# SUPREME COURT OF NOVA SCOTIA

**Citation:** *Downey and Gray v. Attorney General (Nova Scotia)*, 2020 NSSC 213

**Date:** 20200806
**Docket:** Hfx No. 498337
**Docket:** Hfx No. 498338
**Registry:** Halifax

**Between:**

Rae'Heem Downey and
Andre Gray

*Applicants*

v.

The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia and the Superintendent of the Central Nova Scotia Correctional Facility

Respondents

## *HABEAS CORPUS* DECISION

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| **Judge:** | The Honourable Justice Kevin Coady |
| **Heard:** | July 3, 2020, in Halifax, Nova Scotia |
| **Written Decision:** | August 6, 2020 |
| **Counsel:** | Rae'Heem Downey, Applicant on his own behalf<br>Andre Gray, Applicant on his own behalf<br>Duane Eddy, for the Respondents |

**By the Court:**

[1] Mr. Downey and Mr. Gray are inmates currently held on remand at the Central Nova Scotia Correctional Facility. Mr. Downey has been in custody since August 2, 2018 and has served 201 days in close confinement (segregation). Mr. Gray has been in custody since March 12, 2019 and has served 267 days in close confinement.

[2] On May 28, 2020 Mr. Downey filed a Notice of *Habeas Corpus* which set out the following grounds for review:

> The Applicant is detained for admin reasons only without consent.
>
> The Applicant says the detention is illegal – it is violating my rights.
>
> I have not consented to this hold. All options have not been looked at by the jail. My do process rights have violated and this confinement is wrong do to the Covid conditions are extremely hard.

[3] Also on May 28, 2020 Mr. Gray filed a Notice of *Habeas Corpus* which set out the following grounds for review:

> The Applicant is detained for admin reasons: did not concent!
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> I have not concent to this hold! I've been in CCU since 2020/02/14… As of April 21, 2020 I've been held 64 days. Then 30 days for admin reasons: incompatibles!
>
> I have not consented to this hold, all options have not been concitered!
>
> My do process rights have been violated. This confinement is unreasonable.
>
> Do to the Covid the conditions of confinement are extremely bad. My mental health is deterioration!

[4] On June 2, 2020 I had a telephone Motion for Directions with the Applicants and Mr. Eddy, the Respondents' counsel. During those discussions the following emerged:

- Both Applicants were advancing the same complaint. They stated they were placed in close custody as a result of institutional infractions. Upon completion of the sanctions they were not released from close custody.

- The Applicants acknowledged that they share the same complaint and they consented to their applications being consolidated and heard at the same time.
- The Applicants acknowledged receipt of the materials before me at the Motion for Directions.

On the basis of the materials before me, as well as the Applicants' submissions, I ordered a hearing on the merits to be held on July 3, 2020.

[5] The hearing on the merits was held as scheduled. The Respondents acknowledged at the outset that the Applicants' residual liberty was, and continued to be, infringed and that the issue before the Court was the reasonableness of that infringement. With that admission the onus shifted to the Respondents to establish the legality of the infringements.

[6] Deputy Superintendent Richard Verge filed an affidavit and was examined on both direct and cross examination. The following is a summary of his evidence:

- The Applicants have an institutional history of non-compliance with the rules. As a result of assaults and other behaviours, they were sanctioned and placed in segregation. Upon completion of their sanctions on May 26, 2020 they remained in close confinement.
- Mr. Downey and Mr. Gray are "protective custody" inmates. Consequently, they cannot be placed in the general population.
- There are two protective custody ranges in the facility. In general there is no difference in living conditions, restrictions or privileges between protective custody living units and general population living units.
- Neither Mr. Downey nor Mr. Gray agreed to these possible placements on the basis there were "incompatibles" in those areas. The facility deemed these concerns to be credible and did not feel it could mitigate the risk of physical harm. They remained in segregation until a review was conducted on June 10, 2020.
- This internal review board determined that the Applicants would be placed in the health care unit (HCU). The HCU is normally

reserved for inmates recovering from illness or for medical treatment. It is a segregation unit. The applicants are scheduled to remain in the HCU until such time they can be placed in a protective custody living unit without risk of harm.

