Date: 20090116

Docket: T-446-08

Citation: 2009 FC 40

Ottawa, Ontario, January 16, 2009

PRESENT: THE CHIEF JUSTICE

BETWEEN:

DANIEL BRENNAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] Daniel Brennan, the applicant, was convicted of refusing to provide a random urine sample while incarcerated in a federal penitentiary. His sentence of five days in segregation was suspended for sixty days.

[2] The applicant seeks judicial review of his conviction. Notwithstanding my concerns about the evidence in this case, these are my reasons for concluding that the conviction was not unreasonable.

[3] There is substantial agreement between the parties concerning the facts.

[4] The applicant was convicted of a serious disciplinary offence for failing or refusing to provide a urine sample, contrary to s. 40(l) of the *Corrections and Conditional Release Act*, 1992, c. 20:

40. An inmate commits a disciplinary offence who	40. Est coupable d'une infraction disciplinaire le détenu qui :
(*l*) fails or refuses to provide a urine sample when demanded pursuant to section 54 or 55;	*l*) refuse ou omet de fournir l'échantillon d'urine qui peut être exigé au titre des articles 54 ou 55;

The institution's right to have demanded the random sample is not in issue and it is not necessary to refer to ss. 54 and 55.

[5] The collector's Observation Report, the Inmate's Offence report and the ICP's decision confirm that the applicant was charged and convicted of "refusing" to provide, as opposed to "failing to provide".

[6] The standard of proof of beyond a reasonable doubt is set out in s. 43(3) of the Act:

43.(3) The person conducting the hearing shall not find the inmate guilty unless satisfied beyond a reasonable doubt, based on the evidence presented at the hearing, that	43.(3) La personne chargée de l'audition ne peut prononcer la culpabilité que si elle est convaincue hors de tout doute raisonnable, sur la foi de la preuve présentée, que le

the inmate committed the disciplinary offence in question.	détenu a bien commis l'infraction reprochée

[Emphasis added]

[7] "Collector" is defined in s. 60 of the *Corrections and Conditional Release Regulations*, SOR/92-620, as the staff person authorized to collect the sample. In these reasons, "collector" will refer to the individual who was responsible to obtain the urine sample from the applicant. "Sample" means "a quantity of unadulterated urine sufficient to permit" laboratory analysis.

[8] Section 66(1) stipulates that the collector is to keep separate the inmate from any other person during the two hours available to provide the sample and "shall supervise as the donor provides the sample":

66. (1) A sample shall be collected in the following manner:	66. (1) La prise d'échantillon d'urine se fait de la manière suivante :
…	...
(*c*) the collector shall provide the donor with a container for the sample and shall supervise as the donor provides the sample;	*c*) il doit remettre à la personne un contenant pour son échantillon d'urine et la surveiller pendant qu'elle s'exécute;
(*d*) the collector shall give the donor up to two hours to provide a sample, from the time of a demand;	*d*) il doit accorder un délai de deux heures à la personne pour fournir l'échantillon d'urine à compter du moment de sa demande;
(*e*) the collector shall ensure that the donor is kept separate from any other person except	*e*) il doit veiller à ce que la personne soit gardée à l'écart de toute autre personne que

the collector and is supervised during the two hour period referred to in paragraph (*d*);	lui-même et reste sous surveillance pendant le délai de deux heures prévu à l'alinéa *d*);

[Emphasis added]

[9] Parenthetically, s. 66(2) of the Regulations raises a concern not canvassed at any length during this proceeding:

Where a person fails to provide a sample in accordance with subsection (1), the person shall be considered to have refused to provide the sample.	Le défaut de fournir un échantillon d'urine conformément au paragraphe (1) est réputé être un refus de le fournir.

On its face, this provision might suggest a displacement of the burden of proof in s. 43(3) of the Act, from the complaining party to the accused, where the procedures in s. 66(1) are not followed. The appropriate officials may wish to consider the purpose of s. 66(2) in light of s. 43(3) of the Act.

[10] On October 29, 2007, the applicant was asked to provide a random urinalysis sample. Initially, the applicant was unable to do so. The collector suggested that the applicant go outside for a cigarette, and offered him some water. The collector departed the testing area to attend to other matters until the applicant was ready to provide a sample.

[11] The collector returned after receiving a phone call from another staff member who had remained with the applicant. The applicant then provided the collector with the urinalysis cup which contained a liquid.

[12] The urinalysis container had a built-in thermometer strip, with an apparent range from 80 to over 100 degrees Fahrenheit. The collector expects a minimum temperature of 90 to 100 degrees Fahrenheit for a normal urine sample.

[13] Because the liquid in the cup did not register on the thermometer strip, the collector was not satisfied with the sample.

[14] Neither the collector nor the staff member observed the applicant provide the sample.

[15] The collector then told the applicant to provide another sample under his direct supervision. The applicant emptied the contents of the container in compliance with the collector's direction. After some fifteen minutes of attempting to provide, the applicant became upset and left without giving another sample. The applicant was informed that he would be charged for refusal but he kept walking away.

[16] The disciplinary hearing was of short duration. The transcript of the evidence and submissions is less than ten pages. The decision-maker or the Independent Chairperson (ICP) delivered his ruling immediately. The ICP preferred the collector's evidence over that of the applicant: "When [the applicant] says he gave a sample, I do not believe … believe he gave a urine sample whatsoever. I think it's … it's just [indiscernible] that. So in all the … in all the circumstances, I've listened to all the evidence, and I find that beyond any reasonable doubt that [the applicant] refused to provide a urine sample …."

Analysis

[17] Was there evidence, beyond a reasonable doubt, upon which the ICP could convict the applicant of refusing to provide?

