Federal Court Cour fédérale

Date: 20240226

Docket: T-87-23

Citation: 2024 FC 310

Ottawa, Ontario, February 26, 2024

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

ABDI ISMAIL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS FOR JUDGMENT

I. Overview

[1] The Applicant seeks judicial review of the decision of the Independent Chairperson [Chairperson] of the Warkworth Institution Disciplinary Court finding the Applicant guilty of the offence of failing or refusing to provide a urine sample when demanded, pursuant to paragraph 40(l) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*].

[2] I am allowing this application because the Chairperson's decision is fraught with errors. First, the Chairperson failed to make a determination concerning the lawfulness of the demand for a urine sample. Second, in determining whether the *actus reus* of the offence had been made out, the Chairperson failed to assess and consider the Applicant's defence of involuntariness and focused instead on the voluntariness of the Applicant leaving the collection area. Third, in imposing a sanction under the *CCRA*, the Chairperson failed to consider measures that had already been taken by the Correctional Service of Canada [CSC].

[3] While I am allowing the application for judicial review, I do not agree with the Applicant that an order of *mandamus* is the appropriate remedy in this case. As the jurisprudence makes clear, a directed verdict is an exceptional remedy. In my view, this is not a case where the result is inevitable such that it would be pointless to remit the matter to another decision-maker.

II. Background

[4] The Applicant is an inmate at Warkworth Institution, a medium-security facility. On April 5, 2022, he was summoned for a urine test as part of a random selection urinalysis program pursuant to paragraph 54(b) of the *CCRA*. During that time, the Applicant was fasting in observance of the Islamic month of Ramadan (April 2, 2022 to May 1, 2022).

[5] According to the Applicant, he told Officer Wellman [the Collection Officer] that he was fasting due to Ramadan. The Applicant left the collection area after approximately 45 minutes. This was before the allotted two-hour collection period for providing a sample, as set out in

paragraph 66(1)(d) of the *Corrections and Conditional Release Regulations*, SOR/92-620 [*CCRR*], had elapsed.

[6] The Applicant was charged with a disciplinary offence under paragraph 40(l) of the *CCRA* for failing or refusing to provide a urine sample when demanded. The Applicant pleaded not guilty to the charge.

[7] A disciplinary trial was held before the Chairperson on December 15, 2022. Both the Collection Officer and the Applicant testified at the hearing. The Collection Officer testified that he did not recall that the Applicant explained why he was leaving the collection area, nor that the Applicant said anything about fasting for religious purposes (or being unable to provide a urinary sample for this reason) at the time of the demand.

[8] The Applicant testified that he had told multiple individuals, including the Collection Officer, that he was fasting and that it would be difficult for him to try to give a urine sample. He further testified that he stayed for about 45 minutes but left because he was exhausted, hungry, and uncomfortable given it was his second day of fasting. While he was not offered an alternate time to provide a urine sample, the Applicant testified that he did return later in the day but was told to leave.

[9] At the conclusion of the hearing, the Chairperson rendered his verdict orally. The Chairperson convicted the Applicant under paragraph 40(l) of the *CCRA* for failing or refusing to

provide a urine sample when demanded. The Chairperson also imposed a $40 fine, half of which was suspended for 90 days, pursuant to section 44 of the *CCRA*.

[10] In rendering his decision, the Chairperson noted that the urinalysis demand was made two and a half hours after the Applicant last had something to eat. He further noted that the Applicant had only remained in the collection area for a half hour before deciding to leave. The Chairperson stated that if the Applicant had said that he was unable to urinate due to fasting immediately after arriving at the collection area and that he was therefore going to leave, there would have then been "some concerns about a refusal": Transcript of the December 15, 2022 Disciplinary Hearing at p 12, lines 11-12 [Transcript].

[11] The Chairperson further stated that if the Applicant had remained the entire two-hour allotted period and was unable to urinate, he would have dismissed the charge "without reservation": Transcript at p 12, line 15. Ultimately, the guilty verdict was based entirely on the Chairperson's finding that the Applicant decided "of his own volition" that he was going to leave the collection area. The Chairperson determined that leaving, "in and of itself", was the voluntary act that established that the Applicant had failed or refused to provide a urine sample when demanded: Transcript at p 12, lines 18-23.

[12] With respect to a sanction, the Chairperson took into account the Applicant's inability to pay a fine. However, the Chairperson refused to consider the Applicant's placement in a drug strategy program due to this disciplinary charge.

