

Federal Court



Cour fédérale

**Date: 20240726**

**Docket: T-1796-23**

**Citation: 2024 FC 1196**

**Ottawa, Ontario, July 26, 2024**

**PRESENT: The Honourable Madam Justice Blackhawk**

**BETWEEN:**

**PATRICK DANIEL FISCHER**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The Applicant, Patrick Daniel Fischer, seeks judicial review of the July 13, 2023 Offender Final Grievance Response decision of the Correctional Service of Canada (CSC) to deny the Applicant possession of an electric guitar for use in his cell at the Kent Institution (Decision).

[2] The Applicant asks this Court to set the Decision aside and substitute its own decision or issue a “directed verdict” to permit possession of the guitar in his cell.

[3] For the reasons that follow, this application is dismissed.

## II. Background

[4] The Applicant is an inmate at the Kent Institution, a maximum-security institution. On June 30, 2003, the Applicant purchased an acoustic guitar; this item was approved as a personal item for possession in cells at the Kent Institution. On August 21, 2006, the Applicant purchased an electric guitar to replace the acoustic guitar; this item was approved as a personal item for possession in cells at the Kent Institution on August 21, 2006, and again on April 15, 2009.

[5] The Applicant transferred to the medium-security Mountain Institution, and the electric guitar was listed as an approved personal item for possession in the Applicant's cell on June 6, 2012.

[6] The Applicant transferred back to the Kent Institution, where on March 2, 2017, the electric guitar was listed as a personal item in storage at the Kent Institution. In other words, it does not appear that the guitar was permitted in the Applicant's cell for possession.

[7] The Applicant then transferred back to the medium-security Mission Institution. On October 23, 2018, the electric guitar was listed as a personal item in storage at the Mission Institution. When the Mission Institution received the guitar in 2018, it had a broken neck; it is not clear from the record before me, but that appears to be the reason the guitar was put into storage. The damaged guitar was destroyed and the Applicant successfully made an "Inmate Claim for Lost or Damaged Effects" and was reimbursed the cost of the instrument. The Applicant purchased a new electric guitar while at the Mission Institution in 2019 to replace the

damaged instrument. It is not clear from the record if this instrument was approved for use in the Applicant's cell at the Mission Institution.

[8] On April 10, 2021, the Applicant transferred back to the Kent Institution. The Kent Institution received the electric guitar on May 21, 2021, and it was placed into storage, where it currently remains.

[9] On July 21, 2021, the Applicant filed an Offender Complaint Presentation (grievance V80R00045491), requesting the return of the electric guitar and related accessories for in cell possession. On August 27, 2021, CSC interviewed the Applicant in respect of the grievance.

[10] On August 28, 2021, the Applicant's grievance was dismissed pursuant to Commissioner's Directive 566-12 (CD 566-12), which prescribes that in maximum-security institutions, stringed instruments are only permitted at the discretion of the Institutional Head (Warden). The Warden of Kent Institution issued a direction on February 23, 2021, that prohibited stringed instruments for use or possession in cell, because they may jeopardize the safety and security of the Institution (Warden's Standing Order).

[11] On September 5, 2021, the Applicant filed an Offender Initial Grievance Presentation where he presented additional information and requested a reconsideration of his request to issue his guitar for possession in cell. CSC staff interviewed the Applicant regarding the grievance on February 24, 2022. As set out in the Offender Initial Grievance Response, CSC advised the Applicant during the interview about the applicable policies regarding use of guitars in cell at maximum-security institutions. The Applicant was advised that his grievance was denied because guitars are prohibited for cell use due to the application of CD 566-12 and the Warden's Standing Order.

[12] The Applicant filed an Offender Final Grievance Presentation on June 3, 2022, again requesting reconsideration of his request to have his guitar for use in cell (Final Grievance). CSC responded to this Final Grievance on July 13, 2023, stating that:

Unlike headphones, which are authorized at institutions of every security level, stringed instruments are only authorized in maximum security institutions at the Institutional Head's discretion, in accordance with Annex B of CD 566-12. As you were advised in the response to initial grievance V80R00045491, the Institutional Head of Kent Institution has provided direction that guitars are not to be issued for cell use.

Additionally, while you claim that policy dictates that you be allowed to retain any item that was in your possession upon transfer, paragraph 11 of CD 566-12 includes the limitation "unless indicated otherwise for reasons of safety, health or security, and the security level of the institution". You purchased the electric guitar at a medium-security institution and then were transferred to a maximum-security institution. In light of the above, this portion of your grievances is denied.

[13] The Applicant commenced his application for judicial review to this Court on August 24, 2023.

