SUPREME COURT OF NOVA SCOTIA
Citation: *MacNeil v. Springhill Institution*, 2020 NSSC 324

Date: 20201109
Docket: Amherst No. 500420
Registry: Amherst

Between:

Morgan James MacNeil

Applicant

v.

Springhill Institution (Warden)

Respondent

DECISION ON *HABEAS CORPUS*

Judge:	The Honourable Justice Scott C. Norton
Heard:	November 2, 2020, in Amherst, Nova Scotia
Written Decision:	November 9, 2020
Counsel:	Morgan MacNeil, self-represented Applicant Sahand Farahanchi and Kaitlin Duggan, for the Respondent

By the Court:

Introduction

[1] This decision responds to a Notice of *Habeas Corpus* filed by the Applicant on September 14, 2020. The Court heard a motion for directions by telephone on September 17, 2020 at which time the matter was scheduled for hearing on October 19, 2020. On that date the Respondent requested that the matter be adjourned without day to allow the Respondent to gather the necessary evidence for the hearing. The Court refused to adjourn the matter without day and instead scheduled a hearing date of November 2, 2020 with a filing deadline of October 23, 2020 for the Respondent's evidence and brief.

[2] The November 2, 2020 hearing was held by telephone. The Applicant provided oral testimony and the Respondent witnesses were cross-examined by the Applicant. All evidence was given by telephone, on affirmation, and without objection. The evidence is comprised of the Applicant's testimony and the affidavits and oral testimony evidence of Jaimie Ryan, an Institutional Parole Officer at the Springhill Institution and Nathalie Waterbury, the acting Assistant Warden Interventions at the Atlantic Institution.

[3] At the conclusion of the hearing I reserved my decision.

Background

[4] The Applicant is a 29-year-old offender who began his federal custody in July 2013. Since entering custody the Applicant demonstrated institutional adjustment issues in both medium and maximum security settings. His institutional record reveals numerous instances of aggression, possession of contraband and issues concerning his personal safety resulting in interventions by staff, administrative segregation (before that practice was abolished) and transfers between institutions to manage his behaviour.

[5] Owing to his expressed concerns for personal safety, the Applicant has been housed in every mainstream population range at Springhill with the exception of Unit 57, because of concerns for staff safety relating to a previous incident involving the Applicant in 2013.

[6] At the time of the events in issue he was housed in Unit 58 and had been on that range since August 19, 2020. He described this as a privilege range with expanded time out of cells and wherein the inmates cook their own meals.

[7] On September 12, 2020, the Applicant was observed on CCTV committing an assault on another offender. The Applicant acknowledges his involvement, however, the Applicant and Respondent disagree as to the nature and quality of the assault.

[8] The Applicant says that he was defending himself from an inmate who had two weeks previously threatened him and another inmate with a broken meat thermometer made into a sharp weapon. The weapon was taken from the other inmate by Springhill staff.

[9] The Applicant says that on September 12, 2020 the other inmate ("O") and the Applicant got into an argument and O followed him into the kitchen and threatened to stab the Applicant. The Applicant warned O to stay away from him and when he kept advancing the Applicant feared for another possible stabbing and struck O. O wrestled the Applicant to the ground at which time the Applicant kicked him a couple of times in the head and shoulder area to get away from him. O said "I'm done" and returned to his cell. The Applicant returned to his cell. According to the Applicant there was no serious assault, no injury to O and, in comparative terms, this was a minor incident on the scale of prison altercations.

[10] The Applicant says that it was only after the other inmates on Unit 58 refused to return to their cells unless the Applicant was moved that the administration decided to review his security classification.

[11] The Respondent filed affidavit evidence from Jaimie Ryan, a member of the Applicant's Case Management Team ("CMT") at Springhill. She was cross-examined by the Applicant. She reviewed the CCTV recordings of the interaction between the Applicant and O. Her observation of the recording was that it showed the Applicant walking back and forth in front of O's cell and O then came into the hallway and the two appeared to argue. The Applicant then went into the kitchen and put his coffee down on the table. The Applicant then came back toward O and punched him. Ryan said the punch appeared to be unprovoked in the sense that the victim did not make any physical move toward the Applicant. There was no audio on the CCTV recording. She described the Applicant as the aggressor and said that he both punched and kicked O. She acknowledged there was no physical injury requiring medical treatment. She assessed the actions of the Applicant as a serious

violent physical assault. She testified that the Security Intelligence Officer concurred with this assessment of the incident.

[12] As a result of the incident, the Applicant was moved to a Restricted Movement ("RM") cell on September 12, 2020. A reassessment of his security classification was then undertaken. The Applicant's CMT assessed him to be a maximum security offender and the CMT recommended, and the Warden approved, an involuntary emergency transfer to the Structured Intervention Unit ("SIU") at the Atlantic Institution in Renous, New Brunswick.

