

Date: 20071108

Docket: T-726-06

Citation: 2007 FC 1162

Ottawa, Ontario, November 08, 2007

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

DONALD RUSSELL

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review brought by the applicant pursuant to s.18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended, respecting a decision of the Third Level Grievance Panel (the “Panel”) of Correctional Service Canada (CSC) wherein the applicant’s request to participate in Personal Family Visits (PFV) with his wife was denied.

BACKGROUND

[2] The applicant is incarcerated at Warkworth Institution, a medium security federal penitentiary, serving a life sentence for second-degree murder with a two-year concurrent sentence for forcible confinement after having pled guilty to the charges on October 12, 2001.

[3] A review of the Applicant's criminal history reveals convictions for Robbery (1985), Sexual Assault with a Weapon (2), Unlawful Confinement, Robbery (1986) and Sexual Assault (1990).

[4] In 2004 national changes in programme referrals required the completion of a Spousal Assault Risk Assessment ("SARA") in the Offender Management System ("OMS") before an offender could be waitlisted for a programme.

[5] As there was no SARA registered in the OMS, a new SARA was completed on May 18, 2004. The results of the SARA indicated that the applicant presented a high risk to re-offend and required a high intensity programme.

[6] The applicant was waitlisted for the High Intensity Family Violence programme; however, as of June 2, 2004 he was unable to take the course because he was too far down on the waiting list.

[7] In 2004 the applicant was married while incarcerated. He applied for PFVs with his wife on October 3, 2004.

[8] An Assessment for Decision dated December 11, 2004 recommended that the PFV not be approved, as the applicant had not completed all the programming necessary to reduce the risk of harm against his wife.

[9] The applicant's request for PFV was denied as of January 28, 2005 as he was deemed at high risk to commit an offence against his spouse.

[10] Subsequently, it was decided that the applicant would be allowed to take the Moderate Intensity Family Violence Programme if he successfully completed his other programmes and the sex offender treatment programme in particular, and if his parole officer then determined that it was appropriate.

[11] The applicant grieved these decisions to the third level of the grievance process.

[12] In a decision dated December 16, 2005, the Panel denied the applicant's request to be permitted to participate in PFVs before the completion of the recommended programmes. The decision explained that given the applicant's SARA rating as a high risk to re-offend, and as sexual violence appeared to be the primary factor in his offending pattern causing the greatest risk to his victims, the denial of PFVs was proper. The Panel indicated that the applicant's level of risk and need would be better addressed by first participating in sex offender treatment before being

evaluated for the required level of intensity for family violence programming and before being granted PFVs with his wife.

[13] The relevant provisions are contained in Annex A.

ANALYSIS

i) The Standard of Review

[14] In *Edwards v. Canada (Attorney General)*, [2003] FC 1441, [2003] F.C.J. No. 1887 (QL), Von Finckenstein J., was faced with a similar question involving an interpretation of the statutory wording of “subject to such reasonable limits” contained in s. 71 of the *Corrections and Conditional Release Act*, 1992, c. 20 (the Act). Von Finckenstein J. applied the pragmatic and functional approach and concluded at para. 19:

[...] 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*.

(see also *Londono v. Canada (Attorney General)*, [2007] FC 694, [2007] F.C.J. No. 943 (QL), at para. 9)

I see no reason to deviate from this approach in the present case. A decision will satisfy the reasonableness standard “if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling” or, put another way, if

there is a “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” (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 (QL), at para. 55).

ii). Was the Panel’s Decision Unreasonable?

[15] The decision under review upholds a previous decision indicating that the applicant must complete the Workworth Sexual Behaviours Clinic, and a Family Violence Programme before his PFVs can be approved.

[16] In determining the reasonableness of the decision at issue, it is imperative to sketch the contours of the discretion afforded in the authorization of PFVs. The discretion involved in making PFV determinations is set out in the Act, Commissioner’s Directive (CD) 770, and Standard Operating Practice (SOP) 700-12.

[17] First, in serving sentences, the Act makes it clear that one of the main purposes of the correctional system is to assist in the rehabilitation of offenders and their reintegration into the community (s.3). In furtherance of this purpose, inmates are to retain the rights and privileges of all members of society, except those that are necessarily removed or restricted as a consequence of the sentence (s.4(e)), while the protection of society is to remain a paramount consideration (s.4(a)).

[18] Further, s.71(1) of the Act establishes that inmates are entitled to contact with friends and family “subject to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons.”

[19] CD 770 stipulates that all inmates are eligible for PFVs except those who are assessed as being currently at risk of becoming involved in family violence. Moreover, SOP 700-12 specifies factors which shall be considered in determining the eligibility of an inmate for PFVs. Pertinent factors include a history of violent behaviour against other persons, and if family violence has been identified as a factor in the inmate’s Correction Plan but has yet to be addressed by the offender.