III. Issues and Standard of Review

[13] While the Respondent concedes that the Chairperson made two reviewable errors, the parties are not in agreement as to what makes the underlying decision unreasonable nor what the appropriate remedy is in the circumstances of this case. It was therefore necessary for the Court to canvass all the issues raised by the parties.

[14] In my view, the issues for determination are properly framed as follows: (i) whether the Chairperson erred in failing to consider the lawfulness of the demand based on the Applicant's evidence and submissions that the Collection Officer did not accommodate the Applicant's religious obligations despite being advised that the Applicant was fasting; (ii) whether the Chairperson erred in finding the Applicant guilty under paragraph 40(l) of the *CCRA* because he failed to remain in the collection area for two hours; (iii) whether the Chairperson erred in refusing to consider the administrative consequence of the pending charge in accordance with paragraph 34(f) of the *CCRR* before imposing a sanction; and (iv) the appropriate remedy.

[15] The standard of review applicable to decisions by the Independent Chairperson made in accordance with sections 40 and 43(3) of the *CCRA* is reasonableness: *Rana v Canada (Attorney General)*, 2023 FC 1014 at para 18; *Bibeau v Canada (Attorney General)*, 2022 FC 1748 at para 6; *Cliff v Canada (Attorney General)*, 2022 FC 930 at para 3.

[16] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker":

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 at para 85 [*Vavilov*]; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 8 [*Mason*]. A decision should only be set aside if there are "sufficiently serious shortcomings" such that it does not exhibit the requisite attributes of "justification, intelligibility and transparency": *Vavilov* at para 100; *Mason* at paras 59-61. Furthermore, the reviewing court "must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable": *Vavilov* at para 100.

IV. Analysis

A. *The relevant legislative and policy scheme*

[17] Pursuant to paragraph 54(b) of the *CCRA* and section 63 of the *CCRR*, federal inmates may be subject to random urinalysis testing for the "purpose of ensuring the security of the penitentiary and the safety of persons by deterring the use of and trafficking in intoxicants in the penitentiary".

[18] Sections 11 to 14 of the CSC's Commissioner's Directive 566-10 entitled "Urinalysis Testing" [CD 566-10] set out the process for random urinalysis testing. In particular, section 14 provides that alternate arrangements "can be made" where an inmate's religious obligations (such as fasting) would impede their inability to provide a sample and that the inmate's name "may be skipped" until they are able to do so.

[19] Paragraph 66(1)(d) of the *CCRR* requires that an inmate be given up to two hours to provide a urine sample. Subsection 66(2) of the *CCRR* provides that where an inmate fails to provide a

sample in accordance with subsection 66(1), the inmate shall be considered to have refused to provide the sample.

[20] Pursuant to paragraph 40(l) of the *CCRA*, a failure or refusal to provide a urine sample when demanded under paragraph 54(b) of the *CCRA* constitutes a disciplinary offence. A hearing must be conducted in accordance with prescribed grounds to determine whether an inmate is guilty of the offence: *CCRA*, ss 43(1). Pursuant to subsection 27(2) of the *CCRR*, a hearing of a charge under paragraph 40(l) is conducted by an independent chairperson. The burden of proof applicable to disciplinary offences is proof beyond a reasonable doubt: *CCRA*, ss 43(3).

[21] Where an inmate is found guilty of a disciplinary offence, sanctions such as a loss of privileges or a fine may be imposed: *CCRA*, ss 44(1). Section 34 of the *CCRR* sets out a list of considerations that must be taken into account before imposing a sanction. Notably, paragraph 34(f) requires that the person conducting the hearing consider "any measures taken by the Service in connection with the offence before the disposition of the disciplinary charge".

B. *The Chairperson's decision is unreasonable*

[22] In my view, there are three fatal flaws in the Chairperson's decision that render it unreasonable. The overarching concern, however, is with the lack of intelligibility and coherence in the underlying decision. As explained below, this particularly hampered the Court's review of the two main issues related to lawfulness of the urine sample demand and the *actus reus* of the disciplinary offence.

[23] It is recognized that the Chairperson's decision is neither judicial nor quasi-judicial in nature: *Hendrickson v Kent Institution*, [1990] FCJ No 19, 32 FTR 296. However, as stated by Justice Stratas in *Sharif v Canada (Attorney General)*, 2018 FCA 205 [*Sharif*], given the potential consequences, "the intensity of review under the reasonableness standard in a case like this should be relatively strict": *Sharif* at para 9.

