Federal Court  Cour fédérale

Date: 20170613

Docket: T-1146-16

Citation: 2017 FC 577

Ottawa, Ontario, June 13, 2017

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

MATTHEW G. YEAGER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Dr. Yeager, the applicant, brings this application for judicial review of the June 8, 2016 decision of Mr. Miguel Costa, a Senior Project Officer with Correctional Service Canada [CSC], denying him clearance to attend a John Howard Society [JHS] pre-release fair held in seven penitentiaries located in Ontario during the week of June 20, 2016.

[2] Dr. Yeager seeks an order setting aside the above-referenced decision. He also seeks an order in the nature of *mandamus* directing the respondent to accept his application to attend future JHS pre-release fairs provided he complies with normal security measures applicable to all fair attendees. Dr. Yeager argues that the decision to deny him access was unreasonable, that the process was unfair and that the respondent's closed-mindedness or bias warrants the exceptional remedy of a mandatory order.

[3] For the reasons that follow I conclude that the application for judicial review of the June 8, 2016 decision is moot. I decline to consider the matter. With respect to the request for an order in the nature of *mandamus*, the requirements for the issuance of this extraordinary and discretionary remedy have not been demonstrated. The application is dismissed.

II. Background

A. *The Applicant*

[4] Dr.Yeager is a criminologist and teaching professor in sociology and criminology. He has worked in the field of criminology for over forty years and has authored numerous publications in the criminal justice field. The record indicates that Dr. Yeager has had a history of interactions with CSC that have resulted in him being denied access to federal corrections facilities in the past.

B. *2015 pre-release fair*

[5] In his application record Dr. Yeager describes the pre-release fair as an event that the JHS Kingston sponsors annually at several Ontario Region prisons. Dr. Yeager indicates he has participated in the fair over the years. The warden of the Warkworth Institution describes the fair as an "opportunity for offenders to meet with community halfway houses and other community support services in order to establish contact with potential support for their release."

[6] Dr. Yeager has participated in the fairs in the past but the record does not demonstrate that he has attended on an annual basis. He last participated in 2013. Dr. Yeager states that he participates "in order to offer inmates knowledge, resources and tools relevant to parole".

[7] Dr. Yeager applied to participate in the 2015 pre-release fair, filing his application with JHS Kingston. His access to the federal institutions hosting the fair was denied by the respondent. He was unable to participate. The record indicates that the denial was based on his past history with CSC which is described by a CSC official as "confrontational, derogatory and deceptive" and "that presents as a security concern." The warden of Warkworth Institution separately denied Dr. Yeager access to that institution on the basis that his attendance as a professional criminologist representing himself did not fall within the intent and purpose of the fair.

C. *2016 pre-release fair*

[8] In April 2016, Dr. Yeager wrote to JHS Kingston applying to participate in the upcoming 2016 pre-release fair. In his application letter he states:

> As you know, I have participated in the Pre-release Fair over the years, the last being June 2013. During these fairs, I provide convicts with information about parole, parole preparation, representation at parole hearings, and collateral matters which impact upon release; disciplinary charges, segregation, classification, security scores, and ISO matters. I do this free-of-charge to the Canadian taxpayer and the inmates. It further represents an effort to provide convicts with information about their civil rights under Canadian law and the Charter.

[9] On May 4, 2016, prior to a decision being rendered on his request to participate in the 2016 fair, Dr. Yeager and Keith Nigel Madeley, an inmate at Warkworth Correctional Institution, filed a judicial review application with this Court [T-706-16] seeking the following relief:

A. A declaration pursuant to sections 18 and 18.1 of the *Federal Courts Act* that Mr. Madeley has a right to meet with Dr. Matthew Yeager in person as a professional institutional visitor, whose right is protected by sections 2 and 10 of the *Charter*;

B. A declaration that the ongoing ban against Dr. Yeager from professional visits at federal correctional institutions administered by CSC, in the context of Pre-release fairs, constitutes a violation of Madeley's section 2 and 10 *Charter* rights, which is not saved by section 1 of the *Charter*;

C. A mandatory injunction allowing Dr. Yeager to advise inmates in Ontario, including at the annual John Howard Society Pre-Release fair scheduled to take place between June 20 and 23, 2016 at Warkworth, Milhaven, Bath, Joyceville (Medium and Minimum), Collins Bay (Medium and Minimum) Institutions.

[10] Dr. Yeager and Mr. Madeley also filed a motion seeking an interlocutory mandatory injunction to allow Dr. Yeager to access the premises of five penitentiaries during the 2016 pre-release fair.

D. *Decision on the motion for an interlocutory mandatory injunction*

[11] On June 7, 2016, Justice Yvan Roy issued his decision on the interlocutory motion in *Madeley v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 634 [*Madeley*], denying the applicants the interlocutory relief sought.

