Federal Court  Cour fédérale

Date: 20150213

Docket: T-1651-14

Citation: 2015 FC 173

Ottawa, Ontario, February 13, 2015

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

CANADIAN BROADCASTING CORPORATION, THE TORONTO STAR and THE SHADOW DOCUMENTARY PROJECT INC. (A WHOLLY OWNED SUBSIDIARY OF WHITE PINE PICTURES INC.)

Applicants

and

WARDEN OF BOWDEN INSTITUTION, PUBLIC SAFETY CANADA and CORRECTIONAL SERVICE CANADA

Respondents

JUDGMENT AND REASONS

I. INTRODUCTION

[1] The applicants challenge the decision of the Warden of Bowden Institution to refuse their request to interview the inmate, Omar Khadr.

[2] This case is not about Omar Khadr's rights under the *Canadian Charter of Rights and Freedoms*.

[3] It does, however, engage the rights of the applicant media organizations to freedom of expression and the public's right to know. There is no dispute between the parties that these rights reflect important constitutional values.

[4] The sole question that the Court must answer on this application is whether, in light of the information before the Warden at the time, her decision to deny the applicants access to Mr Khadr for the purpose of an interview was reasonable.

[5] For the reasons that follow, I find that it was and that this application must be dismissed.

II. **BACKGROUND**

[6] Omar Khadr was repatriated to Canada from Guantanamo Bay on September 29, 2012 and admitted into the custody of the Correctional Service of Canada [CSC]. On January 25, 2013, he was assessed as a maximum security offender and placed at Millhaven Institution in Ontario.

[7] The applicants are three media organizations: the Canadian Broadcasting Corporation, the Toronto Star newspaper and the Shadow Documentary Project, a wholly owned subsidiary of White Pine Pictures Inc. They have created a joint enterprise for the purpose of interviewing Mr

Khadr to produce a documentary film about his story, to be aired by the Canadian Broadcasting Corporation, and also for print and online stories.

[8] On January 10, 2013, Michelle Shephard, a journalist for the Toronto Star, applied to the Warden of Millhaven Institution for permission to interview Mr Khadr. On February 22, 2013, the Warden approved a separate request by the Canadian Press for an interview. However, within 90 minutes, Mr Vic Toews, who was the Minister of Public Safety at the time, overturned this approval.

[9] On March 8, 2013, Mr Khadr was placed in administrative segregation after receiving threats from other inmates. He remained there until May 28, 2013, when he was voluntarily transferred to Edmonton Institution in Alberta. There, another inmate physically assaulted him on June 14, 2013. Following this assault, Mr Khadr was placed in administrative segregation for five days for his own safety.

[10] On June 20, 2013, the Warden of Edmonton Institution denied Ms Shephard's request to interview Mr Khadr, which had been originally made to the Warden of Millhaven Institution. Mr Khadr grieved this decision. On July 16, 2013, the Warden denied the grievance. This decision cited the notoriety of Mr Khadr's offences and stated: "The reduction of your public notoriety would be necessary as part of your rehabilitation process and to reduce your personal security risk within the prison population."

[11] On September 25, 2013, Ms Shephard sought reconsideration of her request, arguing that Mr Khadr had been the subject of widespread news coverage due to statements made by Canadian officials and, therefore, that a desire to reduce his notoriety was a moot reason to deny an interview. The Warden rejected this request on October 30, 2013.

[12] Mr Khadr was assessed as a medium security offender on December 11, 2013. He was transferred to Bowden Institution, which is also in Alberta, on February 7, 2014. According to the uncontested affidavit evidence of the respondents, Bowden Institution has a current total population of 656 inmates: 540 classified as medium security and 106 classified as minimum security.

