Federal Court  Cour fédérale

Date: 20181114

Docket: T-635-17

Citation: 2018 FC 1148

Ottawa, Ontario, November 14, 2018

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

JOHN MCLEOD

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, John McLeod, is an inmate at Beaver Creek Institution in Ontario, serving a life sentence for second degree murder. In 2015, he filed three overlapping final grievances challenging the refusal of his applications for a voluntary transfer from the Beaver Creek Institution to the Cowansville Institution in Quebec. The grievances generally alleged that his transfer applications were refused based on racial discrimination; that his parole officer refused to meet and communicate with him; that his parole officer made racist comments; and that one grievance had been improperly categorized and processed by the Correctional Service of Canada.

[2] Due to their overlapping subject matter, the Applicant's three grievances were consolidated and addressed in one response in accordance with paragraph 20 of Commissioner's Directive 081, *Offender Complaints and Grievances*. This response underlies the present application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. The Applicant asks the Court to review and quash the decision of Senior Deputy Commissioner Anne Kelly dated March 21, 2017, which denied his grievances relating to his requests for a voluntary transfer. The Applicant also asks the Court to issue an order of *mandamus* to compel the Commissioner of Corrections to authorize, without delay, his transfer to the Cowansville Institution in Quebec or, alternatively, to a penitentiary classified as a medium security penitentiary in Quebec.

I. Background

[3] The Correctional Service of Canada [CSC] received the Applicant's first application for a voluntary transfer to Cowansville Institution on September 11, 2014. In this application, the Applicant's reasons for the transfer included a lack of support and discriminatory behaviour from his case management team [CMT], his desire to become bilingual by learning French, and to rebuild and restart a new life in Quebec. On October 22, 2014, the Applicant's CMT completed an Assessment for Decision on the transfer request. Five days later the CMT recommended to the Acting Warden that the voluntary transfer should not be approved, in part because the Applicant did not have support in the area. The Acting Warden denied the transfer application on October 30, 2014, since there was nothing to support the transfer as required by the Commissioner's Directives.

[4] After this denial, the Applicant submitted a second application for a voluntary transfer to Quebec on December 8, 2014. In this second application, the Applicant explained that his daughter was living in Montreal, attending McGill University for the next four years, and that he was "seeking an inter-regional transfer to Cowansville institution so I could be much closer to my daughter and to provide family support for her." The Applicant's parole officer informed him on January 5, 2015, that he could not apply for a voluntary transfer to the Quebec region until six months after the denial of his first voluntary transfer application, but that he could apply again in April 2015. His parole officer also requested the address and phone number for the Applicant's daughter for the purposes of preparing for his upcoming application for voluntary transfer. The Applicant refused to provide contact information for his daughter. Subsequently, CSC employees asked the Applicant on several occasions to provide his daughter's phone number so that a community assessment could be conducted, and although the Applicant provided a mailing address he consistently failed to provide a phone number.

[5] In her decision dated March 21, 2017, the Senior Deputy Commissioner [SDC] denied the portion of the Applicant's grievances relating to his voluntary transfer to Quebec as well as those aspects of the grievances alleging racial discrimination. The SDC did, however, uphold the Applicant's complaint that one of his grievances had not been properly categorized and processed by CSC. The remaining aspects of the Applicant's grievances were either denied or required no further action since they had already been addressed by CSC.

[6] Subsequent to the SDC's decision, the Applicant submitted a third application for a voluntary transfer to Quebec. The Acting Warden at Beaver Creek Institution denied this third

transfer request on August 3, 2017. This denial, however, is not under review in the present application for judicial review. Not only was it made after the SDC's decision and after the filing of this judicial review application, but an application for judicial review ordinarily relates to only one decision unless the Court orders otherwise under Rule 302 of the *Federal Courts Rules*, SOR/98-106 (see: *Human Rights Institute of Canada v Canada*, [2000] 1 FC 475, 176 FTR 225).

II. Issues

[7] In his Notice of Application for judicial review, the Applicant alleges that:

- the SDC violated the common law duty to act fairly as well as section 7 of the *Canadian Charter of Rights and Freedoms*, specifically the requirement that a person must not be deprived of his residual liberty except in accordance with the principles of fundamental justice;
- the decision in question was procedurally unfair in that the SDC relied upon information that was irrelevant, prejudicial and incorrect; and
- the decision resulted in a denial of natural justice, causing the SDC to lose her jurisdiction over the matter.