[13] Prior to his transfer to Atlantic, the Applicant met with Jaimie Ryan and Acting Correctional Manager David Deegan. According to the records kept by the Respondent, during that meeting the Applicant expressed his relief to the correctional officials and stated that he thought it would be much better for him at Atlantic than at Springhill.

[14] He was transferred to Atlantic on September 15, 2020 and was placed initially in the Reception range where he was to be held, with his consent, until the outcome of the *habeas corpus* application. The Reception range has very little time out of cell for recreation. However, on September 25, 2020 he requested a transfer to the SIU at Atlantic and was moved to that range that day.

[15] On September 26, 2020, the Applicant was involved as a secondary aggressor in a violent assault on another inmate wherein the Applicant and the principal aggressor kicked the victim repeatedly while he was on the ground. When officers arrived on the scene they observed the Applicant and the principal aggressor smiling and shaking hands.

[16] The applicant blames this incident on the Atlantic Institution as he was asked if he wanted to go outside and when he exited into the recreation area he realized he was there with two maximum security inmates. He complains that as his maximum security classification was not yet finalized, he should never have been placed in that situation. He says that prison norms demanded he participate or risk being seen by the principal aggressor as being aligned with the victim against the principal aggressor. He says that his kicks to the victim were fake and that he caused no injury to the victim. As with the Springhill assault, the observations of the correctional personnel are to the contrary.

[17] In conducting the security classification review, the Respondent utilized a Security Reclassification Scale ("SRS") which is a computer algorithm that produces

a score based on the inputted data. His SRS produced a score of 23.5 which falls into the range for a security classification of medium security.

[18] This represents only part of the review. Based on the factors set out in section 30 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*") and section 17 of the *Corrections and Conditional Release Regulations*, SOR/92-620 ("*Regulations*"), the CMT, exercising its professional judgement, classified the Applicant as maximum security. This was primarily due to a finding of "high" with regard to the Applicant's "institutional adjustment" meaning that, based on his history while in custody, he has demonstrated a need for a high degree of supervision and control within the penitentiary and therefore must be classified as a maximum security offender.

[19] Pursuant to Section 27 of the *CCRA*, the Applicant was provided with a copy of the SRS completed along with a copy of the "scoring matrix" which details how the SRS is scored. He was also provided with the Assessment for Decision ("A4D") completed by the CMT which includes a detailed review of noted behaviours since his incarceration in the federal penitentiaries and an explanation of why CSC considered that he required the highly structured environment offered by a maximum security penitentiary. He was provided with all of the information to be considered by the Warden in this case, including the CCTV footage of the September 12, 2020 incident being shown to him.

[20] The Applicant was provided with the opportunity to provide a rebuttal to his security reclassification recommendation and proposed involuntary transfer to Atlantic Institution on two occasions following each decision-making process – being before and after the incident at the Atlantic Institution. The recorded rebuttals were taken on September 25, 2020 and October 2, 2020.

[21] On October 5, 2020 the Applicant's CMT, with the approval of the Warden, reclassified the Applicant as a maximum security offender and approved his involuntary transfer to the Atlantic Institution.

Issues

[22] The issues before the court are whether the October 5, 2020 decision on security reclassification and involuntary emergency transfer was lawful, reasonable and procedurally fair.

Law and Analysis

[23] Pursuant to the decision of the Supreme Court of Canada in *Khela v. Mission Institution*, 2014 SCC 24, an Applicant for *habeas corpus* must establish:

1. A deprivation of liberty or residual liberty; and
2. A legitimate ground upon which to question the legality of the deprivation.

If the Applicant meets this threshold, the onus shifts to the responding detaining authority to show that the deprivation of liberty was justified in all of the surrounding circumstances.

[24] The Respondent concedes that the Applicant's transfer from medium to maximum security results in a deprivation of residual liberty and that the burden of proof is borne by the Respondent to show that the deprivation is lawful. A decision is lawful if it is procedurally fair and reasonable. (*Khela* at para 52)

[25] *Khela* set out what makes a decision unreasonable in the context of *habeas corpus* at para. 74:

> … a decision will be unreasonable, and therefore unlawful, if an inmate's liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion, although I do not foreclose the possibility that it may also be unreasonable on other grounds. Deference will be shown to a determination that evidence is reliable, but the authorities will nonetheless have to explain that determination.

[26] Since *Khela*, the Supreme Court of Canada has re-articulated what is meant by "reasonable" in the context of administrative law decisions. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, the Court held that for a decision to be reasonable:

1. Its reasoning must be internally coherent, ie., rational and logical; and
2. It must be justified in relation to the constellation of law and facts that are relevant to it.

