SUPREME COURT OF NOVA SCOTIA
Citation: *Crawley v. Nova Scotia (Attorney General)*, 2020 NSSC 221

Date: 20200813
Docket: 499522
Registry: Halifax

Between:

Andreko Jamal Crawley

v.

Nova Scotia (Attorney General) and Central Nova Scotia Correctional Facility

Decision on Habeas Corpus Application

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	August 11, 2020, in Halifax, Nova Scotia
Counsel:	Andreko Crawley, Self-Represented Drew Hampden, for the Respondents

By the Court:

Introduction

[1] Mr. Crawley is in custody at the Central Nova Scotia Correctional Facility ("CNSCF"), located in the Burnside Industrial Park at Halifax, Nova Scotia. He has been there on remand since December 2019, regarding charges of conspiracy to commit murder and attempted murder.

[2] On July 28, 2020 this court received his notice seeking relief from confinement based on the writ of *habeas corpus*. It noted that he was detained "on 22- hour lock up without just cause". He says his detention is illegal because "administration hold seg cell [administrative close] confinement without reason being given as to why" and "four hours a day is not given in short-staff [situations] not [reasonable] to stay locked up [since disciplinary] segregation time done. No levels [disciplinary findings] given as to why."

[3] I conclude that the Respondents have satisfied me that: Mr. Crawley's detention is not unlawful or unreasonable, and that the agents of the Attorney General responsible for the CNSCF (a.k.a. "Burnside") complied with the required procedural duties and requirements of fairness.

[4] Therefore, I dismiss his application for a *habeas corpus* remedy.

The evidence available

[5] The court has the benefit of the affidavit of Richard Verge, Deputy Superintendent of Burnside, upon which he was cross-examined. I found his evidence was given in a forthright manner. He elaborated upon matters raised in an effort to ensure that the court properly understood the relevant context and Mr. Crawley's circumstances were fairly presented. I accept his evidence.

The legal framework

[6] In assessing whether Mr. Crawley is entitled to a remedy under the *habeas corpus* regime the court must ask itself the following questions:

1. Has he established an apparent deprivation of liberty and raised a legitimate ground to question the legality of the deprivation?

[7] A claim that the deprivation that is based on no disclosure or reasons for the decision can meet the latter requirement. An inmate can challenge their initial deprivation of liberty, a substantial change in conditions amounting to a further deprivation of liberty, and a continuation of the deprivation of liberty. "Not every administrative decision made by prison authorities will attract a *habeas corpus* remedy. It will depend on the circumstances of the alleged deprivation and the

applicable legal principles."- *Gogan v. Canada (attorney General)*, 2017 NSCA 4 at para. 64.

[8] I accept that this has been established, as Justice Campbell concluded it to be the case at the motion for directions. This finding then shifts the onus to the Respondent authorities to show that the deprivation of liberty was "lawful". It is therefore the responsibility of the Respondents to introduce evidence to justify the deprivation of liberty. I note in this case that Mr. Crawley's complaints have not been rendered moot.

2. in deciding whether the deprivation of liberty was "lawful" the court will examine whether the Respondents have shown that Mr. Crawley's deprivation of liberty is:[1]

   a) lawful (that the institution had the legal authority to impose the deprivation of liberty)

   b) reasonable;

   (per the majority in *Dunsmuir*, 2008 SCC 9 at para. 47: "A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with ***the existence of justification, transparency and intelligibility within the decision-making process.***

[1] As stated in *Vavilov* 2019 SCC 65 at para. 12, generally the purpose of judicial reviews of administrative decisions is: "to protect 'the legality, the reasonableness and the fairness of the administrative process and its outcomes'…"

> *But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.* ". See also Justice Norton's comments in a recent *habeas corpus* case, *Nagle-Cummings v Nova Scotia (Atty. Gen.)*, 2020 NSSC 188 at para. 77.)

c) And whether the decision-maker has complied with its procedural duties and otherwise the requirements of fairness?