III. Applicable Commissioner's Directives and Institutional Standing Orders:

[14] *Commissioner's Directive 566-12, Personal Property of Offenders* (in effect in October 19, 2015):

11. Inmates will normally be allowed to retain the following items providing they are consistent with the **National Lists of Personal Property for Men/Women Inmates**, unless indicated otherwise for reasons of safety, health or security and the security level of the institution:

a. items, which were in the inmates' lawful position at the time of admission or readmission to their placement institution, or in their lawful possession on transfer

...

18. Authorized items currently in an offender's possession that are not on the **National Lists of Personal Property for Men/Women Inmates** will remain in their possession for the life of the items. However, if any item presents a risk to the security of the institution, staff, or inmates, or is not compliant with CD 345-Fire Safety or the Fire Safety Manual, it will be removed and stored with the inmate's stored effects or disposed of according to policy. The reason for such action will be documented and the inmate will be advised in writing.

[Bold emphasis in original; underline emphasis added.]

[15] *Annex B – NATIONAL LIST OF PERSONAL PROPERTY FOR MEN INMATES:*

**Musical Instruments (one only)**

Stringed instrument, wind instrument or keyboard (maximum of 1 meter in length and no amps) and instrument accessories (stringed and wind instruments at the Intuitional Head's discretion in maximum security)

[Bold emphasis in original; underline emphasis added.]

[16] *Annex A – Kent Institution – Warden's Standing Order* dated February 23, 2021:

**Musical Instruments (one only)**

Wind instrument or keyboard (**maximum of 1 meter in length and no amps**) and instrument accessories (at the discretion of the Intuitional Head's in maximum security)

[Emphasis in original.]

IV. Issues and Standard of Review

[17] The sole issue in this application is whether the Decision is reasonable.

[18] The Respondent submits, and I agree that the applicable standard of review in this case is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65

[*Vavilov*] at paras 25, 86.

[19] Reasonableness review is a deferential standard and requires an evaluation of the administrative decision to determine if the decision is transparent, intelligible, and justified (*Vavilov* at paras 12–15, 95). The starting point for a reasonableness review is the reasons for decision. Pursuant to the *Vavilov* framework, 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” (*Vavilov* at para 85).

[20] To intervene on an application for judicial review, the Court must find an error in the decision that is central or significant to render the decision unreasonable (*Vavilov* at para 100).

## V. Analysis

### A. *Legacy Items*

[21] The Applicant argued that because he had authorization to possess an electric guitar for in cell use at the Kent Institution in 2006, it is a legacy item. Therefore, pursuant to paragraph 18 of CD 566-12, he is entitled to possess the guitar. In support of this position, the Applicant cites *Fischer v Canada (Attorney General)*, 2021 FC 112 [*Fischer*] at paragraph 36, where Justice Russel Zinn noted:

The Decision is also unreasonable because the decision-maker failed to consider the impact of paragraphs 11(a) and 18 of the Directive. Having found that Mr. Fischer was authorized to purchase the memory card, and given that he had been authorized to have it in his cell with his PlayStation One for 18 years, his possession of it appears to have been lawful. Under either or both provisions, he ought to have been permitted to retain it unless it was a safety risk. Given that there was no such finding of a risk for 18 years in a maximum-security institution, there can be no reasonable suggestion of such a risk in a medium-security institution.

[Emphasis added.]

[22] The Respondent notes that the item at issue in the *Fischer* decision was a PlayStation memory card, which is considerably different from “a large, weighty guitar with removable steel strings.” The Respondent also notes that these items present different security concerns and risks within inmate populations. I agree.

[23] The *Fischer* decision is clear, legacy items pursuant to paragraph 18 of CD 566-12 are permitted for possession in cell, unless such items present a safety risk. In the case at bar, the Warden of Kent Institution has determined that guitars do present safety risks. Therefore, the guitar is not a legacy item that is permitted for use or possession in cell at the Kent Institution.

B. *Safety and Security Concerns*

[24] The Applicant submits that the Warden’s exercise of discretion to issue the Warden’s Standing Order is not reasonable. He submitted that he possessed a guitar in his cell for several years without incident. He also submitted that he was not aware of any incident involving a guitar at Kent Institution.

[25] The Respondent argued that in recognition of the dynamic nature and purpose of correctional institutions, and pursuant to CD 566-12, the Warden of a maximum-security institution has the discretion to determine if possession of a string or wind musical instrument in cells may present a risk to the health, safety, and security of the institution.

[26] The Respondent also submits that pursuant to the *Corrections and Conditional Release Act*, SC 1992, c 20 [Act] at section 3.1, the paramount consideration in the corrections process is “the protection of society.” Subsection 4(c) of the Act underscores that CSC “uses the least restrictive measures consistent with the protection of society, staff members and offenders.” The

Respondent argues that prohibiting guitars for possession in cell is reasonable, in light of CD 566-12, the *Act*, and the Warden's Standing Order. I agree.