[8] The Applicant did not, however, pursue these grounds impugning the SDC's decision at the hearing of this matter; nor did he do so in his Memorandum of Fact and Law. The Applicant appears to have abandoned his procedural fairness arguments (although he did assert at the hearing of this application that it was not fair that his CMT did not support his voluntary transfer).

[9] In his written submissions, the Applicant argues only that the SDC's decision was not reasonable. In contrast, the Respondent says the decision under review was reasonable. The only issue, therefore, is whether the SDC's decision was or was not reasonable.

III. Analysis

A. *Standard of Review*

[10] A decision to transfer an inmate is a discretionary one. Section 29 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*], provides, in relevant part, that the Commissioner of Corrections "…may authorize the transfer of a person who is sentenced, transferred or committed to a penitentiary to … another penitentiary in accordance with the regulations made under paragraph 96(d), subject to section 28…". In reviewing discretionary decisions, the Court ought not to interfere with the exercise of discretionary statutory authority merely because it may have arrived at a different decision. Where the decision is made in good faith, based on considerations relevant to the exercise of discretion, and no reliance is placed on any irrelevant or extraneous considerations, the decision ought not to be disturbed (see: *Légère v Canada*, [1997] FCJ No 749 at para 6, 133 FTR 77; and *Archer v Canada (Attorney General)*, 2004 FC 865 at para 7, 62 WCB (2d) 301).

[11] Judicial review of a transfer decision requires a high level of deference. As the Supreme Court of Canada remarked in *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502:

> [75] A review to determine whether a decision was reasonable, and therefore lawful, necessarily requires deference (*Dunsmuir*, at para. 47; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59; *Newfoundland and*

> *Labrador Nurses' Union*, at paras. 11-12). An involuntary transfer decision is nonetheless an administrative decision made by a decision maker with expertise in the environment of a particular penitentiary. To apply any standard other than reasonableness in reviewing such a decision could well lead to the micromanagement of prisons by the courts.
>
> [76] Like the decision at issue in *Lake*, a transfer decision requires a "fact-driven inquiry involving the weighing of various factors and possessing a 'negligible legal dimension'" (*Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at paras. 38 and 41). The statute outlines a number of factors to which a warden must adhere when transferring an inmate: the inmate must be placed in the least restrictive environment that will still assure the safety of the public, penitentiary staff and other inmates, should have access to his or her home community, and should be transferred to a compatible cultural and linguistic environment (s. 28, CCRA). Determining whether an inmate poses a threat to the security of the penitentiary or of the individuals who live and work in it requires intimate knowledge of that penitentiary's culture and of the behaviour of the individuals inside its walls. Wardens and the Commissioner possess this knowledge, and related practical experience, to a greater degree than a provincial superior court judge.

[12] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708). So long as "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to

substitute its own view of a preferable outcome"; nor is it "the function of the reviewing court to reweigh the evidence" (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339).

B. *Was the Senior Deputy Commissioner's decision reasonable?*

[13] Inmates in federal institutions may request to be transferred to another institution by virtue of section 29 of the *CCRA*. Section 28 identifies certain criteria to be taken into account in penitentiary placement decisions, including accessibility to an inmate's home community and family and to a compatible cultural and linguistic environment. The Commissioner's Guide Line GL 710-2-3, version dated 2014-04-01, identifies the criteria against which a voluntary inter-regional transfer application is to be assessed:

> 47. An inter-regional transfer will normally be considered in cases where such a transfer will:
>
> a. assist the inmate in achieving the objectives identified in his/her Correctional Plan
>
> b. provide the inmate access to his/her home community
>
> c. alleviate the segregated status of an inmate where alternative options to segregation have been exhausted, including those cases that are within six months of their statutory release or warrant expiry date, regardless of whether or not there is confirmed community support in the receiving region. In such cases, the Assessment for Decision must provide a detailed account of the alternative options to segregation that were considered

[14] The Applicant argues that the decision was unreasonable because it did not meaningfully and completely consider the statutory criteria that guide the exercise of the Commissioner's discretion on inmate transfers. Specifically, the Applicant says the decision did not include any

reference to or consideration of all the legislative criteria in section 28 of the *CCRA*. This argument is without merit.