(1) The lawfulness of the demand

[24] At the disciplinary hearing, the Applicant argued that the urine sample demand was unlawful and the charge should be dismissed because he had not been accommodated in accordance with section 14 of CD 566-10: Transcript, pp 7-9. The Chairperson, however, did not engage with this argument nor determine whether the Collection Officer failed to consider an accommodation request in accordance with CD 566-10. On this basis, the Chairperson's decision is unreasonable.

[25] The Applicant testified that he had informed the Collection Officer that he was fasting due to Ramadan and that he was therefore unable to drink any water. The Applicant further testified that he was not offered any accommodation by the Collection Officer. The Collection Officer did not mention the Applicant's fasting in his Observation Report. During his testimony, the Collection Officer could not recall whether the Applicant had said anything about fasting for religious purposes at the time of the demand nor whether the Applicant had told him he could not drink water because he was fasting.

[26] Squarely faced with the argument that the demand was unlawful because the Applicant was not accommodated, the Chairperson was required to make a clear and express factual determination. The Federal Court of Appeal has recognized the importance of factual determinations in accommodation cases: *Canada (Attorney General) v Duval*, 2019 FCA 290 at para 39 [*Duval*].

[27] Here, the Chairperson acknowledged that there was a "dispute" about whether the Applicant was unable to provide a urine sample because it was Ramadan and he was fasting. However, I do not agree with the Applicant that the Chairperson resolved that dispute nor do I agree that the Chairperson made a factual determination that the Applicant told the Collection Officer he was fasting for religious purposes.

[28] It was incumbent on the Chairperson to make a definitive ruling as to whether the Applicant told the Collection Officer that he was fasting. If the Chairperson determined that the Applicant had told the Collection Officer, he had to consider the possible application of the accommodation provision in CD 566-10. However, the Chairperson's decision was equivocal, finding that the Applicant "may have told the officer".

[29] The Applicant urges the Court to find that the Chairperson resolved the factual dispute in the Applicant's favour based on a review of the reasons as a whole and, in particular, the Chairperson's subsequent statement that "I accept what Mr. Ismail says". I am not convinced.

[30] The relevant passage of the transcript of the Chairperson's oral decision reads as follows:

> Every case is many times – every case turns on its individual facts. So here we have no dispute that Mr. Ismail was given a demand. The inmate showed up at A and D, he attended, he indicated he was unable to provide. There's a dispute as to whether or not it was for Ramadan or not. I take it at face value that I believe Mr. Ismail may have told the officer, this was again, back in April, does dozens of urinalysis testing every month, and again we're talking something that occurred almost eight months ago. Over eight months ago. That being said, the difference in this particular case is somewhat unique. Here you had Mr. Ismail attending, claiming I cannot urinate, I urinated earlier today, I'm fasting. I accept what Mr. Ismail says, but what he did was a little bit different. He remained. He remained for half an hour, and then said well, it's uncomfortable.
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> Transcript at p 11, lines 6-24.

[31] In my view, it is not entirely clear that the Chairperson was stating that he accepted that the Applicant told the Collection Officer he was fasting for Ramadan. Adding to the confusion in the Chairperson's decision is the subsequent statement that the Chairperson would "have some concerns about a refusal" if the Applicant had shown up and said, "I can't urinate I'm fasting, there's no way I can drink water, I'm going to leave right away": Transcript at p 12, lines 8-12.

[32] Even if the Chairperson had determined that the Applicant told the Collection Officer he was fasting, that would not end the relevant and necessary inquiry into accommodation measures. The Chairperson then should have proceeded to consider what possible accommodation measures were required (if any), whether there was a failure to accommodate in the particular circumstances of the case and, if so, the consequences for failing to accommodate. As further discussed below in regard to remedy, these matters are for the Chairperson to determine as "the person designated by Parliament to be the fact-finder and the merits-decider": *Sharif* at para 26.

[33] In light of the above, I find that an express and clear determination, given the Applicant's evidence and submissions concerning accommodation, was required of the Chairperson. The failure to make such a determination amounts to a reviewable error.

(2) The defence of involuntariness

[34] The Applicant argued that he could not be found culpable of a failure or refusal to provide a urine sample under paragraph 40(l) of the *CCRA* because he was physically incapable of providing a urine sample as he was fasting for Ramadan. The Chairperson, however, failed to consider the Applicant's defence of involuntariness, rendering the decision unreasonable: *Cyr v Canada (Attorney General)*, 2011 FC 213 at para 20 [*Cyr*].