[9] Generally, one of the procedural fairness requirements is that the decision-maker provide written reasons. However, in this specific context, as noted by Justice Norton at para. 67 *Nagle-Cummings*: "no written reasons were provided [to the inmate] by the decision-maker, nor were they required by the statutory scheme."[2]

Why the decision here withstands scrutiny and a remedy of habeas corpus is rejected

Background

[10] D/S Verge's affidavit states at paras. 41-47:

[2] It is not uncommon for inmates to complain they do not know why a further deprivation of liberty in cases of administrative close confinement (which does bear great similarity to Mr. Crawley's present placement) has been imposed upon them. The court would certainly very strongly encourage correctional institutions to provide at least generalized reasons to inmates so affected by rotational lockdowns, *and* to have them reduced to writing, copies given to the inmate, and that they then be noted on the inmate's institutional record. During his testimony Deputy Superintendent Richard Verge undertook to provide such written confirmation of the individual expectations the Superintendent has of Mr. Crawley's (and by implication the other inmates') behaviour in the presently constituted rotational unit North 4 ["N4"], and timeline within which achieving such expectations (i.e. – no significant negative behaviour for a minimum of 30 days) would lead to a review of their placement, with an expectation that, absent extraordinary circumstances, their next placement would be less restrictive.

"In July 2020 management at Burnside made the decision to split the North 3 unit into two separate units: North 3 and West 1 with two separate day rooms due to a number of serious inmate and staff assaults that took place in the North 3 unit while it was the only general population unit. The North 3 unit and everyone housed there was then moved to North 4 the following day. The North 4 unit was created as a separate step down unit where inmates who experience continued and consistent behavioural issues in the sole general population unit, now West 1, could be housed until their behaviour improved, reducing the security risk for staff and other inmates. Inmates housed on the North 4 unit were placed on this unit due to having already been unsuccessfully placed with other inmates and other units at CNSCF resulting in their removal. Due to Covid 19, most of these inmates, including Mr. Crawley, cannot be transferred to any other facility in Nova Scotia and therefore the only other alternative housing option would be housing in the close confinement unit which the CNSCF wishes to avoid as a long term placement option. The inmates and West 1 unit are subject to the following periods of unlock… [effectively they are able to exit their cells 12 hours of every 24-hour period]

The inmates in the North 4 unit are subject to a rotational unlock and are permitted out of their cells for a minimum of two hours per day with a peer, with additional time being dependent on how many inmates are housed and how many rotations are required, during each 24 hour period, which is offered daily and is determined by the CNSCF's operational ability to facilitate. CNSCF attempts to provide additional time if possible based on these factors and staffing.

The rotational unlock on the North 4 unit is subject to a daily review by senior management. Mr. Crawley was moved to the North 4 unit on July 29, 2020. In the months leading up to his placement in North 4, Mr. Crawley had been placed in the CCU ["closed confinement unit"] on a number of occasions, yet his behaviour continued [to] place other inmates, himself and facility staff at risk of harm.

Placement decisions at all material times were based on several factors and considerations, such as:

- Incompatibles
- Availability of beds within a given living unit
- Institutional Risk Assessment
- Inmate's Health Condition
- Intelligence Information
- The status of an inmate (i.e. protective custody/general population inmate)."

[11] In summary, since July 29, 2020 Mr. Crawley has been placed in the North 4 unit which was notionally re-purposed from a "general population" unit to a

customized “rotational” unit housing between six and eight offenders who were considered to have demonstrated continued and consistent behavioural issues which gave rise to serious concerns regarding the security of staff and other inmates, and generally pose a risk of violence, intimidation, and subterfuge, collectively undermining the security and safety of those within the institution. D/S Verge confirms that he explained verbally to each of those offenders on July 27 – 28, 2020, why they were being transferred to this unit, and that upon demonstrated good behaviour over a sustained period, they would be considered for transfer out of the unit.

[12] D/S Verge confirmed that Mr. Crawley has been of good behaviour since July 21, 2020, and that should he remain so until August 21, 2020, genuine efforts will be made to transfer him out of the unit, absent other countervailing extraordinary circumstances.

[13] Mr. Crawley’s arguments that he should be returned to a general population unit by the court, may be reduced in substance to the following:

1. there is no lawful authority for creating a rotational unit like N 4, where the offenders are generally only allowed out of their cells with a peer for a minimum of two hours each 24-hour period; and there is

no procedure for a review of this decision or the length of time that Mr. Crawley may be subjected to placement in this unit

2. the imposition of a 22 hour per 24-hour period lockdown in their cells is not justifiable in the circumstances (which he argues is largely due to staffing shortages)[3]

3. the stated reasons for keeping him in this unit are insufficient, especially given the level of deprivation of his liberty.