The Court articulated several factors to assess, although they are not a checklist and were offered merely to highlight when a reviewing court may lose confidence in the decision under review:

> [106] It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be

> relevant in evaluating whether a given decision is reasonable, namely the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

[27] In reviewing the reasonableness of the Warden's decisions, the court must take into account that the original decision-maker has experience and expertise in the environment of a prison. A transfer decision is a fact-driven inquiry involving the weighing of multiple factors . The decision-maker will have knowledge of the prison's culture, norms and individuals and has a related specialized, practical experience in making decisions of this nature. Accordingly, these decisions are due deference on review. (*Khela, supra,* at paras. 75-76 and *Cain v Correctional Services Canada*, 2013 NSSC 367, at paras. 33-34)

[28] In *Cain*, Justice Van den Eynden (as she then was) stated as follows:

> Deference
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> 33 I have considered the principle of deference respecting the decision of administrators in penal institutions. I am mindful of the deference afforded respecting such administrative decisions, as is the subject matter of this case. In particular, administrative segregation and classifications respecting security. Deference is referred to in many authorities including, *Khela v. Mission Institution (supra), Dunsmuir (supra),* and *Bradley (supra),* a decision of the New Brunswick Queens Bench, as well as *Samms v. Atlantic Institution*, 2004 NBQB 140 (N.B. Q.B.).
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> 34 In short, this Court's role is not to determine whether the administrative segregation and/or the security classification was the "proper decision" but rather whether the Respondent had the jurisdiction to make those decisions and whether such decisions were lawful and reasonable in the circumstances, taking into consideration the rights and procedural safeguards which Mr. Cain is to be afforded at law.

[29] In the present case, the Applicant argues that the altercation with the other inmate was not a serious and violent assault. He argues that having obtained an SRS score of medium security, the Respondent should not be permitted to subjectively

assess him as maximum security. I find that when I afford the decision-maker the deference they are entitled to by virtue of their training and experience, I am unable to say that the decision is unreasonable. I find that the decision-maker had the jurisdiction to make the decision (pursuant to the *CCRA*, the *Regulations* and policies known as Commissioner's Directives) and the decision fell into the range of reasonable outcomes defensible on the facts and law. The decision is not arbitrary and is transparent and logically defensible. The conclusions of experienced prison administrators with respect to what behaviours can and cannot be tolerated in the context of a particular institution with unique offender dynamics ought not to be discounted lightly and is due a high degree of deference.

[30] With regard to the issue of procedural fairness, the Respondent acknowledges that a duty of procedural fairness rests on every public authority making administrative decisions that affect the rights, privileges or interests of an individual. In the present case, the Respondent says that this duty is reflected in and bolstered by the disclosure requirements under the *CCRA*.

[31] In accordance with s. 27 of the *CCRA*, the Applicant was entitled to disclosure of the information to be considered by the decision-maker regarding his transfer to Atlantic Institution:

> 27(1) Information to be given to offenders
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> Where an offender is entitled by this Part or the regulations to make representations in relation to a decision to be taken by the Service about the offender, the person or body that is to take the decision shall, subject to subsection (3), give the offender, a reasonable period before the decision is to be taken, all the information to be considered in the taking of the decision or a summary of that information.
>
> 27(2) Idem
>
> Where an offender is entitled by this Part or the regulations to be given reasons for a decision taken by the Service about the offender, the person or body that takes the decision shall, subject to subsection (3), give the offender, forthwith after the decision is taken, all the information that was considered in the taking of the decision or a summary of that information.
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> 27(3) Exceptions
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> Except in relation to decisions on disciplinary offences, where the Commissioner has reasonable grounds to believe that disclosure of information under subsection (1) or (2) would jeopardize
>
> (a) the safety of any person,
>
> (b) the security of a penitentiary, or

> (c) the conduct of any lawful investigation,
>
> the Commissioner may authorize the withholding from the offender of as much information as is strictly necessary in order to protect the interest identified in paragraph (a), (b) or (c).

[32] In *May v Ferndale Institution*, 2005 SCC 82, the Supreme Court of Canada found that in the penitentiary context, the duty to disclose requires that an offender be given sufficient information to meaningfully challenge a decision affecting his or her liberty interests. If a decision-maker fails to provide information sufficient to allow an offender to know the case that he or she has to meet to challenge a deprivation of liberty, the decision will be void for lack of jurisdiction. (para. 92)

[33] In this case, the Applicant was provided with all of the material that was before the Warden when the decision was made. The Applicant was provided with the opportunity to provide two separate verbal rebuttals. I find that the Applicant knew precisely why he was being transferred from a medium security institution to a maximum security institution.

[34] I find that the decision was made with justification, transparency and intelligibility and falls clearly within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law. When all of the circumstances are considered I find that the decision was reasonable.

Conclusion

[35] In conclusion, I find that the decision was lawful in that it was reasonable and procedurally fair. The application for *habeas corpus* is dismissed without costs to either party.

[36] Order accordingly.

Norton, J.