SUPREME COURT OF NOVA SCOTIA

Citation: *Wallace v. Nova Scotia (Attorney General)*, 2021 NSSC 101

Date: 20210326
Docket: Pic. No. 504454
Registry: Pictou

Between:

Charles B. Wallace

Applicant

v.

The Attorney General of Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia and Northeast Nova Scotia Correctional Facility

Respondent

DECISION

Judge:	The Honourable Justice Scott C. Norton
Heard:	March 22, 2021, in Pictou, Nova Scotia
Written Decision:	March 26, 2021
Counsel:	Charles B Wallace, self-represented Myles Thompson, for the Respondent

By the Court:

[1] Charles B. Wallace ("Mr. Wallace" or the "Applicant") is an inmate currently held on remand at the Northeast Nova Scotia Correctional Facility ("NNSCF" or "Institution") housed on the Alpha 2 (also called "A2") living unit.

[2] On February 26, 2021 Mr. Wallace filed an application for *habeas corpus*. The applicant alleged he is being detained for "without reasons having been given" and that the detention is illegal because:

1. I'm not on any levels and I'm being locked up 22 hours a day;
2. I'm locked in for no reason highly illegal.

[3] Pursuant to *Civil Procedure Rule* 7.13(2), an Order issued to compel the Institution to bring the Applicant before the Court by telephone for a motion for directions hearing and to produce to the Court all documents related to the detention.

[4] The motion for directions by teleconference was held on March 4, 2021. In advance of the motion, the Respondents produced to the Court and the Applicant a package of documents related to the detention. At the conclusion of the motion, I scheduled a hearing to be held on March 22, 2021.

[5] At the conclusion of the hearing on March 22, 2021, I reserved my decision.

***HABEAS CORPUS* PROCESS**

[6] I followed the process I described in *Nagle-Cummings v Nova Scotia (Attorney General)*, 2020 NSSC 188 (see paras. 6 - 25). At the motion for directions the Respondents conceded that the residual liberty of Mr. Wallace was being deprived. I found that Mr. Wallace had raised a legitimate argument that such deprivation was unlawful as required by the decision of the Supreme Court of Canada in *Khela*, *infra*.

***HABEAS CORPUS* HEARING**

[7] Due to restrictions related to the Covid-19 pandemic, the hearing was held on March 22, 2021 with the Applicant appearing by video from the Institution; the Respondents' Witness Kevin Willett in the courtroom; and counsel for the Respondent by video.

[8] In advance of the hearing, the Applicant filed a package of materials containing a Statement of Facts and a written brief of his argument. The Applicant acknowledged receiving the affidavit and brief filed by the Respondents.

[9] The Applicant was affirmed, testified that the facts contained in his Statement of Facts was true and correct to the best of his knowledge and belief. He was cross-examined by counsel for the Respondents.

[10] The Respondents filed affidavit evidence from Kevin Willett. Mr. Willett was affirmed, signed the affidavit that was marked Exhibit 1 and testified that the affidavit was true and correct.

Factual Background

[11] The evidence from the Respondents is that Mr. Wallace is a sentenced inmate serving four months for driving while disqualified and flight – operating a motor vehicle in evading a peace office. His estimated release date is April 7, 2021. He was admitted to the NNSCF on October 16, 2020. He has been placed in virtually every available living unit at the facility due to his behaviour. He is currently living on the A2 living unit and has been there since December 8, 2020. A2 is an open living unit for protective custody ("PC") inmates. Mr. Wallace is a PC inmate.

[12] Mr. Wallace has been placed on 9 disciplinary reports since being housed on A2, three of which were in February, 2021: one for assaulting another inmate; another for disrespectful and using abusive language toward healthcare staff; and one for detrimental behaviour. Each was adjudicated and disciplinary "levels" were assessed.

[13] In addition to the direct detrimental behaviours for which formal disciplinary sanctions were received, Mr. Wallace was observed by Correctional Services exhibiting indirect negative and detrimental behaviour on this unit on numerous occasions.

[14] On February 22, 2021, it was decided by management to place Mr. Wallace and two other inmates on a two hour out daily rotation (1130 hrs to 1330 hrs) due to their behaviour. Mr. Wallace was out of his cell with the two other inmates while the rest of the living unit is secured. Management meet each Monday to assess the progress of the inmates on the A2 living unit and their behaviour over

the previous week. Depending on that assessment, an inmate may be placed on or removed from a rotation.

[15] While on the rotation, Mr. Wallace had two hours each day to shower and have recreation out of his cell. He has access to the Canteen once per week the same as all other inmates unless their Canteen privileges have been suspended. Regular facility meals are delivered to Mr. Wallace in his cell. He has access to the daily newspaper and one video visit per week with family subject to that privilege being suspended for a disciplinary report.

[16] Mr. Wallace's evidence is that the disciplinary reports are frivolous and that the management is biased against him and has provided him with contradictory reasons for his present rotation. He complains that he is being denied his smudge rights and calls to his lawyer. He says that by the time he is let out each day, the newspaper is no longer available. He says that by the time he is let out there is no hot water left in the shower. He says that the facility does not recognize his mental health issues which are deteriorating and that he is being threatened and intimidated by certain captains.