1 - The lawful authority for instituting rotational lockdowns in Burnside, and a specific customized use of the unit, N3

[14] Firstly, I would note that there is express authority given to the Superintendent of each correctional facility to customize the use of the facility to the fulfil the mandate of the Superintendent – see section 74 of the *Correctional Services Act*, c. 37 SNS 2005 as amended ("close confinement") and section 79 of

[3] Regarding the argument that the Respondents are doing the best they can in the circumstances, including staffing shortages and the public health concerns around Covid 19, Justice Coady very recently concluded at para. 19 in *Downey and Gray v Nova Scotia (Atty. Gen.),* 2020 NSSC 213, "that the ongoing placement of Mr. Downey and Mr. Gray in the HCU [healthcare unit] 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." Mr. Downey had been in custody since August 2, 2018 and served 201 days in close confinement, whereas Mr. Gray had been in custody since March 12, 2019 and had served 267 days in close confinement. Mr. Crawley's situation is that he is expected to be in the rotational unit for not much longer than 30 days if he demonstrates good behaviour. At present his situation is very distinguishable from those of Messrs. Downey and Gray.

the *Correctional Services Act* Regulations ("conditions for confinement of offenders in custody"):[4]

> 7 Section 79 of the *Correctional Services Act Regulations* reads:
>
> Conditions for confinement of offenders in custody
>
> (1) A Superintendent may impose different conditions of confinement for different offenders within the correctional facility.
>
> (2) An offender held in a correctional facility may be restricted from associating with another offender held in the correctional facility.
>
> (3) For reasons of safety, security or order in the correctional facility, a Superintendent may restrict access to the correctional facility or part of it by
>
> a) confining the offenders held in the correctional facility or those of them who are normally held in that part, as the case may be, to their sleeping areas; and
>
> b) restricting entry to the correctional facility or that part, as the case may be.

[15] A question may arise whether there is "a distinction without a difference" between administrative "close confinement" and the so-called "rotational lockdown" unit which houses Mr. Crawley. This question is significant because when an inmate is in *disciplinary* "close confinement" Regulation 95 accords certain protections, such as the specific length of time in which one can stay in

[4] Taken from my decision in *Coaker v Nova Scotia (Atty. Gen*.), 2018 NSSC 291 which concerned the complaint of a number of inmates from an entire range or section of the Burnside correctional facility having been placed on rotational schedule or "lockdown" by the Superintendent. Although "lockdowns" are similar to administrative and disciplinary "close confinement" as they do all find their roots in section 74 of the Correctional Services Act, disciplinary close confinement only may be imposed pursuant to section 95 of the Regulations- whereas non-disciplinary or administrative close confinement may be imposed under section 74 of the Act and section 79 of the *Correctional Services Act Regulations* , where the offender is considered in need of protection, needs to be segregated to protect the security of the correctional facility or safety of other offenders, or the offender requests.

close confinement for the same institutional "offence", whereas for an inmate in *administrative* "close confinement" the protection accorded by section 75 (b) of the Act is that: "[the Superintendent] shall, in accordance with the regulations, conduct a review of the close confinement." without specifying when and how often such reviews must take place.[5]

[16] Notably, however section 80 of the Regulations reads:

> Review of close confinement
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> (1) if an offender is placed in close confinement under section 74 of the Act, the Superintendent must conduct a preliminary review of the offender's case no later than 24 hours after the time that the close confinement began.
>
> (2) After a preliminary review, if a Superintendent believes that the continued close confinement of the offenders not warranted, the Superintendent must release the offender from the close confinement.
>
> (3) If an offender remains in close confinement after a preliminary review, the Superintendent must review the offender circumstances at least once in every five-day period to determine whether the continued close confinement of the offender is warranted.
>
> (4) *If an adult offender remains in close confinement for a continuous period of 10 days,* or if an offender who is a young person remains in close confinement for a continuous period of 7 days, *the Superintendent must request permission from the Executive Director before continuing the close confinement*."

[5] I should add here that although the evidence was not presented in this case, in *Coaker v Nova Scotia,* at footnote 9, I attached as an Appendix "A" to that decision, the Policy and Procedure Subject Number 43.00.00 Correctional Services Policy and Procedures – Close Confinement, updated to June 22, 2018. Article 12 is entitled "Close Confinement Review and Request for Extension". They do not have the force of law, and I have not considered them in Mr. Crawley's case, however the reader of this decision should be aware of their existence.