[13] On March 3, 2014, Ms Shephard made a request to the Warden of Bowden Institution on behalf of the applicants to interview Mr Khadr. She explained that she had been working on Mr Khadr's case since 2002, having written over two hundred articles for the Toronto Star and a book on the topic. She explained the nature of her assignment on behalf of the applicants and stated that she has experience conducting prison interviews in Canada and the United States. Also, as "a sign of good faith and to relieve pressure", she stated that Mr Khadr and his lawyer had agreed that he would participate only in this one interview, so as to minimize disruption to the facility.

[14] On April 25, 2014, Jeff Campbell, an agent of the Warden, sent an email to Ms Shephard denying her request. He invoked subsection 18(c) of the *Commissioner's Directive 022: Media Relations* [*CD 022*] and explained:

> Given the disruption to the functioning of the operational unit, the potential to jeopardize the security of the operational unit, or the potential risk to the safety of any person; the request for this interview is not approved in accordance with the Commissioner's Directive 022, paragraph 18(b).

[15] Mr Campbell incorrectly cited subsection 18(b), as he acknowledged in response to a further inquiry by Ms Shephard later that day. The correct reference is to subsection 18(c).

[16] On May 21, 2014, Ms Shephard sent a three-page letter by email to Mr Campbell seeking reconsideration of her request. She explained at length the measures that would be taken to minimize disruption to the facility and emphasized the importance of the *Charter* right to freedom of expression. On July 7, 2014, counsel for the applicants sent a letter to the Warden pressing for a response to Ms Shephard's reconsideration request.

[17] On July 9, 2014, Mr Campbell sent an email to Ms Shephard, which again rejected her request. This time he correctly cited and reproduced subsection 18(c) of *CD 022* and concluded: "After assessment, CSC has determined that your request to interview Mr Khadr cannot be granted as per CD 022 section 18 c."

[18] The next day (July 10, 2014), Nancy Shore, the Acting Warden of Bowden Institution, responded to counsel's letter. After acknowledging receipt of the request for reconsideration, Warden Shore wrote:

> I have taken the opportunity to review and consider the additional information provided by your clients. As you are aware, the protection of society is the paramount consideration for the CSC in the corrections process. Contacts with person from outside the penitentiary are subject to such reasonable limits as are prescribed

> for protecting the security of the penitentiary or the safety of persons. Consequently, I have come to the conclusion that CSC cannot grant this request at the present time on the grounds that it would unduly endanger the security of the institution and the safety of the persons.

[19] Warden Shore wrote that, in her view, an on-camera interview would "result in significant disruptions to the institution and thus endanger [its] security". She explained that the physical layout of Bowden, which lacks containment barriers, meant that other inmates would have to be confined to their living units for the duration of the interview. This would affect work, school and other program routines. If the interview were to be conducted outside business hours, it would disrupt inmates' access to leisure activities. Invoking her experience, the Warden predicted that this could reasonably "spark unrest amongst the inmate population". Therefore, she concluded that "the proposed accommodations presented by your client(s) on the manner in which the on camera interview would take place would not be adequate to control the risk".

[20] Warden Shore wrote that an interview with Mr Khadr, once released, would cause the inmate population to form further opinions about him, both negative and positive. In her view, "[it] is reasonable to assume that the potential ramifications within the inmate population may be significant and cause security/safety incidents". The Warden explained that Mr Khadr has kept a low profile within the institution, which has contributed to his positive integration. However, an interview would lead to "additional security concerns within the institution and safety concerns for Mr Khadr."

[21] In conclusion, the Warden denied the request. According to her, allowing an interview was not feasible at the time because it "could reasonably jeopardize the security of the institution and the safety of persons".

[22] On July 22, 2014, the applicants filed a notice of application at the Federal Court challenging the refusal decisions communicated by Mr Campbell on April 25 and July 9, 2014, under sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[23] It is worthy of note that no request was made for the delivery of all of the materials in CSC's possession relevant to the decision pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106. The respondents served and filed an affidavit sworn by John McKill, the acting Assistant Warden Management Services at Bowden Institution. Mr McKill was not cross-examined on his affidavit. Attached as an exhibit to that affidavit, among other things, is Warden Shore's letter of July 10, 2014.

