Federal Court  Cour fédérale

Date: 20160620

Docket: T-1627-15

Citation: 2016 FC 695

Ottawa, Ontario, June 20, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

PATRICK DANIEL FISCHER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review by the Applicant, a federal inmate, of the third level grievance decision of the Senior Deputy Commissioner [Commissioner] of the Correctional Service of Canada, Offender Redress Division [CSC] dated December 12, 2014, dismissing the Applicant's grievance concerning his request to have numerous CD-ROMs containing legal material allowed in his cell.

I. Background

[2] The Applicant, Patrick Fischer, is a federally incarcerated inmate serving a life sentence for first degree murder. Though leave to appeal his conviction was denied by the Supreme Court of Canada on December 15, 2005 (*R v Fischer*, [2005] SCCA No 308), the Applicant advises he is working to overturn his conviction with the Association in Defence of the Wrongly Convicted.

[3] Among the Applicant's personal property are numerous CD-ROMs, some containing legal materials pertaining to the criminal conviction for which he is incarcerated. Upon transferring from Kent Maximum Security Institution to Mountain Medium Security Institution, the CD-ROMs were confiscated and he was informed they were not permitted in his cell.

[4] Inmate grievances relating to actions or decisions of CSC staff are governed by the procedure set out in section 90 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*]. The *Corrections and Conditional Release Regulations*, SOR/92-620 [*CCRR*] outline the four stages of the grievance procedure in sections 74 to 82 as: (1) an initial complaint; (2) a written grievance to the institutional head [the first level grievance]; (3) an appeal to the regional head [the second level grievance]; and (4) a final appeal to the Commissioner [the third level grievance].

[5] The Applicant submitted a first level grievance on June 4, 2012, a second level grievance on August 13, 2012, and a third level grievance on June 5, 2013. The first and second level grievances determined the CD-ROMs were considered "burned", which is contrary to policy.

The decision-makers at both levels found that the arrangement permitting the Applicant to view his materials on a CSC computer in the Operations Building constituted reasonable access to his legal reading materials, as required under subsection 97(3) of the *CCRR*.

[6] At the third level grievance the Applicant made the following arguments:

a. the CD-ROMs were not homemade as they were professionally transferred and labelled by a professional video company;
b. the CD-ROMs were issued to him while he was previously incarcerated at Kent Institution, have been authorized to be in his possession since at least 2003, and thus, should also be allowed at Mountain Institution;
c. that restricting his possession of the CD-ROMs violated his Charter rights and was also contrary to the principles guiding CSC in subsection 4(d) of the CCRA;
d. that the access to the CD-ROMs he was provided was not *"reasonable access"* as it jeopardized his safety due to the fact other inmates would consider him to be a *"rat"*; and
e. that the computer he had been given did not have installed software such that he could in fact access the material on the CD-ROMs.

[7] The third level grievance issued September 4, 2013, denied the Applicant's request on the basis that the material on the CD-ROMs – containing crime scene video and pictures – were not appropriate for viewing in an institutional environment, and that pursuant to subsection 96(1) of the *CCRR*, correctional staff could prohibit the CDs [the Previous Decision]. The Previous Decision also notes the Applicant did not prove he was permitted to retain the CDs at Kent Institution.

[8] The Applicant filed for judicial review of the Previous Decision on May 7, 2014 (T-1140-14). Upon motion by the Attorney General acknowledging the decision was flawed, the Court ordered that the Previous Decision be sent back for redetermination by consent on August 14, 2014. The Court issued no reasons [the Previous Judicial Review].

[9] On September 17, 2014, prior to the redetermination third level grievance decision being rendered, the Applicant was transferred on an emergency involuntary basis from Mountain Institution back to Kent Institution. He is permitted access to the CD-ROMs in a designated area, but they are not permitted in his cell.

[10] The December 12, 2014 third level grievance decision under review denied the Applicant's request [the Decision]. The Commissioner reviewed the Applicant's grievance in light of his previous submissions, relevant legislation and policy, the Applicant's correctional file and the Previous Judicial Review.

[11] The Commissioner agreed with the finding of the first and second level grievances that the arrangement providing the Applicant access to his legal materials was reasonable.

[12] The Decision describes that paragraph 14 of Commissioner's Directive 566-12, *Personal Property of Inmates* [CD 566-12], outlines the items inmates will normally be allowed to retain, provided they are consistent with the National Lists of Personal Property and do not pose a safety risk. Permitted items include:

> (a) items, which were in the inmates' lawful possession at the time of admission or readmission to their placement institution, or in

> their lawful possession on transfer, unless indicated otherwise for reasons of safety, health or security and the security level of the institution;

[13] Annex B to CD 566-12, the National List of Personal Property for Men Inmates, indicates Men Inmates are permitted 40 Audio cassettes, audio CDs or CD-ROM disks, but stipulates "No CD-RW, CD-A-Write, … or "burned" permitted (exception: PBC digital recordings on CD)".

[14] As well, paragraphs 9 and 10 of Annex D to CD 566-12, referring to allowable peripherals for inmates with authorised computers (not the Applicant's case), prohibits "burned" or "homemade" CDs. The Decision explains that Threat Risk Assessments conducted by CSC Security have assessed that it is difficult to ascertain the true content of such CDs.