[12] In *Madeley*, Justice Roy noted that Mr. Miguel Costa had provided an affidavit outlining the reasons CSC had denied Dr. Yeager access to the 2015 pre-release fair: (1) security; and (2) the fairs have a different purpose than the purpose expressed by Dr. Yeager for his participation. Justice Roy also quotes from and summarizes Mr. Costa's affidavit and Mr. Yeager's evidence in describing the nature and the purpose of the fairs (*Madeley* at paras 10-12).

[13] Justice Roy concluded, based on the record before him, the pre-release fairs do not encompass parole issues and that the denial in 2015 was based upon, among other things, Dr. Yeager's "contribution not being consistent with a program whose purpose is to provide

information and advice on the availability of services and programs post release" (*Madeley* at para 36).

[14] He further found that section 5 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 [*CCRA*] did not assist the applicants for the purpose of mandating "by judicial fiat" that CSC must let Dr. Yeager participate in the fairs. He also concluded that the *Charter* arguments advanced were unsubstantiated (*Madeley* at paras 38, 47-52, 56).

[15] Justice Roy concluded that the applicants had failed to establish irreparable harm and that the balance of convenience favoured the respondent. He further stated that the Court would also have concluded that the applicants' case did not rise to the level of a *prima facie* case warranting interlocutory relief and that the "issue presented is even frivolous and vexatious because it is based on an inexistent footing" (*Madeley* para 56).

[16] The application for interlocutory relief was dismissed.

III. Decision under Review

[17] On June 20, 2016, the applicant received Mr. Costa's June 8, 2016 decision. The decision was set out in a three-paragraph letter which is reproduced in full:

> Dear Mr. Yeager,
>
> Your application for access to the John Howard Society Pre-Release Fairs to be held during the week of June 20 to 24 at various Federal Institutions in the Ontario region have been reviewed.

> The services you propose to offer offenders is not consistent with the purpose of the Pre-Release fair. As such your application for clearance is denied.
>
> Please do not hesitate to contact me if you have further questions or wish to discuss the matter further.

[18] On June 22, 2016, Dr. Yeager and Mr. Madeley discontinued their judicial review application in T-706-16. The 2016 pre-release fair took place between June 20 and 23, 2016.

[19] On July 16, 2016, the applicant filed this application seeking judicial review of the June 8, 2016 decision.

IV. Preliminary Issues:

A. *Mootness*

[20] The parties were asked to address the issue of mootness. The respondent provided written submissions on the question in advance of the hearing and Mr. Yeager's counsel addressed the issue in oral submissions.

[21] A matter will be moot where the issues raised are hypothetical or abstract and do not resolve an issue of controversy impacting upon the rights of the parties. There must be a live issue as between the parties not only at the time of the initiation of the proceeding in question but also at the time the Court is called upon to decide the matter. The Court may nonetheless exercise its discretion and consider a matter that is moot (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, at para 15 [*Borowski*]).

[22] In determining whether to exercise that discretion, the Court engages in a two-step analysis. The Court first asks whether the live issue as between the parties has disappeared, thereby rendering the issues raised hypothetical or abstract. Then, if the live issue has disappeared, the Court asks whether the matter nonetheless should be heard (*Borowski* at para 16).

[23] In determining whether to hear a matter that is moot the following factors are to be considered: (1) whether an adversarial relationship prevails as between the parties; (2) whether the circumstances of the case warrant the application of scarce judicial resources; and (3) the proper law-making function of the Court (*Borowski* at paras 35, 36 and 40).

[24] In this case there is no existing live issue or controversy as between the parties. The decision in issue denied Dr. Yeager access to attend the 2016 pre-release fair during the week of June 20, 2016. The event has passed and the basis of the controversy no longer exists. The controversy is merely hypothetical. It is important to note that judicial review of the June 8, 2016 decision is separate and distinct from Dr. Yeager's request for an order in the nature of *mandamus* requiring that he be permitted to attend *future* pre-release fairs subject to legitimate security concerns.

[25] Having concluded that a review of the decision is moot, should the Court consider the matter in any event? There is no doubt that there is an ongoing adversarial relationship as between the parties. It is also evident that the time between the rendering of a decision on access to the annual pre-release fair and the conduct of the fair makes it unlikely that a Court will ever

be in a position to hear and determine an application for judicial review while there remains a live issue between the parties. These factors weigh in favour of the exercise of this Court's discretion to consider the decision despite its mootness.

[26] On the other hand, the decision in issue is fact-based. Those facts may well evolve should future applications be pursued, as it is the content of the information provided in support of the application that will need to be considered in rendering any future decision. A decision based on the facts as set out in this record will not provide meaningful future guidance to the parties.