[24] In my view, the decision under review is reflected in the continuing series of communications between Ms Shephard on behalf of the applicants, their counsel, Mr Campbell and Warden Shore. Warden Shore's letter provides the reasons for that decision.

III. **ISSUES**

[25] The applicants framed the issues in terms of a denial of procedural fairness, a failure to provide sufficient reasons and a violation of subsection 2(b) of the *Charter*. In their written

submissions, they also raised an objection to the respondents' affidavit evidence that was withdrawn at the hearing.

[26] The respondents initially misconstrued the nature of the application and characterized it as concerning whether Omar Khadr's freedom of expression outweighed the security of Bowden Institution and the safety of inmates and staff within the institution. They abandoned that position at the hearing.

[27] As indicated above, the sole issue in my view is whether the Warden's decision was reasonable. The alleged inadequacy of the Warden's reasons is not a stand-alone basis for challenging her decision. Rather, the Court must take reasons into account when reviewing the substance of a decision to determine whether it is reasonable as a whole: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14 [*NL Nurses*].

IV. **RELEVANT LEGISLATION**

[28] Subsection 2(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 enshrines the right to freedom of expression.

2. Everyone has the following fundamental freedoms: […]	2. Chacun a les libertés fondamentales suivantes : […]
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of	b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de

communication; […]	communication; […]

[29] Subsection 71(1) of the *Correctional and Conditional Release Act*, SC 1992, c 20 [*CCRA*] outlines the principles governing contacts and visits with inmates.

71. (1) In order to promote relationships between inmates and the community, an inmate is entitled to have reasonable contact, including visits and correspondence, with family, friends and other persons from outside the penitentiary, subject to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons.	71. (1) Dans les limites raisonnables fixées par règlement pour assurer la sécurité de quiconque ou du pénitencier, le Service reconnaît à chaque détenu le droit, afin de favoriser ses rapports avec la collectivité, d'entretenir, dans la mesure du possible, des relations, notamment par des visites ou de la correspondance, avec sa famille, ses amis ou d'autres personnes de l'extérieur du pénitencier.

[30] Section 97 of the *CCRA* empowers the Commissioner of the CSC to make certain rules. Section 98 empowers the Commissioner to designate any or all of these rules as Directives and instructs him to make them accessible.

97. Subject to this Part and the regulations, the Commissioner may make rules	97. Sous réserve de la présente partie et de ses règlements, le commissaire peut établir des règles concernant :
(a) for the management of the Service;	a) la gestion du Service;
(b) for the matters described in section 4; and	b) les questions énumérées à l'article 4;
(c) generally for carrying out the purposes and provisions of this Part and the regulations.	c) toute autre mesure d'application de cette partie et des règlements.

98. (1) The Commissioner may designate as Commissioner's Directives any or all rules made under section 97.	98. (1) Les règles établies en application de l'article 97 peuvent faire l'objet de directives du commissaire.
(2) The Commissioner's Directives shall be accessible to offenders, staff members and the public.	(2) Les directives doivent être accessibles et peuvent être consultées par les délinquants, les agents et le public.

[31] Subparagraph 91(1)(a)(i) of the *Correctional and Conditional Release Regulations*, SOR/92-620 [*CCRC*] permits the Warden to refuse a visit so as to ensure the security of the penitentiary or the safety of any person.

91. (1) Subject to section 93, the institutional head or a staff member designated by the institutional head may authorize the refusal or suspension of a visit to an inmate where the institutional head or staff member believes on reasonable grounds	91. (1) Sous réserve de l'article 93, le directeur du pénitencier ou l'agent désigné par lui peut autoriser l'interdiction ou la suspension d'une visite au détenu lorsqu'il a des motifs raisonnables de croire :
(a) that, during the course of the visit, the inmate or visitor would	a) d'une part, que le détenu ou le visiteur risque, au cours de la visite :
(i) jeopardize the security of the penitentiary or the safety of any person […]	(i) soit de compromettre la sécurité du pénitencier ou de quiconque […]

[32] The Commissioner of the CSC issued *CD 022* under the authority granted by subsection 98(1) of the *CCRA*. The latest version took effect on January 20, 2014. Section 17 imposes a procedural duty on operational unit heads (including Wardens) when they assess media requests for an interview with offenders.