[20] Thus, it is apparent that the rehabilitation of the offender as well as the safety of the public are primary concerns in the discretionary decision to grant PFVs. In *Edwards, supra*, at para. 16, Von Finckenstein J. aptly indicated the considerations involved in applying the family visit provisions of the Act:

“In all of these programs the security of the public remains a paramount concern. In the case of family visits, of course, one of the concerns is the safety of persons visiting the offender.”

Therefore, the safety of the applicant’s wife must be a primary consideration.

[21] The applicant cites *Edwards, supra*, in which Von Finckenstein J. concluded that it was unreasonable to require the inmate to undergo a sex offender assessment before being granted PFVs, in support of his case. However, contrary to the present applicant, the offender in *Edwards*

had never been convicted of a sexual offence, and had not been assessed as being at risk of becoming involved in family violence.

[22] The applicant submits that it was unreasonable for the panel to ignore relevant facts in denying his PFV, i.e. that he had successfully participated in PFVs between 1994 and 1997, and completed sex offender programmes in the past including the Workworth sex offender programme in 1992 and 1995 as well as the Long Termer's sex offender programme at Kingston in 2002. Further, the applicant submits that the panel ignored the fact that there was no sexual component to his present offences.

[23] However, in reviewing the panel's decision, I do not find any evidence that relevant facts were ignored. To the contrary, the panel clearly explained the reasons why the PFVs with his wife were not granted:

“With regard to the implementation of National Guideline 2.17 your file was reviewed on 2005/06/14 in order to consider your placement in the High Intensity Family Violence Prevention program. PDO C. Winkworth consulted with your Parole Officer and the Director of the Moderate Intensity Sex Offender Program, Dr. Peacock. National Program Guideline 2.17 was applied as you were referred to both family violence and sex offender treatment. It was determined at that time that as sexual violence appears to be the primary factor in your offending pattern, and has caused the greatest harm to your victims; your level of risk and need would be addressed by first participating in sex offender treatment. After successfully completing sex offender programming, you should be evaluated for the required level of intensity for family violence programming.”

[24] While it may be true that the applicant's current offences contain no sexual component, it is clear that the assessment of his potential risk took into account his entire offending pattern. With

regards to the applicant's participation in PFVs and sex offender programmes over the course of previous incarcerations, I am satisfied that the decision, taken as a whole, addresses all pertinent factors. The decision-maker was not required to specifically refer to all elements of the applicant's history of incarceration in its reasons, only those relevant factors upon which its decision was based.

[25] On the whole, the decision is supported by a tenable explanation and reveals a line of analysis by which the decision-maker reasonably arrived at the conclusion in question. As such, I find no reviewable error.

[26] Therefore given the offender's past history of violence including a conviction for sexual assault, and his current SARA assessment, combined with the overarching concern for public safety inherent in the statutory scheme, I find the decision to deny PFVs in the present case reasonable.

[27] For these reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the application for judicial review is dismissed.

“Danièle Tremblay-Lamer”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-726-06

STYLE OF CAUSE:
DONALD RUSSELL

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: November 6, 2007

REASONS FOR JUDGMENT: TREMBLAY-LAMER J.

DATED: November 8, 2007

APPEARANCES:

Me Diane Condo

FOR THE APPLICANT

Department of Justice
Per: Me Derek Edwards

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Me Diane Condo
Condo Law Office - Ottawa