[17] Since the Motion for Directions, Mr. Wallace's behavioural progress has been reviewed on three occasions. On March 1, 2021 it was determined that Mr. Wallace's behaviour had not improved and the two hour out of cells rotation was continued. On March 8, 2021, due to improvements in his behaviour, Mr. Wallace's rotation was amended to increase the time out of cells to four hours per day from 1130 hrs to 1530 hrs daily. On March 15, 2021, due to further improvement in behaviour, the time out of cells has been increased to six hours (1130 hrs to 1730 hrs) daily.

***HABEAS CORPUS* – THE LAW**

[18] I adopt the summary of the law including the standard of review as I stated them in *Nagle-Cummings* at paras. 45-62.

Application of the Standard of Review

[19] Under *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, for a decision to be reasonable: 1) its reasoning must be internally coherent, i.e. rational and logical; and 2) it must be justified in relation to the constellation of law and facts that are relevant to it.

[20] The Court in *Vavilov* 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:

> [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.

The Test for *Habeas Corpus*

[21] The relevant issues to be addressed in response to Mr. Wallace's *habeas corpus* application are as follows:

I. *Are the Applicant's Residual Liberty Interests Being Infringed?*

As stated, the Attorney General conceded this at the telephone motion for directions. Mr. Wallace is on a rotational schedule, sometimes called "lockdown". By definition, his residual liberty interests are being infringed.

II. *Has the Applicant Raised a Legitimate Ground to Question the Legality of the Deprivation?*

As stated above, at the motion for directions I determined that the complaints made by the Applicant in the Notice of Application and as further explained by the Applicant at the motion for directions were sufficient to satisfy the threshold set out by the Supreme Court of Canada in *Mission Institution v. Khela*, 2014 SCC 24, ("*Khela*"):

> [30] To be successful, an application for *habeas corpus* must satisfy the following criteria. First, the applicant must establish that he or she has been deprived of liberty. Once a deprivation of liberty is proven, the applicant must raise a legitimate ground upon which to question its

> legality. If the applicant has raised such a ground, the onus shifts to the respondent authorities to show that the deprivation of liberty was lawful. [references deleted]

III. *Is the Applicant's current form of detention a lawful and reasonable infringement of the Applicant's residual liberty interest?*

The burden is upon the Respondents to establish the deprivation of residual liberty is lawful and reasonable.

[22] In this case, the Respondents led evidence through the affidavit of Acting Deputy Superintendent Kevin Willett.

[23] The evidence establishes that Mr. Wallace is not being subjected to a rotation for disciplinary purposes, but to ensure the safety and security of the unit, the staff, and the other inmates by closely monitoring and managing Mr. Wallace's behaviour and restricting his access to other inmates on the unit. Mr. Wallace has been placed on nearly every compatible living unit but has had to be moved due to his detrimental behaviours while housed on these units. He cannot go back to those units due to incompatibilities with other inmates and restrictions imposed by public health due to the Covid-19 pandemic. By placing Mr. Wallace on rotation, the Institution mitigates the risk of Mr. Wallace engaging in aggressive, intimidating and detrimental behaviours towards other inmates and staff. Mr. Wallace requested a transfer to the Central Nova Scotia Correctional Facility on March 2, 2021. The request was denied by Deputy Superintendent John Hawkins on March 3, 2021. Transfers between provincial correctional facilities are currently on hold to reduce the risk of spread of Covid-19. Only emergency transfers based on facility occupancy numbers are currently being considered.

[24] No written reasons were provided by the decision-maker, nor were they required by the statutory scheme. However the reasons for the decision can clearly be adduced from the documents and circumstances surrounding how and why the decision was made.

[25] The legal authority to place Mr. Wallace on a rotation on A2 is identified in the Correctional Services Policy and Procedure Number 43.00.00; in Sections 74 and 75 of the *Correctional Services Act,* S.N.S. 2005, c. 37; and in sections 79, 80, and 81 of the Correctional Services Act Regulations, N.S. Reg 99/2006, as am. By N.S. Reg. 160/2017.

[26] As to the legal and factual constraints of the decision, I am of the view that I should give deference to the decisions made by the facility management related to safety and security. The Deputy Superintendent exercised decision-making power provided by statute, he has relative expertise in the management and administration of correctional facilities (generally), and the scope of his authority is broad and outlined within the *Correctional Services Act*.

[27] In *Coaker v Nova Scotia (Attorney General)*, 2018 NSSC 291, Justice Rosinski held, at para. 32, that the implementation of rotations is a necessary tool for prison administrators and that courts should be deferential to prison administration when rotations are used for the purpose of maintaining the safety and security of the institution.