17. Following consultation with the Regional Deputy Commissioner, the operational unit head will document the decision in writing and include specific reference to the impact of the interview on the safety of any identified victim or a member of a victim's family	17. Après avoir consulté le sous-commissaire régional, le responsable de l'unité opérationnelle consignera la décision par écrit et inclura toute mention spéciale concernant l'incidence de l'entrevue sur la sécurité d'une victime ou d'un membre de la famille d'une victime dont l'identité est révélée.

[33] Section 18 of *CD 022* provides guidance to Wardens for the exercise of their discretion when deciding media requests to interview offenders. In the present case, the Warden relied on subsection 18(c) to justify refusing the request.

18. Interviews with offenders may be granted provided the operational unit head has fully assessed and/or determined that: […]	18. Les entrevues avec les délinquants peuvent être autorisées à condition que le responsable de l'unité opérationnelle ait pleinement évalué/ou déterminé que : […]
c. the interview can be conducted with minimal disruption to the functioning of the operational unit and will not jeopardize the security of the operational unit or present a risk to the safety of any person, including but not limited to staff, other offenders, visitors or a victim or a member of a victim's family […]	c. l'entrevue n'entraîne pas d'interruption importante dans le fonctionnement de l'unité opérationnelle, elle ne met pas en péril la sécurité de l'unité et elle ne présente pas de risque pour la sécurité de quiconque, y compris, mais sans s'y limiter, celle des membres du personnel, d'autres délinquants, des visiteurs ou d'une victime ou d'un membre de la famille d'une victime […]

V. **ANALYSIS**

A. *Standard of review*

[34] Allegations of procedural unfairness warrant review on the standard of correctness: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 129; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*]; *Mission Institution v Khela*, 2014 SCC 24 at para 79 [*Khela*].

[35] The issue of whether the Warden erred in refusing the request involves mixed questions of fact and law connected to the Warden's expertise. The standard of reasonableness applies: *Dunsmuir*, above, at para 54. Decisions of Wardens relating to the security of their institutions call for deference: *Khela*, above, at paras 75-76.

[36] Where an administrative decision implicates a *Charter* right, the Supreme Court instructed in *Doré v Barreau du Québec*, 2012 SCC 12, that a reviewing court must assess the administrative decision on the standard of reasonableness, querying whether it reflects a proportionate balancing of *Charter* protections against countervailing considerations. In *Doré*, the applicant challenged the constitutionality of the specific administrative decision rendered against him. At para 3, Justice Abella stated:

> This raises squarely the issue of how to protect *Charter* guarantees and the values they reflect in the context of adjudicated administrative decisions. Normally, if a discretionary administrative decision is made by an adjudicator within his or her mandate, that decision is judicially reviewed for its reasonableness. The question is whether the presence of a *Charter* issue calls for the replacement of this administrative law framework with the *Oakes* test, the test traditionally used to determine whether the

> state has justified a law's violation of the *Charter* as a "reasonable limit" under s. 1.

[37] The Court decided against employing the *Oakes* test. At paras 6-7, it drew the following distinction between the methodologies for assessing *Charter* challenges to laws and administrative decisions:

> In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. In assessing whether an adjudicated decision violates the *Charter*, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.
>
> As this Court has noted, most recently in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, the nature of the reasonableness analysis is always contingent on its context. In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.
>
> [Emphasis added]

[38] And at paragraph 36 the Court stated:

> As explained by Chief Justice McLachlin in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, the approach used when reviewing the constitutionality of a law should be distinguished from the approach used for reviewing an administrative decision that is said to violate the rights of a

> particular individual (see also Bernatchez). When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us this should attract deference (para. 53; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 39).

