Date: 20091217

Docket: T-1431-09

Citation: 2009 FC 1286

Ottawa, Ontario, December 17, 2009

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

WARREN MCDOUGALL

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] By motion in writing dated November 12, 2009 the applicant, Warren McDougall, appeals the order of Prothonotary Lafrenière dated November 3, 2009 dismissing the applicant's requests:

> (a) to proceed in *forma pauperis* pursuant to section 19 of the *Federal Courts Rules*, SOR/98-106 (the "Rules"); and
>
> (b) to be provided with all of the requested material in the notice of application pursuant to section 317 of the Rules.

[2] The applicant is a federally incarcerated inmate.

[3] On August 26, 2009 the applicant issued a notice of application commencing a judicial review of a third level grievance decision made by the Senior Deputy Commissioner (the "SDC") of the Correctional Service of Canada ("CSC") on June 2, 2009.

[4] The applicant claims that his application for judicial review is not only with regards to the third level grievance decision made by the SDC on June 2, 2009 but is also an application for an order in *certiorari* to quash the "Security Bulletin" of the Security Operations and Procedures Division at CSC National Headquarters sent to staff members on June 30, 2008 to clarify the procedures relating to the new Institutional Standing Order (ISO) 770 – *Inmate Visits*.

[5] The notice of application included requests for materials, pursuant to Rule 317(2). In addition to requesting the record of proceedings before the SDC, which the applicant received on September 16, 2009, the applicant requested:

a) information that identifies visitors who visit more than one inmate or more than one penitentiary as an area of concern for the introduction of drugs into federal penitentiaries, including any evidence allegedly supporting or corroborating that information and any evidence suggesting that families present a lesser risk than friends and other persons from outside the penitentiary;

b) the minutes from the Matsqui Visitors' Advisory Committee meetings, where Noelle Anderson is on record as an active member; and

c) the applicant's visiting records, pertaining to Noelle Anderson and Ralna Burridge.

Decision Under Appeal

[6] In his November 3, 2009 order, Prothonotary Lafrenière found that there were insufficient facts to demonstrate the special circumstances necessary to waive filing fees: *Pearson v. Canada*,

(2000), 195 F.T.R. 31, [2000] F.C.J. No. 1444. Acknowledging that the applicant clearly has limited funds, the prothonotary found that he is not an indigent person. As the applicant admitted that he could pay the modest filing fee to file a requisition for hearing if required, the prothonotary concluded that the application to proceed in *forma pauperis* could not be granted.

[7] With regards to the requested material in the applicant's notice of application, Prothonotary Lafrenière indicated that for the applicant to obtain relief pursuant to Rule 318 he must first establish that the material is relevant to the application. In considering the material requested by the applicant, described above at paragraph 5, the prothonotary noted that the applicant is challenging the third level decision made by the SDC on June 2, 2009 denying the applicant's grievance.

[8] Prothonotary Lafrenière determined that the applicant had failed to establish that the requested documents were before the SDC when he rejected the applicant's grievance. It is mentioned in the order that the motion for production of documents should be dismissed on this ground alone.

[9] In addition, it was determined that the applicant had failed to establish that the documents requested are relevant to the issues raised in the application.

[10] Lastly, it is stated in Prothonotary Lafrenière's order that Rule 318 is not intended as a means of obtaining discovery of all documents that may be in the possession of CSC.

Issue

[11] The issue on this appeal is whether Prothonotary Lafrenière erred in dismissing both of the applicant's requests: (a) to proceed in *forma pauperis* and (b) to be provided with all of the requested material in the notice of application?

Standard of Review

[12] The standard of review applicable to a prothonotary's discretionary decision was established by the Federal Court of Appeal in *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.), [1993] F.C.J. No. 103, and endorsed with approval by the Supreme Court of Canada in *Z.I. Pompey Industrie v. ECU-LINE N.V.*, [2003] 1 S.C.R. 450, [2003] S.C.J. No. 23, at para. 18:

> Discretionary orders of prothonotaries ought to be disturbed by a motions judge only where (a) they are clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of the facts, or (b) in making them, the prothonotary improperly exercised his or her discretion on a question vital to the final issue of the case.

[13] The *Aqua-Gem* test was reformulated in *Merck & Co. v. Apotex Inc.*, (2003), 315 N.R. 175, [2003] F.C.J. No. 1925, as follows:

> Discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:
>
> a) the questions in the motion are vital to the final issue of the case, or
>
> b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of facts.

Analysis

[14] The final issue before this Court on judicial review in this matter is the SDC's application of the visiting policy established in ISO 770 – *Inmate Visits*. The question whether the applicant is indigent, or can proceed in *forma pauperis*, is not vital to that issue.

[15] Moreover, in this case, there is no reason to depart from the general principle that an applicant's request for an order for documents is not a matter that is vital to the final issue: *Gaudes v. Canada (Attorney General)*, 2005 FC 351, [2005] F.C.J. No. 434, at para. 8; *Deer Lake Regional Airport Authority Inc. v. Canada (Attorney General)*, 2008 FC 1281, [2008] F.C.J. No. 1707, at para. 37.