[17] Similarly, section 95 of the Regulations reads:

> Imposing penalty
>
> (1) The penalty that a Superintendent may impose on an offender under subsection 70 (1) of the Act for breaching a rule must be one of the following, or a combination of any of the following:
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> (a) withdrawal in whole or in part of the offender's privileges;
>
> (b) performance of work;
>
> (c) *close confinement for no longer than 10 days in respect of any one confinement for an adult offender, and for no longer than 7 days in respect of any one confinement for an offender who is a young person;*
>
> (d) *with the approval of the Executive Director, close confinement for longer than 10 days for an adult offender* and longer than 7 days for an offender who is a young person;
>
> (e) a restorative justice process, including restitution is part of all the costs to repair the damage done by the offender, in accordance with policies and procedures;
>
> (f) forfeiture of all or part of the remission currently credited the offender.

[18] The Attorney General relies upon s. 74(b) of the *Act* to justify Mr. Crawley's placement in the rotational lockdown unit N4 – "in the opinion of the Superintendent, the offender needs to be segregated to protect the security of the correctional facility or the safety of other offenders".

[19] I conclude that the only reasonable interpretation of section 75(b) of the *Act* is that the Superintendent must "conduct a review of the close confinement" of Mr.

Crawley as contemplated by section 80 of the Regulations (review of close confinement).

[20] That is, the Superintendent must review the offender's circumstances at least once in every five day period to determine whether the continued close confinement is warranted and that if the offender remains in close confinement for a continuous period of 10 days, the Superintendent must request permission of the Executive Director before continuing the close confinement.

[21] The evidence of D/S Verge is that:

> "I determined that the North 4 unit is the only suitable placement for [Mr. Crawley] at this time. That determination is based on Mr. Crawley's general population status, incompatibles at the CNSCF, concerns for other inmates safety, the availability of beds and living units at the CNSCF , and based on intelligence information pertaining to Mr. Crawley's personal safety, as well as my risk assessment." (para. 64)

[22] In his *viva voce* testimony, he elaborated that there is a significant difference between the close confinement unit (CCU) and the North 4 unit as follows – Mr. Crawley receives the following amenities *not* available to those in the CCU:

1. He is permitted time out of his cell with a peer inmate from the unit; more recently three inmates have been permitted out of their cells at the same time for a minimum of two hours per day with the possibility

for up to four hours (which has not yet been achieved due to staffing and other issues)

2. He has access to amenities such as use of the phone, showers, the airing court; a universal gym machine and TRX bands; yoga mats; use of a PlayStation 4; access to TV; 15 minutes per week video visits with family; and canteen orders are possible.

[23] D/S Verge testified that those in the North 4 unit have the same benefits and amenities that those in the West 1 unit (general population) with the exception that they don't have as much time out of their cell, and they are limited to the number of inmates they can spend time with out of their cell – see paragraphs 49 – 63 Verge affidavit.

[24] He also confirmed that since Mr. Crawley has been in North 4, he does case review notes daily, and the decision to maintain Mr. Crawley in that unit is considered each day when he does those notes. There is also an Institutional Review Board (IRB) which is made up of a number of management members who consider major changes in placements for inmates regularly. That group will review Mr. Crawley's behaviour since July 21, 2020 on or about August 20, 2020, and if all goes well and he has no significant negative incidents, D/S Verge

anticipates there is a very good likelihood that Mr. Crawley will no longer be placed in North 4.

[25] I am satisfied that there is lawful authority for the placement of Mr. Crawley in North 4.

2 - Reasonableness: the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law- the imposition of a 22 hour per 24-hour period lockdown in their cells is also justifiable in the circumstances

[26] The stated reasons for keeping him in this unit are sufficient to justify the level of deprivation of his liberty – the circumstances make this placement decision one that falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[27] Initially the reasons were given by Superintendent Adam Smith in his activity history note July 27, 2020- Verge affidavit Exhibit "E" at page 1 of 15.

[28] Mr Crawley argues that his placement is largely due to staffing shortages and is therefore specifically as well as generally unjustifiable.[6]

[6] See *Ogiamien v Ontario (CSCS*), 2017 ONCA 667 at paras. 57, 58 and 61 – 62, where the court noted that "even lockdowns imposed because of staff shortages are imposed to ensure the security of the institution and the safety of the staff and inmates…I think it is at least fair to say that if frequent lockdowns due to staff shortages led to the treatment of an inmate that was grossly disproportionate to what was appropriate, administrative expediency or

[29] Mr. Crawley has only been on this unit since July 29, 2020. His complaint relates to the time period July 29 – August 13, which is approximately 15 days in total.

