SUPREME COURT OF NOVA SCOTIA
Citation: *Seyforth v. Nova Scotia (Attorney General)*, 2022 NSSC 234

Date: 20220811
Docket: *Hfx* No. 516753
Registry: Halifax

Between:

Travis Seyforth

Applicant

v.

The Attorney General of Nova Scotia

Respondent

Decision

Judge:	The Honourable Justice Scott C. Norton
Heard:	August 9, 2022
Counsel:	Travis Seyforth, Applicant Caitlin E. Menczel, for the Respondent

By the Court (Orally):

[1] Travis Seyforth is a remanded inmate currently detained at the Central Nova Scotia Correctional Facility (CNSCF, Facility, or the Institution). In his Notice for Habeas Corpus filed on August 3, 2022, Mr. Seyforth seeks a writ of *habeas corpus* against the institution.

[2] Mr. Seyforth did not file any written submission or affidavit evidence. At the hearing he was affirmed and testified. He was not cross examined by counsel for the Respondent. In his Notice of *Habeas Corpus*, the contents of which he affirmed to be true, he alleges that over a period of nine days he was only allowed out of his cell for a total of 45 minutes and had no access to phone calls for most of the time. It was on the basis of these allegations that the matter was scheduled for hearing.

[3] The evidence provided by the Attorney General of Nova Scotia (AGNS) established that Mr. Seyforth was admitted into CNSCF on July 19, 2022, on a warrant of remand. Upon admission, he was subject to the Covid-19 Admissions Protocol established by Correctional Services under the direction and guidance of experts from Nova Scotia Health (NSH), the Nova Scotia Medical Officer of Health, Dr. Ryan Sommers, and infectious disease expert, Dr. Lisa Barrett.

[4] Under the Admissions Protocol, new admissions to CNSCF are subject to up to 10 days of isolation and three Covid-19 tests at day 0, day 3, and day 6/7 before they can be placed on a suitable dayroom. Mr. Seyforth was advised verbally of this process on July 19, 2022, and in writing on July 20, 2022. He was housed in the North 1 unit, designated as the Covid admissions unit.

[5] NSH has the responsibility for all health care decisions within correctional facilities pursuant to sections 25 and 26 of the *Correctional Services Act*. NSH directed that Mr. Seyforth must complete a 10-day Covid-19 Admissions Protocol.

[6] As a result of an outbreak of Covid-19 on another living unit at CNSCF, under the direction of NSH, the typical cohorted rotation on North 1 was reduced to single cell rotations (whereby each inmate is allowed out of cell one at a time). As North 1 houses upwards of 20 or more inmates, each received a maximum of 30 to 45 minutes of time out of cell on a single cell rotation each day between the hours of 7:00 am and 10:00 pm.

[7] NSH advised Correctional Services that Mr. Seyforth had cleared his 10-day Admissions Protocol as of August 4, 2022. He was immediately re-assigned to North living unit 2 which is an open dayroom. However, Mr. Seyforth refused to move from North 1, the dedicated Covid-19 unit. He testified that he anticipated being released the following day and so thought that the move would be unnecessary. When he was not released, he did accept the transfer to North 2 on Monday, August 8, 2022.

[8] AGNS acknowledged that the Covid-19 Protocol and the single cell rotation required by it was a form of administrative close confinement and a deprivation of Mr. Seyforth's residual liberty. Thus, the issue for determination is whether it was lawful and reasonable.

Law

[9] It is beyond doubt that the standard of review with respect to the placement and form of detention of an inmate in a provincial correctional facility is reasonableness. This standard of review is defined in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. It has been adopted by this court to the determination of habeas corpus applications in the decisions of *Cox v. Nova Scotia (Attorney General)*, 2020 NSSC 253; *Williams v. Central Nova*, 2022 NSSC 159; and *Whelan v. Central Nova*, 2022 NSSC 161, among others.

[10] I find that the AGNS has met the burden of establishing that the restriction of Mr. Seyforth's residual liberty was lawful and reasonable.

[11] Mr. Seyforth was released from the Covid-19 Admissions Protocol on August 4, 2022 and re-assigned to an open dayroom. Since that time, he has transferred to North 2. His restriction of residual liberty has been less than when on North 1 and was temporary due to staffing shortages also caused in part by Covid-19.