[27] The applicant also raises certain systemic concerns alleged to have impacted upon the reasonableness of the decision. Systemic concerns could be a factor suggesting that a matter should be considered by a Court even when it has determined the matter between the parties has become moot. As outlined immediately below, however, I find the evidence insufficient to come to such a conclusion in this case.

[28] Dr. Yeager points to the absence of any policy or program documentation within CSC establishing (1) the purpose and objectives of the pre-release fair, or (2) the sufficiency of the CSC pre-release education program. He also points to the participation in the 2016 pre-release fair of organizations he submits do not engage in post-release support. He further argues that the process was unfair due to decision-maker bias and the failure of the respondent to consult with the inmate population prior to denying Dr. Yeager access to the pre-release fair. While I have serious doubts as to the merits of these submissions, the record simply is not sufficient to allow

the Court to meaningfully address them and provide guidance that will be of future assistance to the parties.

[29] Dr. Yeager has filed two affidavits, one sworn by Ms. Finateri and the other by Professor Moore, in support of this application. He characterizes the affidavits as containing background information or information that discloses procedural defects not evidenced in the record. These are exceptions to the general rule that evidence not before a decision-maker will not be considered on judicial review of a decision (*Assn of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 [*Assn of Universities and Colleges of Canada*]).

[30] I have carefully considered both the Finateri and Moore affidavits. In the case of the Finateri affidavit, the affiant has had no involvement in the pre-release fair since December 2009. While the information might be viewed as historical in nature, that alone does not bring the affidavit within the scope of the general background exception. The information contained in the affidavit is evidence that goes to the merits of the issues raised in the application and the reasonableness of a decision to exclude an applicant who has been denied access to the fair on the grounds that his purpose for attending was not consistent with the purpose of the event. Similarly, the Moore affidavit does not identify procedural defects nor does it confine itself to facts within the personal knowledge of the deponent as required by sub-rule 81(1) of the *Federal Courts Rules*, SOR/98-106. Instead, it advances an interpretation of the evidence considered by the decision-maker, draws conclusions based on that evidence and expresses opinion. These

affidavits do not fall within the exceptions identified in *Assn of Universities and Colleges of Canada* and are not admissible for the purposes of reviewing the impugned decision.

[31] There is also no explanation as to why the information contained in the Finateri and Moore affidavits was not placed before the decision-maker, or why this information could not form part of a future application in support of Dr. Yeager's attendance at the pre-release fair. The affidavits, however, do highlight the insufficiency of the current record with respect to the systemic concerns raised.

[32] Dr.Yeager submits that the inadequacy of the record flows from the respondent's failure to place any evidence on the record or before the Court addressing the context and purpose of the pre-release fair. He submits that "[n]either the CTR nor the Respondent have provided any evidence that describes or explains the nature and context of pre-release education." This statement is simply inaccurate. Justice Roy's decision in *Madeley* was before the decision-maker and that decision does set out the purpose and context of the pre-release fair, quoting from and summarizing the evidence of Mr. Miguel Costa, the individual who made the June 8, 2016 decision that is at issue in this application (*Madeley* at paras 10 and 11). However, this evidence does not speak to the systemic issues raised by Dr. Yeager and, as a result, does not assist in addressing the sufficiency concerns set out above.

[33] I acknowledge that access to the pre-release fair may remain an issue as between the parties in the future. However, on the basis of the record before the decision-maker and now before this Court, a record that does not differ substantially from that reflected in Justice Roy's

decision in *Madeley*, I am not convinced that consideration of the moot June 8, 2016 decision will be of future assistance to the parties. As noted above, review of the June 8, 2016 decision is separate and distinct from the request for an order in the nature of *mandamus*. This latter issue is addressed immediately below.

V. Is a Mandatory Order Warranted?

[34] Dr. Yeager notes that an order in the nature of *mandamus* is an exceptional remedy but argues it is warranted in this case.

[35] In *Lukacs v Canada (Transportation Agency)*, 2016 FCA 202 [*Lukacs*], the Federal Court of Appeal recently reaffirmed the test to be applied when considering an order in the nature of *mandamus*. Justice Scott, writing for a unanimous Court, states at paragraph 29:

> Both parties acknowledge that the legal test for an order of mandamus was clearly set out by this Court in Apotex. Eight requirements must be satisfied before an order of mandamus is to be issued:
>
> (1) there must be a legal duty to act;
>
> (2) the duty must be owed to the applicant;
>
> (3) there must be a clear right to performance of that duty;
>
> (4) where the duty sought to be enforced is discretionary, certain additional principles apply;
>
> (5) no adequate remedy is available to the applicant;
>
> (6) the order sought will have some practical value or effect;
>
> (7) the Court finds no equitable bar to the relief sought; and
>
> (8) on a balance of convenience an order of mandamus should be issued.