FOR THE APPLICANT

Me Derek Edwards
Department of Justice - Toronto

FOR THE RESPONDENT

ANNEX A

<p><i>Corrections and Conditional Release Act, 1992, c. 20.</i> [...]</p> <p>Purpose Purpose of correctional system</p> <p>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.</p> <p>Principles Principles that guide the Service</p> <p>4. The principles that shall guide the Service in achieving the purpose referred to in section 3 are (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; [...]</p> <p>Contacts and visits</p> <p>71. (1) In order to promote relationships</p>	<p><i>Loi sur le système correctionnel et la mise en liberté sous condition, 1992, ch. 20.</i> [...]</p> <p>Objet But du système correctionnel</p> <p>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.</p> <p>Principes Principes de fonctionnement</p> <p>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 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; [...]</p> <p>Rapports avec l'extérieur</p> <p>71. (1) Dans les limites raisonnables fixées par règlement pour assurer la sécurité de</p>
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<p>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.</p>	<p>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.</p>
<p>[...]</p>	<p>[...]</p>
<p>Grievance Procedure Grievance procedure</p>	<p>Griefs Procédure de règlement</p>
<p>90. There shall be a procedure for fairly and expeditiously resolving offenders' grievances on matters within the jurisdiction of the Commissioner, and the procedure shall operate in accordance with the regulations made under paragraph 96(u).</p>	<p>90. Est établie, conformément aux règlements d'application de l'alinéa 96u), une procédure de règlement juste et expéditif des griefs des délinquants sur des questions relevant du commissaire.</p>
<p>Access to grievance procedure</p>	<p>Accès à la procédure de règlement des griefs</p>
<p>91. Every offender shall have complete access to the offender grievance procedure without negative consequences. 1992, c. 20, s. 91; 1995, c. 42, s. 22(F).</p>	<p>91. Tout délinquant doit, sans crainte de représailles, avoir libre accès à la procédure de règlement des griefs. 1992, ch. 20, art. 91; 1995, ch. 42, art. 22(F).</p>
<p>[...]</p>	<p>[...]</p>
<p>Rules Rules</p>	<p>Règles Règles d'application</p>
<p>97. Subject to this Part and the regulations, the Commissioner may make rules (a) for the management of the Service; (b) for the matters described in section 4; and (c) generally for carrying out the purposes and provisions of this Part and the regulations.</p>	<p>97. Sous réserve de la présente partie et de ses règlements, le commissaire peut établir des règles concernant : a) la gestion du Service; b) les questions énumérées à l'article 4; c) toute autre mesure d'application de cette partie et des règlements. Directives du commissaire Nature</p>
<p>Commissioner's Directives Commissioner's Directives</p>	<p>98. (1) Les règles établies en application de l'article 97 peuvent faire l'objet de directives du commissaire.</p>
<p>98. (1) The Commissioner may designate as</p>	<p>[...]</p>