[39] On judicial review, reasonableness requires justification, transparency and intelligibility within the decision-making process. Reasonableness also requires the outcome to fall within the range of possible, acceptable outcomes that are defensible in respect of the facts and law. The range of acceptable outcomes varies with the context in which the administrative decision is made: *Dunsmuir*, above, at para 47; *Khosa*, above, at para 59.

B. *Reasonableness of the decision*

[40] In my view, the Warden's letter, and Mr Campbell's two email messages, satisfy any requirement to provide reasons for the decision under the reasonableness standard.

[41] The applicants argue that these communications do not adequately explain why an interview of Mr Khadr could not be conducted safely, when the Administration Building where the interview would take place regularly houses meetings between inmates and visitors. They contend that this failing is compounded by the fact that the reasons given by the respondents for refusing interview requests varied over time. While at one time Mr Khadr was told that he could not be interviewed because "a reduction in public notoriety" was required for his rehabilitation, the impugned decision points to subsection 18(c) of *CD 022*, which relates to danger to persons and the facility. However, the Warden never explained how any danger might materialize and

provided no evidence that she had conducted a "full assessment" of the risk posed by an interview.

[42] While the earlier refusals may not have withstood judicial scrutiny, they do not constitute the decision under review on this application. That decision is the one communicated by Mr Campbell's emails and explained by Warden Shore in her letter of July 10, 2014.

[43] The applicants contend that the Warden erred in law by failing to weigh the reasons for denying the request against the media's and the public's *Charter* right to freedom of expression. This is an especially important right in a free and democratic society: *Canadian Newspapers Co v Canada (Attorney General)*, [1988] 2 SCR 122 at para 14; *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at 1336. It encompasses "the right to gather news and other information without undue government interference": *Canadian Broadcasting Corp v Lessard*, [1991] 3 SCR 421 at 430.

[44] The decision is unreasonable, the applicants submit, because it gives no consideration to this constitutional protection. The Warden denied the interview requests – and infringed the *Charter* rights of the applicants and the public – without justification. It is unreasonable for a public authority to exercise discretion in a manner that infringes the *Charter*: *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 875.

[45] There is no dispute in these proceedings that subsection 2(b) of the *Charter* protects the public's right to information. The public relies on the freedom of expression of the press in order

to develop and express informed opinions about matters of public interest: *Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1991] 3 SCR 459 at 475; *Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1996] 3 SCR 480 at para 26.

[46] The impugned decision affects the applicants' expressive interests by preventing them from collecting the material they require in order to transmit information and opinion to the public. Unjustified restrictions on press freedom do not only infringe the rights and interests of media institutions but also those of the general public.

[47] Media organizations such as the applicants may legitimately expect constitutional protection for free expression in a penitentiary. Interviewing a high profile inmate for the purpose of sharing his story with the public, at a time when political debate continues about his case, contributes to at least the first two purposes of subsection 2(b), namely promoting democratic discourse and truth finding: *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 at para 74. This is even more compelling, as the applicants argue, when it is apparent that the subject of the interview will be released at some point in the future and there is a continuing controversy about his place in Canadian society.

[48] However, as the respondents submit, the right to freedom of expression is not absolute. It suffers reasonable limits. In the context of a penitentiary, this right must be balanced against the need to protect the security of the institution and the safety of persons, including the staff, the prison population and any particular inmate.

[49] Penitentiaries are heavily restricted environments. Members of the public may enter to visit inmates but only on very strict conditions. A visit can be suspended or cancelled if the Warden or a designate believes that there is a risk to the security of the institution or the safety of any person. A penitentiary is not a place where the public has an expectation of exercising its right to freedom of expression. The unrestricted exercise of this right is not consistent with the "function of the place": *Montréal (City)*, above, at paras 72-77.