[36] The requirements identified in *Apotex Inc v Canada (Attorney General)*, [1994] 1 FCR 742 and reaffirmed in *Lukacs* are cumulative and must be satisfied by the party seeking the order.

[37] Dr. Yeager relies on section 5 of the *CCRA* and the Federal Court of Appeal decision in *Minister of Public Safety and Emergency Preparedness v Yves LeBon*, 2013 FCA 55 [*Lebon* FCA] to argue that this Court should direct his participation in future pre-release fairs. He argues that section 5 essentially obligates the respondent to allow him to participate where his participation does not raise security concerns. In effect he submits there is only one lawful outcome in response to his application to attend a pre-release fair. I disagree.

[38] *LeBon* FCA dealt with a Canadian citizen serving a sentence in the United States whose application for transfer to a Canadian facility had been refused. The refusal to grant the application had been previously set aside by the Federal Court of Appeal and the matter returned for redetermination. The refusal was maintained on the redetermination. The decision-maker was of the opinion, despite other positive factors, that the applicant was likely to commit a "criminal organization offence".

[39] The Court was asked to review the decision a second time. Justice Luc Martineau, in *Lebon v Minister of Public Safety and Emergency Preparedness*, 2012 FC 1500 [*Lebon* FC] concluded that the decision-maker had "only paid lip service to the reasons and directions given by the Federal Court of Appeal" (*Lebon* FC at para 13). Justice Martineau allowed the judicial review and set the decision aside. He also granted the request that the Court make a "directed

verdict". He found that the exceptional circumstances including, the absence of any factual dispute between the parties, the passage of time since the request had been made, that the decision-maker had shown bias and the serious impact on the applicant warranted the exceptional remedy (*Lebon* FC at paras 25 – 27). The decision was upheld on appeal (*Lebon* FCA at para 17). These circumstances are readily distinguishable from those in this case.

[40] While Dr. Yeager asserts a right to participate in the pre-release fair, the argument advanced in support of that position is far from clear. Justice Roy addressed the question in *Madeley*, stating the following at paragraph 38:

> Finally, there was no solid argument made that Dr. Yeager, somehow, can use section 5 of the Act to insinuate that the respondent must let him take part in the fairs. Section 5 is similar to many other pieces of legislation at the federal level where Parliament defines the duties and responsibilities of its creatures, their legislative mandate. Moneys appropriated against the treasury can be spent only within the confines of the responsibilities given by Parliament to any given organisation. There is not indicia that can be found in section 5 that particular programs with prescribed designs must be created by the CSC. That Dr. Yeager would wish that the services he wants to offer be recognized by the CSC is one thing. It is quite another that they should be mandated by judicial fiat. The services that Dr. Yeager offers are not consistent with the fairs as established; section 5 of the Act is of no assistance to the applicants.

[41] Unlike *LeBon* FC, where the decision-maker was obligated to consider mandated factors and render a decision, section 5 of the *CCRA* broadly defines the duties and responsibilities of CSC. This cannot be interpreted as imposing a duty on CSC to conduct specific programming or to involve specific individuals regardless of their level of experience, qualification or interest.

[42] Dr. Yeager has no clear legal right nor is the respondent under a legal duty to allow him to participate in the pre-release fair. CSC possesses the discretion to determine the type of programming to offer and which outside professionals are best suited to advance the goals of such programming (*William Head Institution v Canada (Corrections Service)*, [1993] FCJ No 821, at para 10).

[43] Similarly, none of the other circumstances identified in *Lebon* FC are present here. There has been no protracted delay, prior direction of this Court has not been "paid lip service" and there appears to be a factual dispute as between the parties. The request for an extraordinary order in the nature of *mandamus* is refused.

[44] In refusing the request, I note Dr. Yeager's argument that not granting the relief requested will result in "another carefully orchestrated denial". Dr. Yeager's own evidence indicates that he has obtained access to the pre-release fair on past occasions. His evidence also indicates that he has received authority to visit an inmate at the Beaver Creek Medium Institution. The evidence does not lead one to conclude future applications will not be considered on their merits. As stated by Justice Mosely in *Canadian Broadcasting Corp v Bowden Institution*, 2015 FC 173, at para 55: "The Court cannot speculate that an administrative authority behaved unfairly in the absence of any evidence." Nor should the Court prejudge the outcome of any future decision by CSC.

VI. Conclusion

[45] The application is denied. In the course of oral submissions the parties advised the Court that an award of costs in the amount of $3000 to the successful party would be appropriate. That amount is reasonable.

[46] The respondent is awarded costs in the amount of $3000 inclusive of disbursements.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. The respondent is awarded costs in the amount of $3000 inclusive of disbursements.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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