[15] In specific response to the Applicant's submissions, the Decision notes the following:

a. though the CD-ROMs may have been professionally reproduced, they did not originate from an approved vendor and are therefore considered *"burned"* or *"homemade"* CDs, prohibited under CD 566-12;
b. the Applicant provided no documentation confirming he was permitted at Kent Institution to possess the CD-ROMs in his cell: nor were these items recorded on the Applicant's Offender Personal Property Records at the time of the Decision;
c. there is no indication that the Applicant's safety is jeopardized by the accommodation; and
d. the Institution should ensure the computer provided for accessing the materials has the same software as inmate-authorized computers, which was confirmed to have been the

case for the computer provided the Applicant for the purpose of accessing his legal materials.

[16] The Commissioner thus found that the Applicant was afforded the opportunity to review the legal materials in a safe and controlled environment, and when balanced with the need to ensure security of the Institution, the measures taken to facilitate access to the Applicant's legal materials were reasonable.

[17] Finally, the Decision notes that the Applicant was transferred to Kent Institution, and it outlines the procedure the Applicant must go through at that Institution to access his CD-ROMs.

II. Issues

[18] The issues are:

A. Is the Decision's denial of the Applicant's request for permission to have CD-ROMs containing legal material allowed in his cell reasonable?

B. Is the Decision's finding that the Applicant had reasonable access to the CD-ROMs, in accordance with subsection 97(3)(a) of the *CCRR* reasonable?

III. Standard of Review

[19] The merits of the third level grievance decision are to be reviewed against the standard of reasonableness. It is a decision of mixed fact and law, and CSC personnel are better situated than the Court to make and review decisions arising in the correctional setting (*Spidel v Canada*

(Attorney General), 2011 FC 999 at para 31 aff'd 2012 FCA 26; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47-50).

[20] I have also considered whether the Commissioner fettered her discretion (an argument not raised by the parties, but on the face of the Decision, a necessary consideration), which is also reviewed on the standard of reasonableness: a decision that is the product of a fettered discretion is *per se* an unreasonable decision (*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paras 22-25).

IV. Analysis

A. *Preliminary Issue*

[21] The Applicant contends the Decision is the same as that which was sent back for redetermination by this Court in file number T-1140-14. He claims the new Decision virtually mirrors determinations and reasons provided in the Previous Decision, acknowledged by the Respondent to be in flawed. No new issues or justifications are provided in the Decision, and the Applicant argues causing him to relitigate the same issue over constitutes bad faith.

[22] He describes that after speaking with Respondent's counsel in the Previous Judicial Review, he was left with the understanding that the Respondent was no longer disputing the accuracy of his submissions and would tender a Motion for Consent to allow the Application. Thus, he argues that the Decision in this proceeding has made determinations contrary to facts acknowledged in the Previous Judicial Review.

[23] However, the Previous Judicial Review provides no reasons as to why it was granted. It may have been on a substantive basis, but could also have been granted on procedural grounds. The reasons for the Respondent's Motion for Consent to grant the judicial review are not provided and the Court in this application cannot speculate or make inferences that are not supported by the record as to what was conceded by the Respondent, or for what reason the Decision was sent back for redetermination. There is no evidence of bad faith or improper purpose.

[24] I do however note that the Applicant is correct to point out that the Previous Decision is very similar to the Decision currently under review.

B. *Is the Decision's denial of the Applicant's request for permission to have CD-ROMs containing legal material allowed in his cell reasonable?*

[25] The Respondent submits the Decision was reasonable. Pursuant to subsection 96(1) of the *CCRR*, circulation within the penitentiary of any video audio material or computer program that the institutional head or staff member believes on reasonable grounds would jeopardize the security of the penitentiary or the safety of any person may be prohibited.

[26] CD 566-12 expressly sets out in Annex B that "burned" CDs are not permitted in cells. The documentation before CSC confirmed that the CD-ROMs in this case are rewritable CDs (CD-R or CD-RW type) and determined by staff to be "burned" materials containing crime scene video and pictures.

[27] The Commissioner determined the CD-ROMs were not allowed in the Applicant's cell because, although they may have been professionally produced, they are considered "homemade", as they do not originate from an approved vendor. The Decision conveys that pursuant to paragraph 14, Annex B and Annex D of CD 566-12, burned or homemade CDs are prohibited.

[28] I find that the Decision denying the Applicant's request for permission to have his legal CD-ROMs allowed in his cell is not justified by transparent and intelligible reasons.

[29] First, the Decision's characterization of all CDs not originating from an approved vendor as "homemade" is unreasonable. Such an interpretation is not found in or supported by CD 566-12, the *CCRA*, the *CCRR*, or a consideration of the ordinary meaning of the term "homemade".

[30] Second, the Decision notes that the justification for prohibiting burned or homemade CDs is because "it is difficult to ascertain their true content". Yet, there is no discussion within the Decision under review of the content of the CD-ROMs, or whether they would jeopardize the security of the penitentiary or the safety of any person in accordance with subsection 96(1) of the *CCRR*.

