Federal Court  Cour fédérale

**Date: 20210409**

**Docket: T-316-19**

**Citation: 2021 FC 309**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, April 9, 2021**

**PRESENT: The Honourable Associate Chief Justice Gagné**

**BETWEEN:**

**PAUL FONTAINE**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

# JUDGMENT AND REASONS

## I. Nature of case

[1] Paul Fontaine is serving a life sentence, with no possibility of parole for 25 years, for first degree murder, possession of weapons and carrying weapons. These offences were committed while he was full-patch member of the Hells Angels. He is currently detained at Drummond Institution and is challenging the Institutional Head's decision to deny his request to terminate an

affiliation with the Hells Angels, recognized by the Correctional Service of Canada [CSC] as a security threat group [STG].

[2] Mr. Fontaine alleged that the Institutional Head was biased and did not consider all of the [TRANSLATION] "accurate, complete and up to date" information in his file.

## II. Facts

[3] Under Commissioner's Directive 568-3, *Identification and Management of Criminal Organizations* [CD 568-3], the Institutional Head may, on the recommendation of a security intelligence officer, identify an offender as being affiliated with an STG. The affiliation itself and the degree of affiliation (member, key player, etc.) are recorded in the offender's file to ensure that the offender does not exert influence within the penitentiary. The goals of CD 568-3 are to:

- establish a framework for the identification and management of STGs and offenders affiliated with same;
- recognize that affiliation to STGs is considered a significant risk, poses a serious threat to the safety and security of the CSC's operations and compromises the protection of society;
- prevent offenders affiliated with STGs from exercising influence and power and to prevent actions and circumstances that enhance their image and prestige; and
- support and assist offenders' termination of affiliation with STGs.

[4] In 2009, based on the circumstances surrounding his criminal activity, the applicant was assessed upon his arrival in prison as a full-patch member of the Hells Angels, East Coast Chapter.

[5] On June 8, 2015, he submitted a request to CSC for termination of affiliation, alleging, among other things, that he had withdrawn from the Hells Angels in March 2014. He was then informed that his request had to first be submitted to the appropriate police force for verification.

[6] This resulted in some delays in processing the application, which required several interventions by the applicant's lawyer.

[7] In any event, CSC issued an initial assessment of the applicant's affiliation on March 30, 2017, in which it concluded that there had been no change in the applicant's status.

[8] The applicant filed a grievance challenging this decision, which was upheld in part on November 6, 2018. CSC concluded that some of the police information on which the officer based her decision may not have been current and that not all rules of procedural fairness were followed; a new assessment was ordered.

[9] On December 20, 2018, CSC issued its new STG affiliation assessment. The officer again concluded that the applicant is still active in the Hells Angels and recommended continued membership.

[10] On January 17, 2019, this recommendation was endorsed by the Institutional Head of the Drummond Institution, who denied the applicant's request for termination of affiliation. It is that decision, and by the same token the officer's recommendation, that is the subject of this application for judicial review.

A. *Decision under review*

[11] In support of the application, the applicant submitted his affidavit and that of a man named Marvin Ouimet whose role in the Hells Angels remains ambiguous, to say the least. He also provided an [TRANSLATION] "Attestation of withdrawal of Paul Fontaine from the Hells Angels club as of March 15, 2014" signed by Mr. Ouimet. However, the officer noted that Sûreté du Québec investigators met with both individuals, who refused to provide the investigators with a written statement.

[12] The applicant also submitted two emails dated May 8, 2014 and March 20, 2015 reporting internal communications to the Hells Angels, where it was confirmed that Paul "Fon Fon" Fontaine and Maurice "Mom" Boucher had left the club. The officer noted, however, that the author of these emails refused to speak with Sûreté du Québec investigators.

[13] Finally, the applicant submitted the transcript of the sentencing submissions to the Court of Quebec's Judge James L. Brunton who, according to the applicant, confirmed his withdrawal from the Hells Angels. Rather, the officer noted that the judge merely pointed to evidence that the applicant has [TRANSLATION] "most recently left the Hells Angels organization . . . [and hopes that this is] a sign he is taking charge of [himself] . . .". The officer therefore did not accept Judge Brunton's comment as evidence of the applicant's disaffiliation.

[14] Similarly, the officer did not accept the references in the applicant's correctional plan as evidence of his disaffiliation from the Hells Angels. In her opinion, the author of this plan was

simply repeating what the applicant had said, without the benefit of a thorough assessment, as provided for in CD 568-3.

[15] The applicant argued that he had asked to be transferred to a different sector at the Donnacona Institution to distance himself from the Hells Angels members who were detained there. The officer saw this as a contradiction since the applicant also asked to be placed in the Drummond Institution section where he was residing at the time of the decision while knowing that individuals affiliated with the Hells Angels were there. The officer also noted that the applicant had been observed eating with Hells Angels and that he had had telephone conversations with a contact common to the other inmates who are members of the Hells Angels.