[12] The court is receiving applications for habeas corpus weekly related to the operational protocols of Correctional Services related to Covid-19. In my view this provides a compelling ground for the court to provide the inmates and the AGNS with a declaration as to whether those protocols are lawful and reasonable.

[13] Mr. Seyforth is being detained at the CNSCF on a warrant of remand ordering him to remain in custody at a provincial correctional institution in the Province of Nova Scotia. Mr. Seyforth does not challenge the lawfulness of this order.

[14] In determining the reasonableness of the restrictions on Mr. Seyforth due to the Covid-19 Admissions Protocol, it is important to note at the outset that the administration of the CNSCF is acting under the direction of persons with subject matter expertise from Public Health acting within their authority under sections 25 and 26 of the *Correctional Services Act*.

[15] In *Williams, supra*, I referred to the decision of this court in *R. v. Ryan*, 2015 NSSC 286, wherein Justice James Chipman outlined the following with respect to the level of deference afforded to decisions made by prison administrators 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.

[16] In my view the evidence establishes that there exists a rational, intelligible, and objective basis for requiring Mr. Seyforth to undergo a 10-day Covid-19 Admissions Protocol: to mitigate the risk of introducing and spreading Covid-19 within the high risk setting of a correctional facility. Corrections is subject to direction from NSH on when an inmate is free from the protocol and can be transferred out of North 1. In Mr. Seyforth's case that did not happen until 15 days elapsed.

[17] I am satisfied that Mr. Seyforth was provided with information regarding the Covid-19 Admissions Protocol, the reason for it, and its impacts on the inmates' residual liberties. This provided Mr. Seyforth with the procedural fairness discussed by Justice Keith in *Whelan*.

[18] This Court has acknowledged that the risk of Covid-19 virus entering a correctional facility is real (*Cox, supra*) and that the risk of spreading the virus is higher in indoor settings where individuals will remain for prolonged periods of time: *Nova Scotia (Attorney General) v. Freedom Nova Scotia*, 2021 NSSC 170. A congregated living environment such as a correctional facility is the exact type of indoor setting with individuals remaining for long periods of time where there is an extremely high risk of spreading Covid-19. Despite the loosening of Covid-19 restrictions for the general public, Public Health continues to define correctional facilities as a "high-risk setting". As such, Public Health continues to provide Correctional Services with guidance and direction on how to mitigate the risk of introducing and spreading Covid-19 in Nova Scotia's correctional facilities.

[19] Pursuant to section 57 of the *Correctional Services Act*, the Superintendent shall ensure that every offender is allowed at least 30 minutes a day for outdoor exercise, which may be denied for reasons of safety and security. Section 81 of *The Correctional Services Regulations*, N.S. Reg. 99/2006 amended to N.S. Reg. 160/2017, dictates that an offender in close confinement must be allowed at least 30 minutes of exercise outside the cell during each 24-hour period.

[20] Airing court time for inmates housed on North 1, the dedicated Covid unit, has been denied on guidance from NSH as the airing court is not attached to the dayroom and those on the Covid-19 protocol would have to be moved through the facility to access the airing court. NSH has instructed that the risk of transfer of Covid is too great to allow this.

[21] I find that the Court should give deference to Public Health and the prison administration on decisions related to the safety and security of the inmates and staff. The decision to implement the Covid Admissions Protocol was not made to punish Mr. Seyforth or any other inmate, but to mitigate the risk of Covid-19 being introduced into or spread within the CNSCF. It makes it practically difficult, if not impossible, to provide each inmate on North 1 with more than 30 minutes of time out of cell on a given day. That is not the choice of Corrections but a necessary result of the Covid Admissions Protocol. Owing to the deference owed to NSH, it cannot be said to be unreasonable.

[22] Having said that, I caution that the facility must take all reasonable steps to permit each inmate on North 1 to have some time out of their cell each day. Whether any derogation from the requirements of the *Act* and *Regulations* for such time out of cell is reasonable will be determined on the facts of each case. On the basis of

the evidence before me on this case, I am not able to conclude that the actions of Correctional Services was unreasonable.

[23] The Application for habeas corpus is dismissed without costs.

Norton, J.