[35] I agree with the Applicant that the Chairperson "erroneously substituted the voluntary act of leaving the testing area for the actual *actus reus* of the offence itself": Applicant's Memorandum of Fact and Law at para 26. Rather than making a determination on the defence advanced by the Applicant, the Chairperson's finding of guilt was predicated on the fact that the Applicant left the collection area before the two-hour collection period had elapsed under paragraph 66(1)(d) of the *CCRR*:

> If he'd remained the entire two hours and said I can't urinate, I can't drink water, I'm not going to break my fast, I would dismiss the charge. Without reservation I would dismiss the charge; he remained the entire two hours, can't consume water. No one's going to compel him to break his fast, but Mr. Ismail decided to on his own volition I've got other things to do, I'm uncomfortable, I'm exhausted, I'm hungry, I'm not going to hang around for another hour and a half. That in of itself sir, I find is a voluntary act. That in of itself sir, I find unequivocally that you have failed to provide a urine sample when demanded, and as such there will be a finding of guilt.
>
> [Emphasis added]

Transcript at p 12, lines 12-26.

[36] The parties agree that, in accordance with subsection 66(2) of the *CCRR*, an inmate's failure or refusal to provide a urine sample within the two-hour window set out in paragraph 66(1)(d) will automatically result in a disciplinary charge under paragraph 40(l) of the *CCRA*. They disagree, however, about whether the *actus reus* of the offence may be made out by simply leaving the collection area before the allotted time period has elapsed.

[37] Based on the relevant jurisprudence, failing or refusing to stay at the collection area for the two-hour collection period does not automatically result in a finding of guilt. A decision-maker is required to consider any defences advanced by an inmate in determining whether the disciplinary offence has been proven beyond a reasonable doubt, in accordance with subsection 43(3) of the *CCRA*: *Ayotte v Canada (Attorney General)*, 2003 FCA 429 at paras 17-20 [*Ayotte*]; *Cyr* at paras 20-22.

[38] The Respondent's reliance on *Fraser Piché v Canada (Attorney General)*, 2013 FC 652 [*Fraser Piché*] is misplaced. In that case, the decision-maker did not accept the applicant's explanation for refusing to provide a urine sample and found him guilty based on a voluntary refusal to provide a urine sample. The applicant was not found guilty based on the act of leaving the collection area before the two hours had elapsed: *Fraser Piché* at paras 6-8. On judicial review, the Court upheld the decision, finding that the decision was reasonable based on the evidence before the decision-maker: *Fraser Piché* at paras 24-28.

[39] The failure of the Chairperson in this case is the determination that leaving the collection area before the requisite time period had elapsed was, in and of itself, voluntary such that guilt was established under paragraph 40(l) of the *CCRA*. The Chairperson was required to squarely address the Applicant's defence of involuntariness based on fasting.

(3) Consideration of other measures before imposing a disciplinary sanction

[40] The Chairperson erred in failing to consider measures already taken by the CSC in connection with the offence before imposing a disciplinary sanction, as required by paragraph 34(f) of the *CCRR*. As a result of the disciplinary charge, the Applicant was placed in a drug strategy program. However, the Chairperson refused to take this measure into account, finding that as an administrative remedy, it was not a proper consideration: Transcript at p 13, lines 21-29.

[41] As fairly conceded by the Respondent, the Chairperson "was obligated to consider the administrative consequences of the pending charge when considering sanctions, due to the mandatory language" of paragraph 34(f) of the *CCRR*: Respondent's Memorandum of Fact and Law at para 23. The Respondent frames this error as one of procedural fairness. I agree with the Applicant, however, that it is a question of reasonableness. In *Sharif*, the Federal Court of Appeal held that the failure to follow the "mandatory legislative recipe" set out in section 34 of the *CCRR* renders the decision unreasonable: *Sharif* at para 34.

[42] On redetermination and after considering the matter afresh, should a different decision-maker find the Applicant guilty under paragraph 40(l) of the *CCRA*, they are required under

paragraph 34(f) of the *CCRR* to consider the Applicant's placement in a drug strategy program in determining the appropriate disciplinary sanction.

C. *Mandamus is not the appropriate remedy*

[43] Generally, on judicial review under the reasonableness standard, the appropriate remedy is to remit the matter to the decision-maker for redetermination with the benefit of the court's reasons. This general rule is grounded in respect for "the legislature's intention to entrust the matter to the administrative decision maker": *Vavilov* at para 142.