[50] In *Doré*, above, at paras 55-58, the Supreme Court stated that the task of a decision-maker is to balance *Charter* values with statutory objectives when exercising its discretion. First, the decision-maker must consider the statutory objectives. Then, it must "ask how the *Charter* value at issue will best be protected in view of the statutory objectives". In the result, "[i]f, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable".

[51] In this instance, the Warden was called upon to balance freedom of expression against security and safety imperatives. She has the recognized experience and expertise to make such discretionary decisions and she is owed significant deference: *Khela*, above, at paras 75-76. This is reflected in subsection 71(1) of the *CCRA* and subparagraph 91(1)(a)(i) of the *CCRC*.

[52] The Warden did not explicitly make reference to the constitutional protection afforded to freedom of expression in her letter. This could be understood to mean that the decision-maker ignored or minimized the importance of expressive interests in the balancing exercise. However, *Doré* does not say that it is mandatory for decision-makers to explicitly refer to *Charter* values in

their analyses. The substance of the decision must be taken into account, not whether it pays lip service to the *Charter*. The letter states that the Warden took into consideration the submissions made by Ms Shephard and counsel for the applicants. Those submissions expressly referenced the *Charter*. While reasonable people might disagree with the outcome, there is nothing on the record before me to suggest that the Warden ignored or minimized those values.

[53] The July 10, 2014 letter and the additional information provided in Mr McKill's affidavit demonstrate that the particular layout of Bowden Institution lends an air of reality to the concern that it would have been difficult to conduct the interview safely. There is a significant difference between regular visits and on-camera interviews with high profile inmates. Inevitably, the latter will generate a higher level of curiosity and interest among the inmate population than the former. Contrary to the applicants' contention, these concerns are not offset by the fact that Mr Khadr's profile was already high or that there have been no further incidents compromising his safety or the security of the institution despite inflammatory statements made about him by public officials.

[54] It is irrelevant that the Warden of Edmonton Institution, in his grievance reply to Mr Khadr, justified his denial of Ms Shephard's interview request made to the Warden of Millhaven Institution by invoking Mr Khadr's notoriety. That decision is not currently under review. What is under review is the refusal rendered by the Warden of Bowden Institution, expressed in Mr Campbell's two email messages and the Warden's letter. These three communications all raise subsection 18(c) of *CD 022* as the basis for the decision. Contrary to the applicants' argument,

the decision-maker did not change her reasons over time. Moreover, there is no evidence to show that she failed to conduct a "full assessment" of risk.

[55] The Court cannot speculate that an administrative authority behaved unfairly in the absence of any evidence. The applicants could have sought information to assist the Court in this determination pursuant to Rule 317. In *Ochapowace First Nation v Canada (Attorney General)*, 2007 FC 920 at para 12, aff'd 2009 FCA 124, Justice de Montigny asserted that "[t]he onus clearly falls on the applicants to provide admissible evidence to prove the federal board, commission or other tribunal acted in a manner amounting to an established ground for review under section 18.1(4) of the Federal Courts Act…" At para 19, he continued:

> The requirement to produce under Rules 317 and 318 of the *Rules* is intended to ensure that the record that was before the tribunal when it made its decision or order is before the Court on judicial review. Obviously, a party should not request material that is already in its possession. That being said, the prudent course of action would be to request from a tribunal or other decision maker the relevant material that is in its possession if there is any prospect of a debate as to what was before the tribunal when it made its decision. Bearing in mind that the applicant has the burden of establishing, by affidavit or otherwise, what was before the decision maker, the failure to make a request under Rule 317 of the *Rules* can only work to the applicant's disadvantage.
>
> [Emphasis added]

[56] If the applicants had requested disclosure and the certified tribunal record contained no evidence that the Warden followed section 17 of *CD 022*, the Court might have drawn an inference adverse to the respondents. Evidence within that record might have shown that the Warden did not conduct a proportionate balancing exercise, either by overstating the statutory

objectives or understating the importance of freedom of expression. However, this has not occurred. The applicants have not met the onus for proving their allegations.

