. Moreover, the decision did not adequately provide the reasons for the decision or provide the applicant with an opportunity to respond.

[21] The Court cannot decide whether the applicant should be granted clearance. However, the Court did offer its opinion during the hearing that the applicant appeared to be conscientious and

extremely thorough in her sincere attempt to be allowed to help prisoners in the federal penitentiaries with HIV/AIDS.

[22] The Court found the record in this case confusing. The applicant sought clearance on two or three different occasions. The material in support of the last application was voluminous, yet thorough. The confusion was compounded by the respondent not communicating the decision letter to the applicant. In fact, the Court questions whether the so called decision letter from the respondent was really the decision with respect to the application because it was not addressed to the applicant or her counsel.

[23] In any event, the proper course is for the respondent to prepare a thorough decision letter setting out the reasons for its decision and providing the applicant with an opportunity to respond before the decision is finalized. The decision letter should address the submissions dated August 21, 2006 in support of the clearance application.

COSTS

[24] Both parties sought their respective legal costs. The normal practice is that costs follow the event and the applicant will be awarded her costs according to the Tariff.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, the decision denying the applicant clearance is set aside and her application is referred to a different designate of the Commissioner of the Correctional Service of Canada for a new decision, which gives the applicant reasons in advance if the decision is negative, and an opportunity to respond; and

2. The applicant is entitled to her costs.

"Michael A. Kelen"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-2175-06
STYLE OF CAUSE:	DORA ARRIOLA LONDONO and THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 26, 2007
REASONS FOR JUDGMENT:	**KELEN J.**
DATED:	July 4, 2007

APPEARANCES:

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Mr. Derek Edwards	For the Respondent

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