[18] The applicant does not challenge the ICP's negative credibility finding concerning his testimony. However, in the applicant's view, the ICP failed to inquire whether the other evidence, after discounting the applicant's testimony, established beyond a reasonable doubt that the liquid provided in the first sample was not urine.

[19] The burden of the party seeking the conviction is not met simply because the trier of fact disbelieves the testimony of the accused. This burden to prove every element of the offence beyond a reasonable doubt never shifts. Even where the person charged with the offense is disbelieved, the decision-maker must be satisfied that the other evidence meets the applicable standard of proof: David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 5th ed. (Toronto: Irwin Law, 2008) at page 529. See also *R. v. W. (D.)*, [1991] S.C.J. No. 26 at ¶ 28; *R. v. J.H.S.*, 2008 SCC 30; *McLarty v. Canada*, [1997] F.C.J. No. 808 at ¶ 15 (QL).

[20] To repeat, s. 43(3) of the Act states that the inmate shall not be found guilty unless the ICP is satisfied beyond a reasonable doubt "… based on the evidence presented at the hearing."

[21] The following exchange between the ICP and the collector is relevant:

> [The ICP]: Are urine samples usually coloured or do sometimes they are clear?
>
> [The collector]: They vary. They're varying colour.
>
> [The ICP]: Okay. And in this particular case, in your opinion, was it urine or some … some other substance?
>
> [The collector]: Like I say, it was fairly clear, and I was not certain.
>
> [Emphasis added]

[22] This twofold statement of the collector is problematic. The collector first noted that the substance was "fairly clear", presumably implying it was not urine. He then appears to have immediately added that he "was not certain".

[23] On reading the transcript, one could conclude that the collector was uncertain whether the liquid was urine or some other substance. Counsel for the respondent argues that the collector was merely uncertain about its coloration. With either interpretation, the collector was uncertain concerning an important element of the evidence.

[24] The collector's testimony that the liquid's temperature did not come within the range for a normal urine sample is less equivocal.

[25] During the hearing, the collector stated that "the liquid did not register on the thermometer strips which indicated to me it was water and not from the body". The collector was also asked about his experiences with respect to the temperature ranges generally observed

for urine samples. The collector testified that samples must meet the required minimum temperature before they will be accepted.

[26] The collector's evidence with respect to the temperature strip and its role in urinalysis testing was not subjected to particularly rigorous scrutiny by the ICP. For example, the ICP did not inquire as to whether there was reason to believe the strip was defective, or whether the temperature could have been affected by the sample size. However, the ICP seems to have relied on the collector's work experience with random sampling in concluding that the sample provided by the applicant was not urine.

[27] The only evidence to justify the conviction is that of the collector. With respect to the colour of the sample, the collector's evidence was equivocal and unconvincing. However, with respect to temperature, the evidence was cogent and accepted by the ICP.

[28] Both parties acknowledge that the principles of appellate review do not apply to this application for judicial review. There appears to be no other federal statute or regulation where a conviction based on the standard of proof of "beyond a reasonable doubt" is not subject to appellate review. Because Parliament did not provide for an appeal from the disciplinary decisions of the ICPs, the principles of administrative law and judicial review still apply to this unique situation.

[29] On the basis of *Dunsmuir v. New Brunswick*, 2008 SCC 9, I am satisfied that the standard of review must be reasonableness. If the ICP erred, it is as the result of his application of facts to

principles of law. I do not agree with the applicant's submissions that his error can be characterized as a pure question in law and invite the correctness standard of review.

[30] Penal disciplinary proceedings under the Act are neither criminal nor quasi-criminal in nature: *Forrest v. Canada (Attorney General)*, 2002 FCT 539, ¶ 16. ICPs are not bound by rules of evidence and are free to conduct inquisitorial as opposed to adversarial proceedings: *Hendrickson v. Kent Institution*, (1990), 32 F.T.R. 296, at 298-99. The manner in which the evidence is gathered in a disciplinary proceeding is in the hands of the ICP, subject only to the principles of the natural justice and procedural fairness.

[31] While ICPs are free to consider whatever evidence they believe reliable and trustworthy, the legislation requires that the evidence establish beyond a reasonable doubt that the inmate committed the disciplinary offence. This standard of proof, largely unknown to administrative law, requires drawing reasonable inferences from the evidence: *McLarty*, ¶ 13. The mere fact that an ICP is not bound by the laws of evidence does not diminish the obligation of ICPs to properly scrutinize and weigh the accepted evidence. To allow otherwise would seriously undermine the standard of proof mandated by Parliament.

[32] As was observed in *Hendrickson* at page 299:

> The hearing is not to be conducted as an adversary proceeding but as an inquisitorial one and there is no duty on the person responsible for conducting the hearing to explore every conceivable defence, although there is a duty to conduct a full and fair inquiry or, in other words, examine both sides of the question.

[Emphasis added]

The ICP in this case could have been more “inquisitorial” about the collector’s evidence.

[33] While ICPs need not explore every aspect of the case, they must ensure sufficient evidence exists and that the evidence is appropriately scrutinized before reaching a conclusion on guilt.

[34] Was there evidence to ground a conviction, beyond merely the rejection of the applicant’s testimony? With some hesitation, applying the principles of *Dunsmiur*, I must answer yes. The evidence of the collector with respect to the temperature strip, and the failure of the sample to register on temperature strip do provide a basis for inferring that the sample provided by the applicant was not urine. Accordingly, it cannot be said that conclusion reached by the ICP was unreasonable.

[35] This application for judicial review will be dismissed. In view of the novelty of the issue, at least as envisaged by the Court, there will be no order as to costs.

ORDER

THIS COURT ORDERS that:

1. This application for judicial review is dismissed.

2. There will be no order as to costs.

"Allan Lutfy"
Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

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