[44] Only in exceptional circumstances should a reviewing court exercise its discretion and decide issues that are left to administrative decision-makers at first instance as the "merits-decider": *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at para 100. For example, a court may decline to remit a matter where it is evident that a particular outcome is inevitable such that remitting the matter would serve no useful purpose: *Vavilov* at para 142; *Sharif* at para 54. In other words, there needs to be a "foregone conclusion" rendering a redetermination by a different decision-maker unnecessary: *Duval* at para 38.

[45] Here, the Applicant argues that *mandamus* is the proper remedy as there is only one reasonable outcome: dismissal of the disciplinary offence. I do not agree. This case is distinguishable from *Sharif* wherein the Federal Court of Appeal determined that a conviction was not possible "on the facts as found by the Chair" and thus ordered the dismissal of the charge: *Sharif* at para 54. Rather, this case is similar to *Cyr* and *Ayotte*, where critical findings of fact were

required of the decision-maker and therefore the underlying decisions were set aside and the matters remitted for a new hearing: *Ayotte* at para 23; *Cyr* at para 22.

[46] In my view, the factual matrix of this case renders *mandamus* or a directed verdict inappropriate. For each of the two main reviewable errors set out above, there are unresolved questions of fact that must be determined by the decision-maker at first instance.

[47] First, whether or not the Applicant informed the officer of his fasting is factual in nature. The Court cannot, on judicial review, determine the disputed facts based on two competing statements. It is the decision-maker's role to weigh credibility in the context of the evidence as a whole: *Ayotte* at para 22. Here, the Chairperson failed to consider and weigh the Applicant's evidence and arguments concerning the accommodation of his religious obligations. In these circumstances, I am not persuaded that there is one inevitable outcome, as asserted by the Applicant.

[48] Second, the Chairperson failed to consider the Applicant's defence of involuntariness based on fasting because the Chairperson erroneously focused on the voluntariness of the Applicant's departure from the collection area. Given the factual nature of the determination of "voluntariness", I am not satisfied that there is an inevitable outcome. Indeed, the Chairperson's line of questioning suggests otherwise. The Chairperson questioned the Applicant at some length about when he last had anything to eat before the urine demand was made and what he ate: Transcript at pp 5-7.

[49] In rendering the oral decision, the Chairperson then referred to the Applicant's evidence about when he had eaten:

> Although, he did indicate that he last had something to eat just before sunrise, which would've been 6:30 ish and this demand was at 9 a.m. Let me just confirm the exact date. The charge is 9 a.m. The demand was actually at 7:35. So literally about an hour afterwards, hour and a half he shows up, so it's roughly about two hours since he last had something to eat. Two and a half hours to be precise. So Mr. Ismail decided to remain. He remained for half an hour and then decided I'm going to leave.
>
> [Emphasis added]
>
> Transcript at p 11, lines 25-32; p 12, lines 1-3.

[50] Ultimately, because the Chairperson based the finding of guilt exclusively on the Applicant's voluntary departure from the collection area, this evidence was not considered and assessed in terms of a defence of involuntariness. On reconsideration, a different decision-maker must weigh and assess the totality of the relevant evidence and determine how it impacts the voluntariness of the Applicant's failure or refusal to provide a urine sample. This includes not only the evidence of when the Applicant had last eaten but also when he had last urinated, his inability to consume any water during fasting hours, and the discomfort, exhaustion, and stress that the Applicant testified to experiencing at that time. These are all relevant factors for the decision-maker to consider in assessing the voluntariness of the Applicant's failure or refusal to provide a urine sample under paragraph 40(l) of the *CCRA*.

[51] It is the role of the decision-maker, not the reviewing court, to weigh and assess evidence and make a determination about the viability of a defence to a disciplinary offence.

V. Conclusion

[52] Based on the foregoing, I am allowing the application for judicial review as the Chairperson's decision lacks intelligibility, justification, and transparency. I am setting aside the Chairperson's December 15, 2022 decision and remitting the matter for redetermination by another decision-maker. I am not persuaded that acquittal is the inevitable result such that a directed verdict is appropriate.

[53] At the conclusion of the hearing, the parties advised me that they did not require a costs order as they had reached an agreement.

JUDGMENT in T-87-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The Chairperson's decision dated December 15, 2022 is set aside and the matter is remitted for redetermination to another decision-maker.

3. There is no order on costs based on the parties' agreement.

"Anne M. Turley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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