Federal Court  Cour fédérale

Date: 20101217

Docket: T-387-10

Citation: 2010 FC 1302

Ottawa, Ontario, December 17, 2010

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

ALLEN TEHRANKARI

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an appeal from an order of Prothonotary Tabib, dated August 24, 2010, whereby she determined that the respondent's objection to the applicant's request to communicate certain materials pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106 [*FCR*] was well founded. The request for communication was made in the context of an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RS 1985, c F-7 challenging the decision of the Senior Deputy Commissioner (SDC) of the Correctional Service of Canada (CSC), dated February

11, 2010, denying the grievance filed by the applicant in relation to his security classification and penitentiary placement.

Background

[2] The applicant, Mr. Allen Tehrankari, was convicted of first degree murder in February of 2009, and is now an inmate at the maximum security penitentiary in Kingston, Ontario.

[3] After the applicant's conviction, an assessment of his security classification was carried out pursuant to the CSC Commissioner's Directive 705-7, which sets out the process and factors that must be considered when determining an offender's security classification and penitentiary placement. The applicant was classified as a maximum security offender. Several factors were considered in arriving at this classification, among which was "institutional adjustment". In assessing this factor, the CSC relied, in part, on information relayed by the security manager of the Ottawa Carleton Detention Centre (which is operated by the Ontario Ministry of Community Safety and Correctional Services) where the applicant had been detained during his pre-sentencing period. The information provided by the Ottawa Carleton Detention Centre indicated that the applicant had been involved in 74 incidents of institutional misconduct.

[4] The applicant grieved the decision regarding his security classification and penitentiary placement on a number of grounds, among which was the allegation that the decision was based on false and inaccurate information regarding the 74 incidents of institutional misconduct.

[5] The SDC denied the applicant's grievance at the third level of the grievance process. His decision consisted of a number of separate determinations, but the relevant aspect of the decision, for the purposes of the applicant's current application for judicial review and his request for information, relate to the SDC's determinations regarding the institutional misconduct incidents and the accuracy of the information in the applicant's file.

[6] The SDC provided two main reasons for denying the applicant's grievance in this regard: a) the information regarding the incidents of misconduct had been relayed to the CSC from an outside official source (i.e. the Ottawa Carleton Detention Centre) and, as such, the CSC lacked the jurisdiction necessary to question that information's validity, and b) the applicant had failed to follow the appropriate process for obtaining a file correction as set out in paragraph 24(2)(a) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*].

[7] The applicant filed an application for judicial review of the SDC's decision denying his grievance.

[8] As permitted under Rule 317(2) of the *FCR*, the applicant included in his Notice of Application a request for certain materials in the possession of the tribunal. Specifically, the applicant requested that the CSC provide the following:

> All documents Related to the events surrounding the 74 alleged Disciplinary Misconduct charges enumerated in the Exhibit #8 to this application, including any and all such materials as VHS, CD (compact Disks) and audio and or any and all other surveillance materials / reports related to the said allegations enumerated in the Exhibits…

[9] On April 29, 2010, the respondent filed an objection pursuant to Rule 318(2) of the *FCR*. The respondent argued that the applicant's request for material was too broad and that the only documents relevant to the judicial review were documents that appeared before the decision-maker when the decision at issue was made. On May 14, 2010 the respondent provided a 391 page Certified Tribunal Record (CTR) accompanied by a sworn affidavit indicating that the CTR included all materials that were before the decision-maker.

[10] On June 24, 2010, Prothonotary Tabib directed the parties to provide the Court with written submissions regarding the contested request for materials. On August 24, 2010, Prothonotary Tabib decided that the respondent's objection was valid and that the applicant's request for materials was overly broad. The Prothonotary adopted the respondent's submissions to the effect that, generally speaking, on a judicial review only the record that was before the tribunal needs to be produced. Further, Prothonotary Tabib indicated that the applicant's submissions were "insufficient to contradict the evidence filed by the respondent to the effect that the documents sought by the applicant were not before the decision-maker when the decision was rendered." Prothonotary Tabib concluded that:

> The Applicant's submissions otherwise go to his view and belief as to what the law should be with respect to communication of materials on a judicial review application; however, this Court is bound to apply the rules of procedure of this Court and the jurisprudential authorities as they exist, and not as the Applicant would like them to be.