<p>Commissioner's Directives any or all rules made under section 97. [...]</p> <p>Commissioner's Directive (CD) 770 (Visiting) [...]</p> <p>ELIGIBILITY - INMATES</p> <p>23. All inmates are eligible for private family visiting except those who are: assessed as being currently at risk of becoming involved in family violence; in receipt of unescorted temporary absences for family contact purposes; or in a special handling unit or are awaiting decision or have been approved for transfer to a special handling unit. [...]</p> <p>Standard Operating Practices (SOPs) 700-12 (Private Family Visits) [...]</p> <p>Procedure</p> <p>7 In preparing recommendations to the institutional head with respect to Private Family Visiting Program participation, the Correctional Officer II shall consider the eligibility of the offender and the proposed visitor(s), in conjunction with the value to the offender of maintaining ties with that person(s).</p> <p>8 Upon receipt of the offender's application to participate in the Private Family Visiting Program, file information relevant to the application shall be reviewed. The offender is to be made aware of the eligibility requirements and program specifics, e.g., behavioural expectations, responsibilities, rules, etc. The visitor shall also be made</p>	<p>Directives du Commissaire (DC) 770 (Visites) [...]</p> <p>ADMISSIBILITÉ DES DÉTENUS</p> <p>23. Tous les détenus sont admissibles aux visites familiales privées sauf ceux qui : risquent en ce moment de se livrer à des actes de violence familiale; bénéficient de permissions de sortir sans surveillance pour des raisons familiales; ou sont incarcérés dans une unité spéciale de détention, ou encore en attente d'un transfèrement vers cette unité ou d'une décision à cet égard. [...]</p> <p>Instructions Permanentes (IP) 700-12 (Visites Familiales Privées) [...]</p> <p>Procédure</p> <p>7 Lorsqu'il prépare ses recommandations pour le directeur d'établissement quant à la participation du délinquant au Programme des visites familiales privées, l'agent de correction II doit tenir compte à la fois de l'admissibilité du délinquant et du ou des visiteur(s) éventuel(s) et de l'importance pour le délinquant du maintien des liens avec cette ou ces personne(s).</p> <p>8 À la réception d'une demande de participation au Programme des visites familiales privées, il faut examiner les renseignements pertinents au dossier du délinquant. On doit informer celui-ci des conditions d'admissibilité et de participation au programme (p. ex., les attentes en matière de comportement, les responsabilités et les règles). On doit</p>
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<p>aware of the rules and regulations prior to the commencement of the visits. Special attention shall be given to contraband control measures.</p> <p>9 The most recent Correctional Plan Progress Report shall be reviewed and updated only if changes to ratings within it are required. An Assessment for Decision shall be prepared within 30 days of receipt of an offender's application for an initial private family visit, unless an up-to-date Community Assessment is required and is not yet available. In the case of the latter, the Correctional Plan Progress Report shall be prepared and request for a Community Assessment initiated. The Assessment for Decision shall be prepared immediately upon receipt of the Community Assessment. For subsequent requests for a private family visit, a Correctional Plan Progress Report and Assessment for Decision are not normally required unless there is a significant change in circumstances which would warrant a new report (for example, issues related to family violence).</p> <p>10 Prior to a decision on the visit, the offender shall be provided with a copy of the Correctional Plan Progress Report, the Community Assessment, the Assessment for Decision and all relevant documentation.</p> <p>11 In cases involving a negative decision, the offender and the visitor shall be provided, in writing, the reason for the decision. The offender has the right to appeal this decision via the complaints and grievance process. [...]</p> <p>Annex 700-12A Content Guidelines [...]</p>	<p>également informer le visiteur des règlements régissant le programme avant le début de celui-ci. Les mesures de contrôle des objets interdits doivent faire l'objet d'une attention particulière.</p> <p>9 Il faut revoir la plus récente version du Suivi du plan correctionnel et la mettre à jour seulement si des changements au niveau des cotes sont requis. Une Évaluation en vue d'une décision doit être préparée au plus tard 30 jours après la réception de la première demande du délinquant en vue d'une visite familiale privée, sauf lorsqu'une Évaluation communautaire à jour est requise mais n'est pas encore disponible. Dans ce dernier cas, le Suivi du plan correctionnel doit être rédigé et une demande d'Évaluation communautaire effectuée. L'Évaluation en vue d'une décision doit être exécutée immédiatement après la réception de l'Évaluation communautaire. Pour toute demande subséquente de visites familiales privées, le Suivi du plan correctionnel et l'Évaluation en vue d'une décision ne sont pas normalement requis à moins que des changements importants dans la situation ne justifient la rédaction d'un nouveau rapport (p. ex., des questions liées à la violence familiale).</p> <p>10 Avant de prendre une décision, il faut remettre au délinquant une copie du Suivi du plan correctionnel, de l'Évaluation en vue d'une décision, de l'Évaluation communautaire et de tous les documents pertinents.</p> <p>11 Dans le cas d'une décision négative, il faut remettre au délinquant et au visiteur, par écrit, les motifs de la décision. Le délinquant a le droit d'interjeter appel de cette décision au moyen du processus de règlement des plaintes et des griefs. [...]</p>
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<p>Eligibility of Offender</p> <ul style="list-style-type: none"> • Confirm the eligibility of the offender. • Provide a statement as to the risk of family violence. If the Family Violence Risk Assessment (FVRA) was conducted for the offender, refer to its results. If no FVRA was conducted, in assessing the risk of family violence, the following factors shall be considered: <ul style="list-style-type: none"> ○ any present or past conviction for a violent crime against the family member; ○ history of violent behaviour against other persons; ○ history of childhood victimization or having been a witness to violence in the childhood home environment; ○ abusive, threatening or controlling behaviour towards family members during telephone calls, general visits and/or private family visits; ○ information from the offender, the offender's family and/or other reliable sources such as the police, which indicate that the offender has been abusive with family members; ○ family violence has been identified as a factor in the Correctional Plan and the offender has not yet addressed it; ○ integrate pertinent information from psychological or psychiatric assessments, General Statistical Information on Recidivism (GSIR) score and other actuarial information where appropriate; ○ other factors related to family violence or abuse (this may 	<p>Annexe 700-12A Lignes Directrices [...]</p> <p>Admissibilité du délinquant</p> <ul style="list-style-type: none"> • Confirmer l'admissibilité du délinquant. • Fournir une conclusion sur le risque de violence familiale. Si l'Évaluation du risque de violence familiale (ERVF) a été effectuée, il faut se référer aux résultats. En l'absence d'une ERVF, il faut procéder à l'évaluation du risque en considérant les facteurs suivants : <ul style="list-style-type: none"> ○ l'existence de toute condamnation pour un crime avec violence contre le membre de la famille visé par la demande; ○ les antécédents de violence à l'égard d'autres personnes; ○ le fait que le délinquant aurait été témoin ou victime d'actes de violence dans un contexte familial pendant son enfance; ○ le comportement violent, menaçant ou dominateur envers des membres de la famille au cours d'appels téléphoniques, de visites ordinaires ou de visites familiales privées; ○ les renseignements provenant du délinquant, de sa famille ou d'autres sources dignes de foi, comme la police, selon lesquels le délinquant a usé de violence avec des membres de sa famille; ○ la violence familiale a été cernée comme un facteur dans le plan correctionnel, mais le délinquant n'a pas amorcé de traitement; ○ intégrer l'information pertinente provenant des évaluations
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<p>include participation in family violence programming and the offender's motivation).</p> <p>Note: The presence of one of the above risk factors alone does not necessarily indicate that an offender is at risk for family violence. [...]</p>	<p>psychologiques ou psychiatriques, les résultats à l'ISGR (Information statistique générale sur la récidive) et toute autre information actuarielle appropriée;</p> <ul style="list-style-type: none"> ○ les autres facteurs relatifs à la violence familiale ou d'autres formes de violence, y compris la participation du délinquant aux programmes de lutte contre la violence familiale et sa motivation. <p>Remarque : La présence d'un des facteurs de risque susmentionnés ne signifie pas nécessairement que le délinquant est susceptible de commettre des actes de violence envers sa famille. [...]</p>
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