[16] In his application for judicial review, the applicant seeks to challenge (1) the application of the ISO 770 policy to his approved list of visitors and (2) the implementation of that policy by CSC. As there is no evidence that the requested documents were before the SDC, I conclude that this matter is not vital to the final issue, and accordingly, the prothonotary's order should be assessed on whether the order is clearly wrong: as set out in the second part of the test in *Merck & Co. v. Apotex Inc*., above.

[17] This Court should only interfere with the order of Prothonotary Lafrenière if satisfied that he was "clearly wrong" in that he based his decision upon an incorrect principle of law or upon a misapprehension of the facts and then, only if upon conducting a *de novo* review of the evidence, the Court reaches a different conclusion on the facts and the law.

[18] A *de novo* review may only consider the evidence that was before the prothonotary. The respondent has properly objected to the inclusion of additional evidence in the applicant's motion record. This new evidence, which will not be admitted, is the applicant's affidavit sworn on November 12, 2009. As this affidavit was not before Prothonotary Lafrenière, I am unable to give it consideration in arriving at a decision: *Apotex Inc. v. Wellcome Foundation Ltd.*, 2003 FC 1229, [2003] F.C.J. No. 1551, at para. 10. What I will be considering is the applicant's affidavit filed in support of the original motion.

[19] I disagree with the applicant's view that the prothonotary misapprehended the facts as he based his decision on the mistaken belief that the applicant seeks judicial review of the singular grievance decision of June 2, 2009. When reading the first paragraph at page 3 of the order, it is clear that the prothonotary understood that the applicant was challenging the grievance before the SDC and was also taking issue with the implementation and application of a CSC policy placing restrictions on inmate visits.

[20] I agree with the respondent that the prothonotary's order dismissing leave for the applicant to proceed in *forma pauperis* is not clearly wrong. I note that the record indicates that while incarcerated, Mr. McDougall has limited financial resources but is able to pay monthly expenditures for cable television, school tuition, telephone services, etc., and could sell some of his paintings to earn some money to pay for these proceedings. Noting that the applicant has limited funds, I cannot find that the prothonotary was clearly wrong when he also noted that the applicant's own evidence was that he could pay for the modest filing fee to requisition a hearing: *Merck & Co. v. Apotex Inc.*, supra.

[21] Again, I do not find that the Prothonotary was clearly wrong when he found that the requested documents are not relevant. The Prothonotary was aware that the applicant takes issue with both the implementation and application of the CSC policy restricting inmate visits. Prothonotary Lafrenière found that the applicant did not submit evidence demonstrating that the documents provided in the certified tribunal record, pursuant to Rule 317, were incomplete. In the absence of evidence to the contrary, there is no basis upon which this Court could find that he was clearly wrong in concluding that the certified tribunal record provided is complete and sufficient.

[22] I agree with the respondent that the applicant is seeking documents in order to demonstrate that the ISO 770 (restricting inmate visits) is an unfair policy. However, procedural fairness in the legal sense is not concerned with the fairness of a policy. Rather, procedural fairness relates to fair play in the decision making process: *Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH and Co.*, 2006 FCA 398, [2006] F.C.J. No. 1837, at para. 7. Again, I cannot find that the prothonotary was clearly wrong when he determined that the documents, relating to the CSC policy, are not relevant pursuant to the allegation of procedural unfairness in the notice of application.

[23] There is no evidence that the requested documents were before the SDC when he rejected the applicant's grievance.

[24] The applicant's document request amounts to a discovery of documents. That is not the purpose of a Rule 317 request. I agree with the respondent that the purpose of Rule 317 and Rule 318 is to limit discovery to documents which were before the decision-maker when the decision was

made and which are not in the possession of the person making the request: *1185740 Ontario Ltd. v. Canada (Minister of National Revenue)*, (1999), 247 N.R. 287, [1999] F.C.J. No. 1432.

[25] This is consistent with the summary nature of judicial review. I find that the prothonotary correctly applied the above principles relating to Rule 317 in his order: *Access Information Agency Inc. v. Canada (Transport)*, 2007 FCA 224, [2007] F.C.J. No. 814, at paras. 20-21; *Beno v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia - Létourneau Commission)*, (1997), 130 F.T.R. 183, [1997] F.C.J. No. 535, at paras. 15-17.

[26] The respondent requests an order dismissing the applicant's appeal with costs. While they would normally follow the result, I will exercise my discretion in this matter not to award them. I take into consideration that the applicant is a federally incarcerated inmate with limited financial resources.

ORDER

THIS COURT ORDERS that:

1. The applicant's appeal is dismissed.

2. The parties will bear their own costs.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1431-09
STYLE OF CAUSE:	WARREN McDOUGALL and CANADA (ATTORNEY GENERAL)
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	December 17, 2009
REASONS FOR ORDER:	MOSLEY J.
DATED:	December 17, 2009

APPEARANCES:

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