Analysis

[11] The appropriate standard of review to be applied to a discretionary decision made by a prothonotary is the standard set out in *Merck & Co v Apotex*, 2003 FCA 488, [2004] 2 FCR 459 at

para 19. There, the Federal Court of Appeal indicated that a discretionary order of a prothonotary is not to be disturbed on appeal unless: a) the questions raised in the motion are vital to the final issue of the case, in which case the matter is considered *de novo*, or b) the order is clearly wrong, in the sense that the exercise of discretion by the prothonotary was based on a wrong principle or a misapprehension of the facts.

[12] The applicant argues that the question raised on this motion *is* vital to the final issue of the case and, as such, a *de novo* consideration is warranted. Without access to the requested documents and surveillance materials, the applicant submits that he will not be able to prove that the findings of institutional misconduct, which underlie his security classification and penitentiary placement, are unfounded. He argues that by denying his request for the additional materials, the Court will essentially be determining the outcome of the ultimate judicial review.

[13] Although the Court sympathizes with the applicant's position, as a self-represented litigant, it is apparent that he has misapprehended the scope and purpose of the judicial review mechanism. The pending judicial review is *not* an appeal of the individual institutional misconduct findings which, in part, underlie the applicant's security classification and penitentiary placement. In fact, the validity of those findings will not be directly at issue. At issue, instead, will be the SDC's determination that he lacked jurisdiction to question the veracity and accuracy of the information relayed by the Ottawa Carleton Detention Centre regarding the reported incidents of misconduct, and the SDC's determination that the applicant's failure to follow the appropriate process for obtaining a file correction was determinative. The difference is important. The Court's role will be to determine whether any reviewable errors were committed by the SDC in arriving at his decision.

[14] Given the basis for the SDC's decision, it is hard to see how disclosure of the additional materials being requested by the applicant could be of any assistance in determining the ultimate judicial review. Regardless of what the requested surveillance materials and reports show, they could not possibly assist in determining whether or not the SDC erred in deciding: a) that the CSC lacked jurisdiction to question the validity of the information it received from the Ottawa Carleton Detention Centre, and b) that the applicant's failure to comply with the process for filing corrections, as set out in paragraph 24(2)(a) of the *CCRA*, was determinative.

[15] As such, the questions raised in this motion are not vital to the final issue of the case, and therefore, this Court should only interfere with the order of Prothonotary Tabib if it is satisfied that she was "clearly wrong" in that she based her decision upon an incorrect principle of law or upon a misapprehension of the facts, and then, only if a *de novo* review of the evidence warrants it.

[16] Rule 317 and 318 of the *FCR* are intended to ensure that the record that was before the tribunal when it made its decision is before the Court on judicial review (*1185740 Ontario v Canada (Minister of National Revenue)* (1999), 247 NR 287, 91 ACWS (3d) 922 (FCA)). As Justice Rothstein indicated in *Ominayak v Lubicon Lake Indian Nation* (2000), 267 NR 96, 102 ACWS (3d) 5 (FCA) at para 5:

> In the absence of other evidence submitted by the parties in appropriate circumstances, a judicial review proceeds on the basis of the record before the tribunal whose decision is under review. It is generally not appropriate to order the tribunal to produce information beyond what was before it when it made its decision.

There is no evidence to indicate that the CTR provided by the respondent is in any way incomplete in this regard.

[17] As the respondent rightly points out, the Court may exceptionally receive additional evidence beyond that which was before the decision-maker when issues of procedural fairness or jurisdiction are raised (*McFadyen v Canada (Attorney General)*, 2005 FCA 360, 341 NR 345 at paras 14 and 15). While the applicant's application for judicial review may raise an issue as to jurisdiction, the additional evidence sought on this motion, as discussed above, does not go to that issue. Nor does it go to any issue of procedural fairness.

[18] Ultimately, Prothonotary Tabib's determination as to the validity of the respondent's objection in these circumstances can not be said to have been "clearly wrong". As such, the appeal is dismissed.

ORDER

THIS COURT ORDERS that the appeal be dismissed.

"Marie-Josée Bédard"
Judge