[16] As for the security file the applicant accessed, in which he no longer appears as an inmate involved in illicit activities or conflicts, the officer noted that a report dated October 18, 2018, instead states that he is involved in institutional trafficking at various levels, in financing drug trafficking, or as the head of a network.

[17] Finally, the officer took into account precedents where Hells Angels members have been disaffiliated and then rejoined the club upon their release.

[18] All in all, the officer pointed out that the applicant has contradicted himself on several occasions and she relies essentially on the information and findings of the police partners who confirm that, in their view, the applicant still has links to the Hells Angels. She therefore recommends that his status not be changed.

## III. Issues and standard of review

[19] This application for judicial review raises the following questions:

*A. Did the Institutional Head err in denying the applicant's request?*

*B. Did the decision maker show bias?*

[20] On the merits of the decision, the applicable standard of review is that of reasonableness (*Scarcella v Canada (Attorney General of Canada) et al*, 2009 FC 1272, at para 14).

[21] As for the issue of the officer's alleged bias, this would be a matter of procedural fairness to which no standard of review applies; if the administrative decision maker was biased, the Court must intervene and set aside the decision.

## IV. Analysis

### A. *Did the Institutional Head err in denying the applicant's request?*

[22] Section 24(1) of the *Canadian Corrections and Conditional Release Act* [the Act] requires that an inmate's record reflect his or her circumstances as accurately as possible:

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| 24. (1) The Service shall take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible. | 24. (1) Le Service est tenu de veiller, dans la mesure du possible, à ce que les renseignements qu'il utilise concernant les délinquants soient à jour, exacts et complets. |

[23] The Court's decision in *Tehrankari v Canada (Correctional Service)*, 2000 CanLII 15218 (FC) [*Tehrankari*], which is regularly cited to support the interpretation of this provision, sheds light on its scope:

> [50] There are two separate components to section 24 of the Act. First, the legal obligation in subsection (1) concerning the accuracy, completeness and currency of any information about an offender the Service uses and the reasonableness of the steps taken to ensure this is so. Second, the provisions in subsection (2) where an offender believes certain information contains an error or omission and requests a correction which is refused.
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> [51] The purpose of subsection 24(1) seems clear. Parliament has said in plain words that reliance on erroneous and faulty information is contrary to proper prison administration, incarceration and rehabilitation. Counsel for the respondent focussed on the limitation in the subsection "the information must be used by the Service. If the information is simply on file and not used it has no consequence, he argues. This proposition finds support in a recent decision by my colleague Reed J. in *Wright v. Canada (Attorney General)*, [1999] F.C.J. 1304. I note, however, the provision she was examining was not section 24 but section 26 dealing with disclosure to victims. This is not an access case and there can be no question here the information the applicant complains of is used by the Service; the Commissioner acknowledged so in his reasons at the third level grievance when he said "the information contained in the preventive security reports is still relevant for administrative decision-making . . . ".

[24] The applicant argues that the decision is unreasonable because it does not meet the requirements of justification and adequacy of reasons, particularly because of the treatment of the evidence on file. As far as he is concerned, the decision is the result of speculation and unsubstantiated suspicions rather than a rigorous analysis.

[25] First, he alleges that CSC imposed an undue burden on him by requiring him to provide a statement to Sûreté du Québec investigators, even though this document is not required by the Act or by Directive CD 568-3.

[26] Furthermore, the applicant alleges that the officer erred in relying on the situation of other members who left the club while in prison but joined again upon their release. This evidence is in no way related to his prison record and is insufficient to conclude that he intends to rejoin the Hells Angels upon his release. In this context, the officer imposed an unrealistic burden on the applicant.

[27] Having considered all of the applicant's counsel's submissions, I cannot conclude that the decision under consideration is unreasonable. The officer has fully considered the facts of the case and has analyzed all the evidence. Her decision is reasoned, intelligible and defensible in respect of the facts and the law.

[28] Given the nature of the applicant's claim, the officer's analysis had to be contextual and based on all relevant factors. The applicant alleges that he is no longer a full-patch member of the Hells Angels. However, the officer lists several pieces of evidence that contradict this statement, or at least allow it to be seriously questioned.

[29] First, the validity and merits of the affidavits produced by the applicant could not be confirmed by the Sûreté du Québec investigators. It is true that neither the Act nor CD 568-3 specifically sets out such a requirement. However, it was up to the investigating police officers to

assess the credibility of the applicant's efforts in the context of **this** STG, which is well known in police circles. If merely reading the two affidavits and the attestation signed by Mr. Ouimet, whose role in the group is completely unknown, had been sufficient to convince them of the applicant's withdrawal/disaffiliation, there would probably be cause for concern. Given the objectives of CD 568-3, the analysis of such a request must be rigorous and the information submitted must be verified. Otherwise, it seems to me that it would be easy to be fooled.