[27] The Respondent submitted that the Decision was consistent with the Warden's Standing Order, and therefore was reasonable. I agree.

[28] The Applicant has not demonstrated that the Warden's Standing Order was an unreasonable exercise of their discretion. Further, the Applicant has not demonstrated that the Decision was unreasonable.

[29] The Respondent submitted, and I agree, that there are a number of dynamic considerations at play when considering the management, safety, and security of a facility like the Kent Institution. The Warden has the necessary expertise and working knowledge to assess reasonable and foreseeable threats to the health, safety, and security of the inmates, CSC staff, and the institution as a whole. It is also clear that such considerations are constantly changing based on the inmate population.

[30] I do not agree with the Applicant that CSC must demonstrate that guitars have been misused in an incident before the Warden is able to prohibit the possession of such items for in cell possession. Similarly, the fact that other items that are approved for in cell possession may be misused does not render the prohibition related to guitars unreasonable.

[31] The Applicant was provided transparent and clear reasons for the Decision:

- In the Offender Complaint Response dated August 28, 2021 it states that: "Guitars are large in size and weight, and could be used as a weapon. A guitar being in your cell presents a risk it could be used nefariously, not just by yourself but by other inmates;"



- In the Offender Initial Grievance response it states that: “The warden of Kent Institution, has given direction that guitars are not to be issued at Kent Institution, as they may jeopardizes [*sic*] the safety and security of the institution;” and
- In the Offender Final Grievance Response it states that: “[s]tringed instruments are only authorised in maximum security institutions at the Institutional Head’s discretion, in accordance with Annex B of CD 566-12. As you were advised in the response to initial grievance V80R00045491, the Institutional Head of Kent Institution as provided direction that guitars are not be issued for cell use.”

[32] Additionally, on August 25, 2021, the Applicant was informed by the Warden directly of the policy via Memorandum:

I gave my direction, within my discretion that guitars are not to be issued at Kent Institution, as they jeopardizes the safety and security of the institution. As Kent Institution is Maximum security Institution, and given the high security requirement to manage the risk represented by the population at Kent, it is reasonable to believe that a guitar could be used to cause serious harm.

Guitars are large in size and weight, and could be used as a weapon. A guitar being in your cell presents a risk it could be used nefariously, not just by yourself but by other inmates....

[33] On balance and read holistically, the CSC reasons for the Decision are transparent, intelligible, and justified in relation to the facts and law that constrain the administrative decision maker (*Vavilov* at paras 85, 94, 99, 100). The burden is on the party challenging a decision to show that the decision is unreasonable. In the case at bar, the Applicant has failed to show that the Decision is unreasonable.

[34] In my opinion, the Decision and the Warden’s Standing Order are entitled to significant deference, given CSC’s expertise in respect of inmate and institutional management.

[35] I appreciate that the Warden's Standing Order prohibiting the possession of guitars in cell and the Decision prohibiting possession of the Applicant's guitar in cell has had significant impacts on him. I understand that playing music is therapeutic and a way for the Applicant to use his time in a constructive and positive manner. While the Applicant does not agree with the Decision, this is not a basis for judicial review. Unfortunately, he has not demonstrated that the Warden's Standing Order or the Decision were unreasonable in view of the broader mandate of CSC as set out in the *Act*.

#### VI. Conclusion

[36] The Warden's Standing Order of February 23, 2021, is reasonable. The Decision dated July 13, 2023, to deny the Applicant possession of an electric guitar for use in cell is reasonable. The Kent Institution has restricted guitars as an item authorized for in cell use because they present a threat to the safety and security of the institution.

[37] The Respondent requested that the application be dismissed with costs. The Applicant made some submissions during the oral hearing of this matter with respect to his financial means. Pursuant to Rule 400(1) of the *Federal Courts Rules*, SOR/98-106, this Court has discretionary authority over the amount and award of costs. I have considered all the relevant factors and am of the view that it would not be appropriate to make an award of costs in this matter.

**JUDGMENT in T-1796-23**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed.
2. No order as to costs.

**“Julie Blackhawk”**

---

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1796-23

**STYLE OF CAUSE:** PATRICK DANIEL FISCHER v ATTORNEY  
GENERAL OF CANADA

**PLACE OF HEARING:** HEARD BY VIDEOCONFERENCE

**DATE OF HEARING:** JULY 18, 2024

**JUDGMENT AND REASONS:** BLACKHAWK J.

**DATED:** JULY 26, 2024

**APPEARANCES:**

Patrick Daniel Fischer

FOR THE APPLICANT  
ON HIS OWN BEHALF

Alexandra Scott

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Attorney General of Canada  
Vancouver, British Columbia

FOR THE RESPONDENT