[30] D/S Verge testified that "rolling rotational lockdowns" across ranges/units in Burnside are related to staff shortages, but that the rotational lockdown for North 4 is not significantly due to staff shortages. Mr. Crawley is in the unit because he "cannot be placed into a Protective Custody Unit due to safety concerns for the protective custody inmates"-I note that he testified that approximately 90 to 100 of the male inmates are in protective custody- which I believe is more than half of the present total Covid 19 restricted inmate population.

[31] In Burnside there are the following units available for male inmates (unless otherwise mentioned the cells have double bunking capacity, but are not being presently used due to Covid 19 restrictions placed by Public Health authorities):

- N1-32 cells used to house any persons who have to quarantine for 14 days in the institution as a result of Covid protocols

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convenience would not come to the rescue of the *Charter* violation. In other words, had the frequency, duration and impact of the lockdowns due to staff shortages resulted in treatment so excessive as to outrage standards of decency, the pre-authorized or unscheduled unavailability of correctional officers would have been no answer to Ogiamien's and Nguyen's *Charter* claims."

- N2-32 cells used for protective custody only
- N3-32 cells used for protective custody only
- N4-16 cells used as rotational unit (general population inmates)
- W1-32 cells – general population
- W2-32 cells used for protective custody only
- W3-32 cells – presently being used for inmates requiring intense direct supervision
- W4-16 cells – Transition Day Room-primarily offenders with mental health issues not requiring them to be in the healthcare unit
- HCU-12 (single) cells – Healthcare unit
- CCU-nine (single) cells – close confinement unit
- Admissions-nine (single) cells – temporary housing for newly admitted inmates

[32] D/S Verge in his testimony made a convincing case for why Mr. Crawley is too great a risk to the inmates, staff and the orderly functioning of the institution to be released and be among general population or protective custody inmates. Mr. Crawley has made progress by his positive behaviour since July 21. It is not unreasonable for the institution to conclude that it is reasonably necessary that Mr. Crawley remain in the North 4 unit until he has demonstrated a significant period of time of good behaviour. A period of approximately 30 days is reasonable.

3 - The decision-maker has complied with its procedural duties and requirements of fairness

[33] In *Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817, at para. 22, Justice L'Heureux-Dube for the majority, wrote that "the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected".

[34] She went on to list five non-exhaustive general factors that have been recognized in the jurisprudence is relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. These are:

1. The nature of the decision being made and the process followed in making it;
2. The nature of the statutory scheme and the "terms of the statute pursuant to which the body operates";
3. The importance of the decision to the individual or individuals affected;
4. The legitimate expectation (that a certain procedure would be followed), of the person challenging the decision;

5. The choices of procedure made by the authorized decision maker itself (particularly when the legislation leaves to the decision maker the ability to choose its own procedures or when the decision-maker has an expertise in determining what procedures are appropriate in the circumstances).

[35] D/S Verge informed Mr. Crawley verbally on July 27, 2020 why he was being placed in the rotational unit North 4. Since then, he has had regular contact with Mr. Crawley providing ongoing opportunities for Mr. Crawley to inquire about his circumstances, and I find Mr. Crawley understood the general reasons why he was placed in North 4.

[36] During his questioning and commentary in court Mr. Crawley demonstrated that he understands that he is entitled to fair treatment in the institution, and specifically fair process including being made aware of why he has been placed on North 4, and having the ability to challenge that decision. He referenced himself as being in close confinement and therefore believed that could only be approved for a limited length of time, and thereafter had to be approved by the Executive Director.

[37] Mr. Crawley was advised shortly after July 27 that if he had 30 days of good behaviour he would be considered for placement in general population. He has been given a reasonable opportunity to likely be removed from North 4. The expectation from the institutional administration is simple – 30 days of good behaviour.

[38] I am satisfied that Mr. Crawley has been afforded fundamentally fair process in the process of decision-making that led to his placement on North 4, and his continued placement is justified until on or about August 20, 2020 (absent countervailing material changes in the interim).

Conclusion

[39] The Respondents have satisfied me that Mr. Crawley's application for *habeas corpus* should be dismissed. No costs are claimed, and none are awarded.

Rosinski, J.