[28] Several recent decisions of this Court have determined that Correctional Services has the lawful authority under the Act and Regulations to implement a rotational schedule for the purpose of mitigating the safety and security risks of inmates who have demonstrated a consistent pattern of receiving multiple recent serious disciplinary reports, have participated in violent behaviour, and/or serious threats to staff or others, or if the facility has reason to believe the inmate poses a serious risk to the safety and security of the institution. See *Crawley v. Nova Scotia (Attorney General)*, 2020 NSSC 221; *Alcorn v Nova Scotia (Attorney General)*, 2020 NSSC 276; and, *Lambert v Nova Scotia (Attorney General)*, 2020 NSSC 282.

[29] In *Cain v. Correctional Services Canada*, 2013 NSSC 367, Justice Van Den Eynden (as she then was) wrote the following:

> [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. LeBlanc*, 2004 NBQB 140.
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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.

[30] The impact of *Vavilov* in the context of *habeas corpus* was the subject of this Court's decision in *Cox v. Nova Scotia (Attorney General)*, 2020 NSSC 81. On the topic of deference, Justice Jamieson stated (at para. 33):

> The Majority also indicated that in conducting a reasonableness review the court should be attentive to the application by decision makers of specialized knowledge. They said that expertise can play a role in the application of the reasonableness standard:
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> > 93 An administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that institutional expertise and experience to bear: see Dunsmuir, at para. 49. In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail. (see also para 145)

[31] In *Ryan v. Nova Scotia (Attorney General)*, 2015 NSSC 286 , Justice Chipman outlined the following with respect to the level of deference afforded to decisions made by a Superintendent that pertain to safety and security measures:

> 24 Earlier I said my view may not matter and that is because of what the law says in respect of other reported cases that have come before this one. Decisions of prison administrators, such as have been made by those at CNSCF, are afforded considerable deference by the Court. The deference is afforded for good reason. In the result, my role as a Supreme Court Justice hearing a *habeas corpus* application is not to review all of the evidence so as to make a new decision on the evidence. It is also not my role to determine whether a placement decision such as we have in this case was the correct decision.
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> 25 In making such decisions, prison administrators must take into consideration the safety and security of many stakeholders: the staff, other inmates, the public, and so forth. Prison administrators (here Mr. Keefe, Mr. Fraser and Ms. Dominix) have specific and sometimes special knowledge of the safety concerns. They are in a better position than the Court in assessing and mitigating the risks with respect to prisons. That is why, in part, they are afforded considerable deference. It is not the Court's role to second guess. My role is to

> determine whether the Respondent had the jurisdiction to make the decision and whether that decision was lawful and, as Mr. Eddy has argued, reasonable in the circumstances.

[32] As directed by *Vavilov*, in assessing the reasonableness of the decision I have looked at whether the decision is internally coherent and rational and whether the decision can be justified in light of the legal and factual constraints that bear on the decision.

[33] I have previously reviewed the evidence as I accepted it from the affidavit and the *viva voce* evidence. I find that, substantively and procedurally, the decision to place Mr. Wallace on a two hour out rotation (presently six hours out) was lawful and reasonable. Mr. Wallace had demonstrated ongoing behaviour that was detrimental to the safety of staff and other inmates. The rotation was successful in achieving its purpose. During the month long period that the rotation was in place Mr. Wallace received no disciplinary levels. As a result of his improved behaviour, his time out of cells was increased from two hours to four hours and then a week later to six hours. There had been no behaviour issues the week before the hearing and it was anticipated that his time out of cells would increase by another two hours.

[34] I find the decision to be justified in relation to the law and facts relevant to the decision, including the governing statutory scheme, the evidence before the decision-maker, and the impact of the decision on the Applicant. There is no basis to find the decisions were untenable on the evidence before the Court.

[35] The final part of the test asks me to consider whether the Institution has complied with its procedural duties and requirement of fairness. Decisions that affect the liberty interests of inmates must be made fairly.

[36] In *Cain, supra*, the issue of procedural irregularities had been strongly argued and were at the center of that application. The Court had the following to say:

> 47 Mr. Cain has raised procedural and due process concerns. Although the process followed by the Respondents might not be perfect, I find that overall on balance, Mr. Cain's segregation placement was handled in a manner that, in the circumstances of this case, was generally compliant with the Respondents' obligation at law, including ensuring due process and procedural fairness was appropriately afforded to Mr. Cain.

[37] I adopt this analysis and rationale in the present case. Mr. Wallace was advised and was aware of the reasons for the decision to place him on a rotation. After he complained to the ombudsman, ADS Willett explained the reasons to him a second time. While he did not agree with or accept those reasons, I am satisfied that the duty of procedural fair process was met.

CONCLUSION

[38] The evidence demonstrates that the decision placing Mr. Wallace on a two hour out rotation was reasonable because it was rational, intelligible, and objective.

[39] I conclude that Mr. Wallace was lawfully detained within the NNSCF on the Alpha 2 unit with a two hour out rotation and continues to be lawfully detained on a six hour out rotation as of the date of the hearing.

[40] Mr. Wallace's application for *habeas corpus* is dismissed.

[41] There will be no costs awarded.

Norton, J.