[31] Lastly, the Decision is unreasonable because in considering whether the CD-ROMs would be permitted in the Applicant's cell, I find that the Commissioner fettered her discretion provided under the *CCRA* and *CCRR*.

[32] Subsection 96(p) of the *CCRA* states the Governor in Council may make regulations authorizing the institutional head, or a designated staff member to control the use by inmates of publications, video and audio materials, films and computer programs.

[33] Subsection 96(1) of the *CCRR* provides the institutional head or a designated staff member with the discretion to prohibit the entry into, or the circulation within the penitentiary of any publication, video or audio material, film or computer program that he or she "believes on reasonable grounds would jeopardize the security of the penitentiary or the safety of any person."

[34] CD 566-12 establishes procedures for the authorization, possession, control and protection of offender property. It is settled law that such policy manuals or directives are not law and are not binding on the decision-maker.

[35] Directives and "soft law" from administrative agencies are important to ensure the consistency and efficiency of the decision-making process. However, administrative decision-makers are required to examine the particular facts of each case, and should not apply guidelines, policy statements or directives as if they were law (*Ha v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49 at para 71; *Thamotharem v Canada (Minister of Citizenship & Immigration)*, 2007 FCA 198 at para 62 [*Thamotharem*]; *Lussier v Canada (Revenue Agency)*, 2015 FC 10 at paras 25-29 [*Lussier*]).

[36] In *Thamotharem*, above, the Federal Court of Appeal stated:

> [62]…while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance

> consistency, administrative decision makers may not apply them as if they were law. Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the ground that the decision maker's exercise of discretion was unlawfully fettered: see, for example, *Maple Lodge Farms* [*v Canada* (1982), [1982] 2 SCR 2] at page 7.
>
> [Emphasis added]

[37] In concluding the CD-ROMs were prohibited materials, the Commissioner fettered the discretion afforded her under the *CCRR* by only considering the mandatory prescription of CD 566-12. This is notwithstanding the Applicant's request to deviate from it in light of the particular facts that the CD-ROMs were professionally produced and contain legal material to which he is entitled access, and that PBD Decisions are exempted, and as such these legal CD-ROMs should also be exempted.

[38] The Commissioner does not assess whether to exercise the discretion granted under the *CCRR* to deviate from CD 566-12 on these particular facts, nor does the Decision consider the principles set out in sections 3.1, 4(c), 4(d) and 4(f) of the *CCRA*, which are explicitly referenced in CD 566-12 as guiding principles for such decision-making.

[39] It is only after having determined that the CD-ROMs were prohibited that the Commissioner references subsection 97(3) of the *CCRR* to determine whether the Applicant had been provided "reasonable access to legal materials".

[40] The Decision references the "balance that must be struck between the need to ensure the security of the Institution and [the Applicant's] right to have reasonable access to [his] legal

materials". Yet, the Decision never once indicates how the Applicant having access to the legal CD-ROMs jeopardizes the security of the Institution, or considers whether removal of the CD-ROMs was a necessary and proportionate measure in accordance with guiding principles set out under the *CCRA*.

[41] In solely referencing the Directive, and applying it as if it were law, the Commissioner fettered her discretion, and the Decision is thus unreasonable (*Thamotharem*, above, at para 62; *Lussier*, above, at paras 25-29).

C. *Is the Decision's finding that the Applicant had reasonable access to the CD-ROMs in accordance with subsection 97(3)(a) of the CCRR reasonable?*

[42] The Applicant acknowledges that he was offered access in a "safe and controlled environment"; however, he claims it is the repercussions and aftermath of such access that jeopardizes his safety. He submits CSC knows being suspected a "rat" is a serious safety issue.

[43] The evidence is conflicting on whether the access afforded the Applicant was reasonable:

a. the record suggests the Applicant was not actually able to access the material on the CD-ROMs using the laptop provided;
b. the Applicant's "cross-examination" of Roger Sehra, Correctional Manager of Operations at Mountain Institution, revealed that the laptop provided the Applicant was configured with the necessary software by October 2, 2013 – which post-dates the Applicant's attempt to access his material; and

c. the record before the Commissioner also conveys however that “the laptop was a non-networked CSC computer [that] did provide reasonable access as the software was typical of the common Inmate computer found on a range in the living units”.

[44] In my view, there is no need to consider this issue, given the above finding of unreasonableness. Moreover, the determination of reasonable access is arguably a moot issue: the Applicant has since been transferred to Kent Institution and there is insufficient evidence before the Court on the reasonableness of the access at this Institution to make any determination that would have a practical effect on the Applicant’s current rights.

[45] There is no evidence of bad faith, vexatious or egregious conduct, as alleged by the Applicant, and no punitive or exemplary damages are warranted based on the facts before the Court.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The third level grievance decision made on December 12, 2014, denying the Applicant's request to have CD-ROMs containing legal material issued to him for cell use within the institution, is set aside;
3. The third level grievance decision of the Acting Senior Deputy Commissioner is referred back for reconsideration in accordance with these reasons;
4. Costs to the Applicant.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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