- The facility explored the possibility of transferring the Applicants to another correctional center as is often done in similar situations. The transfer requests were denied by the proposed receiving facilities.
- The Applicants are permitted out of their cells for a minimum of one hour each 24-hour period and a maximum of two and a half hours. This is dependant on the institution's ability to facilitate such privileges.
- The HCU is physical isolation. The only difference between a close confinement unit and the HCU is that there is a window in the HCU. Inmates are unable to mingle and must stay in their cells except for short periods in the "Airing Court".
- The facility has determined that the only suitable placement is in the HCU. There will be ongoing reviews but it is unlikely that an alternative placement will occur in the foreseeable future.
- Mr. Downey's trial is scheduled for September, 2020 while Mr. Gray's trial is scheduled for November, 2020. Due to the COVID pandemic, it is extremely unlikely that these trials will proceed as scheduled.

In essence, the Respondents argue that the present placement is reasonable because there are no other available options. In other words, it is the best it can do in the circumstances.

[7] Segregation in penal institutions has been the subject of much critical debate in the legal community and among the public. In *Gogan v. Nova Scotia (Attorney General)*, 2015 NSSC 360, Justice Moir commented at para. 20:

> 20 To lock a man alone in a cell for twenty-three hours a day is not merely to deprive him of the common room. It is to deprive him of social interaction, of the simplest personal amusements such as cards or television, of the most rudimentary activities that keep us sane. "[S]olitary confinement (or segregation) for a prolonged period of time can have damaging psychological effects on an

> inmate…": *Boone v. Ontario (Community Safety and Correctional Services)*, 2014 ONCA 515 at para. 21.

[8] Justice Duncan in *R. v. Melvin et al*, 2016 NSSC 130 echoed Justice Moir's comments at para. 19:

> 19 The basis of Judge Derrick's decision was, first, that she took judicial notice that segregation of a prisoner, especially for a lengthy period of time, does impact negatively on a prisoner's mental health. She cited Justice Moir in *Gogan v. Nova Scotia (Attorney General)*, 2015 NSSC 360 (N.S.S.C.), at paragraph 20, together with other authorities in support of this proposition.

[9] It is beyond dispute that segregation produces nothing positive and it exists as a tool to manage a prison population. The impact of segregation is especially profound for inmates with mental health and/or addiction issues. While in close confinement privileges may be restricted or denied such as recreation, exercise, visits, correspondence and telephone access. It is hard to imagine how difficult and damaging it must be to sit in a cell 23 hours a day without human contact or without any activity to pass the hours. This condition is exacerbated when the inmate is unsure when such segregation is to end, which is the situation for these Applicants.

[10] It is too easy to suggest that the Applicants have created this situation and, as such, have no standing to complain. In other words, they are responsible for their own misfortune. This is a misguided theory and this Court must guarantee that penal institutions do not adopt such an attitude.

[11] The importance of *habeas corpus* is accentuated in *Civil Procedure Rule* 7.13(1) which states "*habeas corpus* takes priority over all other business of the Court".

[12] The decision of the Supreme Court of Canada in *Khela v. Mission Institution*, 2014 SCC 24, represents a continuation of the Court's long-standing position that prisoners have rights that must be respected and protected by the Courts. Professor Tim Quigley from the College of Law, University of Saskatchewan wrote an analysis of this decision as a prologue to the reported decision. He offered the following comments:

> The extension of the reasonableness standard of review to *habeas corpus* applications modernizes that writ and brings it more closely in line with the approach to other administrative law remedies. It also broadens the scope for the