[30] The applicant faults the officer for considering two calls logged in October 2014 and October 2015 with a caller common to several Hells Angels members. He argues that these calls were not recent and that, in any event, he had explained the reason they were logged. Although these calls are several years old, they are definitely not out of date or inaccurate (*Tehrankari* at para 46). They are both subsequent to the time of the applicant's alleged disaffiliation and therefore relevant to assessing the validity and credibility of that disaffiliation.

[31] Furthermore, if the applicant wants CSC to consider only contemporaneous evidence, why refuse to give a written statement to investigators? The length of time between the applicant's request and the decision under review justified asking for a statement from the two individuals who provided affidavits; all the more so for Mr. Ouimet, who did not explain his ability to attest to the applicant's disaffiliation. Their refusal seems rather surprising in the context, and the officer was justified in drawing a negative inference.

[32] Nor, in my view, did the officer err in her interpretation of what Judge Brunton said in his sentencing judgment. He noted, without specifying whether this is a mitigating factor, that the evidence shows that the applicant has recently left the organization. However, he added:

> [TRANSLATION]
>
> . . . that you were an enthusiastic member of the Hells Angels. I don't know where your record is with respect to the murders of . . . the murder of the prison guard and the attempted murder of the other, but as a matter of law, you are deemed, based on the conviction, to have committed both of those crimes, and the Court notes that you joined the Hells Angels thereafter, demonstrating your allegiance to that organization.

[33] Judge Brunton then concluded by accepting the parties' joint submission on sentencing.

[34] Even if Judge Brunton had found that the applicant was disaffiliated, and even if he had considered it as a mitigating factor, that finding would not be binding on CSC, nor would it excuse CSC from considering the totality of the evidence, including post-sentence evidence, in its analysis of the applicant's current situation.

[35] I also see no error in considering the precedents of individuals who disaffiliated while incarcerated and then rejoined the group upon their release. This evidence is relevant in that it tends to demonstrate that for this STG, an inmate's decision to disaffiliate, to enjoy greater latitude within the prison walls, for example, is not necessarily irreversible. Although not a determining factor, it is one element among others to consider when judging the credibility of an inmate's decision.

[36] As for the October 18, 2018 security report, the fact that the applicant is involved in drug trafficking does not support a finding of affiliation with the Hells Angels. However, that does not make it incomplete or inaccurate. Here the applicant is attempting to question the relevance of the information rather than its accuracy. It is certainly information that is relevant to the holistic analysis that the officer was to perform.

[37] Considering that the applicant requested to join the wing of Drummond Institution where he is currently located with knowledge that members of the Hells Angels are there; that he contacted an acquaintance common to other inmate members after his alleged disaffiliation; and that the most recent security report implicates him in drug trafficking, it was reasonable for the officer to conclude that the applicant's situation was unchanged.

B. *Officer bias*

[38] The issue of the officer's alleged bias is intertwined with the applicant's arguments about the unreasonableness of the decision. This argument is based primarily on the fact that the officer's second decision, rendered after the applicant's grievance was upheld in part, is essentially the same as her first decision.

[39] With respect, I do not share the applicant's view. The applicant's file was returned to the officer to correct certain procedural errors identified in the processing of his grievance at the final level, which she did. The only decision that is the subject of this application for judicial review is the officer's second decision, which in my view has the intrinsic qualities of

reasonableness; it is reasoned, intelligible and defensible in respect of the facts and the law. I see no appearance of bias in her approach.

## V. Conclusion

[40] As the applicant has not satisfied me that an error warranting the Court's intervention was made in processing his disaffiliation request, his application for judicial review is therefore dismissed. Exercising the discretion granted to me, I will make no award as to costs.

**JUDGMENT in T-316-19**

**THE COURT'S JUDGEMENT is as follows:**

1. The applicant's application for judicial review is dismissed.

2. Without costs.

"Jocelyne Gagné"
Associate Chief Justice

Certified true translation
Michael Palles, Reviser

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-316-19 |
| **STYLE OF CAUSE:** | PAUL FONTAINE v ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | HELD VIA VIDEOCONFERENCE BETWEEN MONTRÉAL, QUEBEC, QUÉBEC, QUEBEC, AND SAINT-JÉROME, QUEBEC |
| **DATE OF HEARING:** | NOVEMBER 3, 2020 |
| **JUDGMENT AND REASONS:** | GAGNÉ A.C.J. |
| **DATED:** | APRIL 9, 2021 |

**APPEARANCES:**

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| Claudia Gagnon | FOR THE RESPONDENT |

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