[15] The record shows that the SDC fully considered the legislative criteria. Her reasons meet the necessary standards of justification, transparency and intelligibility for administrative decisions. Her decision directly cites and quotes the statutory criteria from section 28 of the *CCRA* that the Applicant argues were not considered. In this regard, the SDC stated:

> … Given that the eligibility date has now passed, you may resubmit your VT [voluntary transfer] application including any information that you deem relevant or that was not included in your first VT application (2014-07-28) (i.e. community support in the Quebec region). Should you choose to do so, your VT application will be reassessed by your CMT, in accordance with applicable policy.
>
> Upon review at the National level, it has been determined that the denial of your VT application to the Quebec region was consistent with the provisions of the GL 710-2-3, along with section 28 of the *Corrections and Conditional Release Act*, which provides that:
>
> > 28 If a person is or is to be confined in a penitentiary, the Service shall take all reasonable steps to ensure that the penitentiary in which they are confined is one that provides them with an environment that contains only the necessary restrictions, taking into account
> >
> > (a) the degree and kind of custody and control necessary for
> > (i) the safety of the public,
> > (ii) the safety of that person and other persons in the penitentiary, and
> > (iii) the security of the penitentiary;
> >
> > (b) accessibility to
> > (i) the person's home community and family,
> > (ii) a compatible cultural environment, and
> > (iii)a compatible linguistic environment; and

> (c) the availability of appropriate programs and services
>
> (i) and the person's willingness to participate in
>
> (ii) those programs.
>
> In light of the above, this portion of your grievances is denied.

[16] In my view, the SDC reasonably determined that denial of the Applicant's voluntary transfer application to the Quebec region was consistent with the provisions of GL 710-2-3, along with section 28 of the *CCRA*. The SDC applied these criteria and reasonably concluded that the Applicant's CMT had accurately determined that he did not meet the criteria for granting a voluntary transfer. The SDC noted that the Applicant's CMT had determined that the proposed transfer would not provide the Applicant with access to his home community, and that he had no known support in the Quebec region when his first transfer application was rejected.

[17] Although the SDC acknowledged that the Applicant asserted in his final level grievance that he had support from his daughter in Quebec, she did not go so far as to accept that he had community support in Quebec. Rather, she indicated that the Applicant could reapply for a voluntary transfer and include information on community support in the Quebec region. The record supports the SDC's treatment of this issue. The evidence on the record was that the Applicant had not provided CSC with the contact information necessary to conduct a community assessment with his daughter to determine the kind of community support which would favour approving a transfer to the Quebec region under the statutory criteria as implemented in CSC policy.

[18] The SDC's decision was reasonable and, consequently, the application for judicial review is dismissed.

C. *The Applicant's Request for* Mandamus

[19] In closing, a few words about the Applicant's request for an order of *mandamus* are necessary.

[20] The Applicant's request for an order of *mandamus* to compel the Commissioner of Corrections to authorize, without delay, his transfer to Cowansville Institution in Quebec or, alternatively, to a penitentiary classified as a medium security penitentiary in Quebec, is ill-founded. Even if the Applicant's application for judicial review had succeeded on the merits, it is well established that the Courts will not issue *mandamus* to compel a tribunal or decision-maker to make a particular decision, when no decision has been made or when the decision-making power is discretionary in nature (see: *Herzig v Canada (Treasury Board)*, 2002 FCA 36 at para 19, [2002] FCJ No 127). Inmate transfer decisions are discretionary in nature and therefore cannot be subject to *mandamus*. Section 29 of the *CCRA* provides that the Commissioner *may* authorize the transfer of an inmate, not that he must do so. This Court has previously refused to order *mandamus* in the context of an inmate transfer decision (see, e.g.: *Kelly v Canada (Correctional Services)*, [1992] FCJ No 720 at para 23, 56 FTR 166; *Forrest v Canada (Solicitor General)*, [1998] FCJ No 1483 at para 57, 154 FTR 22).

IV. Conclusion

[21] In conclusion, the SDC reasonably determined not to allow the Applicant's grievances relating to the denials of his applications for a voluntary transfer. Her reasons in this regard provide an intelligible and transparent explanation for her decision to deny such grievances, and the outcome is defensible in respect of the facts and the law.

[22] The Respondent advised at the hearing of this matter that she does not seek costs and, therefore, there is no order as to costs.

JUDGMENT in T-635-17

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and there is no order as to costs.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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