> judicial review of *habeas corpus* decisions, although at the cost of some deference to the expertise of prison authorities. Deference according to the *Dunsmuir* standard, however, is better than simply a narrow inquiry into whether there was a lawful basis for the detention in questions. Moreover, the Court has retained the two traditional features of *habeas corpus* that protect against unlawful detention: the non-discretionary nature of the remedy and the placing of the onus on the state to demonstrate the lawfulness of the detention. The overall approach should guard against arbitrary decision-making by prison authorities, especially when combined with the robust protection for procedural fairness.
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> Although not expressly stated in the decision, the equation of unreasonableness with unlawfulness is also consistent with the Court's approach to the interpretation of rights under the *Charter*. That which is unlawful is unreasonable and *vice versa*. Consistency with *Charter* values is valuable and especially so in the case of *habeas corpus* since it has constitutional protection under section 10(c) of the *Charter*.
>
> Finally, the Court has been vigilant to safeguard the duty of procedural fairness and particularly in the context of prison decisions. In *May*, the Court held that the duty includes a requirement of extensive disclosure of the information related to a prison decision. This has been affirmed in *Khela* and strengthened in the sense that any information that was considered by the decision maker must be disclosed, even if she did not expressly rely upon that information.

The Court indicated that to apply any other standard of review than reasonableness would lead to micromanagement of prisons by the Court.

[13] In *Blais v. Correctional Services Canada*, 2011 NSSC 508, Justice Bourgeois stated at para. 9:

> 9 … provincial superior courts do have a role, in fact an obligation to diligently guard against the erosion of the habeas corpus remedy and in particular its continuing application in the prison context.

[14] I believe it is fair comment that prior to Justice Van den Eynden's decision in *Pratt v. Nova Scotia (Attorney General)*, 2020 NSCA 39, *habeas corpus* applications were not getting the respect and attention they deserved. Prior to *Pratt* there was a real danger that the rights demanded by *habeas corpus* could be watered down.

[15] The inquiry into whether Mr. Downey's and Mr. Gray's placement in HCU is a reasonable decision is a fact driven inquiry involving the weighing of various factors and "possessing a negligible legal dimension". (*Khela*, para. 76)

[16] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Supreme Court of Canada recognized there was a need for better guidance on the proper application of the reasonableness standard. The Court commented on the issue at para. 11:

> 11 … The Court has heard concerns that reasonableness review is sometimes perceived as advancing a two-tiered justice system in which those subject to administrative decisions are entitled only to an outcome somewhere between "good enough" and "not quite wrong". …

[17] The Court directed that the analysis begins with a presumption that reasonableness is the applicable standard in all cases and that reviewing Courts "should derogate from this presumption only where required by a clear indication of legislative intent or by rule of law". (para. 10)

[18] The *Vavilov* Court discussed the reasonableness standard of review at paras. 12 – 15:

> 12 … Reasonableness review is methodologically distinct from correctness review. It is informed by the need to respect the legislature's choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court. In order to fulfill *Dunsmuir's* promise to protect "the legality, the reasonableness and the fairness of the administrative process and its outcomes", reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions: para. 28.
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> 13 Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.
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> 14 On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be "justified to citizens in terms of rationality and fairness": the Rt. Hon. B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis deleted); see also M. Cohen-Eliya and I. Porat, "Proportionality and Justification" (2014), 64 *U.T.L.J.* 458, at pp. 467-70.

> 15 In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.

These paragraphs provide the guidance the Court recognized was needed in judicial reviews.

[19] I have concluded that the ongoing placement of Mr. Downey and Mr. Gray in the HCU is not a reasonable outcome. If it were a temporary arrangement, I would find it reasonable. However, to leave them in segregation indefinitely is not acceptable. I make this decision on the evidence recognizing the difficulty faced by the institution and affording it considerable deference.

[20] I recognize that the institution has made some efforts to mitigate the indefinite placement in the HCU. However, these steps are minimal and do little to address the harshness of segregation. I also recognize that there will be ongoing institutional reviews of these placements but there is no evidence before me that such a process will result in an alternative placement for the Applicants.

[21] Leaving Mr. Downey and Mr. Gray in the HCU indefinitely offends the principles of *habeas corpus* and the *Charter of Rights and Freedoms*. The institution must find a resolution. Consequently, I order that if a solution is not found within 14 days of this decision, Mr. Downey and Mr. Gray are to be brought before this Court for a *Criminal Code* review of their detention.

Coady, J.