[57] The record does indicate that the Warden took into consideration the accommodations proposed by the applicants to minimize the risk. While she concluded that these would not be sufficient, it is evidence that her mind was at least open to the possibility. There is no indication that an alternative method, such as an interview through an exchange of written questions and answers, was proposed. I accept that this would not have satisfied the applicants' purpose, which was to obtain a visual and audio record of Mr Khadr's responses to questions as they were posed. There is nothing intrinsically objectionable to this and a positive decision would also have been within the range of acceptable outcomes. However, there is nothing in the record to support the inference that the applicants would like this Court to make: that the interview was refused because it may have portrayed Mr Khadr in a more sympathetic manner to the Canadian public than has been presented in some public statements by government officials and others.

[58] While it is not pertinent to the issues before me on this application, the parties agreed that I could take notice of the fact that Mr Khadr has been able to express himself directly to the Canadian public through an article published in the *Ottawa Citizen* on October 28, 2014. As such, the Warden's decision has not deprived the public of its right to hear directly from Mr Khadr.

[59] I agree with the respondents that the record indicates that the Warden relied on her experience to determine that allowing an interview would require a significant disruption of

activities and would risk undermining the security of the institution and Mr Khadr's safety. Applying the reasonableness standard, her decision deserves deference. It reflects a proportionate balancing of the *Charter* value of free expression against the statutory objectives of institutional security and safety of persons.

[60] In reaching these conclusions, I have not ignored the unfortunate history of apparent interference and public statements by government officials since Mr Khadr's repatriation that the applicants urged I take into consideration. However, there is nothing before me to suggest that the decision by CSC officials to deny the interview request was made otherwise than in good faith, applying the statutory and regulatory framework. As counsel for the respondents argued at the hearing, that background is, at least as it concerns this application, "ancient history".

[61] In closing, I wish to note that, at the hearing, I drew counsel's attention to a decision from the United Kingdom and invited their comments. In *R (BBC) v Secretary of State for Justice*, [2012] EWHC 13 (Admin) [*BBC*], the High Court held that a decision refusing a face-to-face interview with a detainee disproportionately infringed the guarantee of freedom of expression enshrined in article 10 of the *European Convention on Human Rights*. Counsel for the respondents requested additional time to provide written submissions in relation to this decision. In light of the conclusions I have reached, that will not be necessary.

[62] The *BBC* decision is distinguishable from the matter before me for several reasons. Most importantly, the High Court adopted a proportionality framework similar to the *Oakes* test (at

para 51) and expressed skepticism towards the idea of deference (at para 53). This is the approach that the Supreme Court of Canada rejected in *Doré*.

[63] Moreover, the facts of the case before the Court differ significantly from those in *BBC*. Indeed, at para 55, Justice Singh listed ten reasons provided by the claimants to justify the exceptionality of their request. Only the last one – that media outlets had carried several items concerning the potential interviewee's case in the past – resonates with the present facts, which are otherwise distinguishable. The High Court noted, at para 82, that the facts in that case were "highly exceptional". It was only on the basis of those facts that the application of the policy in question was found to constitute a disproportionate interference with the right to freedom of expression.

[64] For these reasons, I do not consider that it would be helpful to the Court to receive additional written submissions on the *BBC* decision.

[65] The respondents have requested costs. In view of the public interests at issue in these proceedings, I will exercise my discretion to order that the parties shall bear their own costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. The parties shall bear their own costs.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1651-14
STYLE OF CAUSE:	CANADIAN BROADCASTING CORPORATION, THE TORONTO STAR and THE SHADOW DOCUMENTARY PROJECT INC. (A WHOLLY OWNED SUBSIDIARY OF WHITE PINE PICTURES INC.) and WARDEN OF BOWDEN INSTITUTION, PUBLIC SAFETY CANADA and CORRECTIONAL SERVICE CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
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JUDGMENT AND REASONS:	MOSLEY J.
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