Federal Court of Appeal | Cour d'appel fédérale

Date: 20121101

Docket: A-63-12

Citation: 2012 FCA 275

CORAM: **BLAIS C.J.**
SHARLOW J.A.
MAINVILLE J.A.

BETWEEN:

MICHAEL AARON SPIDEL

Appellant

and

CANADA (ATTORNEY GENERAL)

Respondent

Heard at Vancouver, British Columbia, on October 31, 2012.

Judgment delivered at Vancouver, British Columbia, on November 1, 2012.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: BLAIS C.J.
SHARLOW J.A

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] The appellant, a former inmate at the Ferndale Institution in British Columbia ("Ferndale") is appealing a judgment of Justice O'Reilly of the Federal Court, reported as 2012 FC 54 ("Reasons") by which his application for judicial review challenging a decision of the Commissioner of the Correctional Service of Canada ("Commissioner") was dismissed.

[2] The appellant had submitted a grievance to the correctional authorities challenging changes made in 2010 to the Inmate Handbook at Ferndale. That change required that the legal guardians be responsible for supervising minors under their care during inmate visits at Ferndale. Prior to this

change, inmates at Ferndale were allowed to have one-on-one visits with their minor children. Since the change, such visits must be in the presence of the legal guardian.

[3] The Commissioner denied this grievance at the third level of the offender grievance procedure set out in the *Corrections and Conditional Release Regulations*, SOR/92-620. The Commissioner determined that the change to the Inmate Handbook had been made in order to accurately reflect the policy in place at Ferndale as well as national policy and legislation.

[4] The appellant disputed the finding by Commissioner that the Inmate Handbook was amended to reflect existing policy. The Federal Court judge found the appellant's submissions on this point to be compelling: Reasons at paras. 25 to 27. However, looking at the overall context, the Federal Court judge was satisfied that the personal concerns of the appellant could be considered within the framework of an individual application to participate in private family visits without supervision. He found that the corrective measures suggested by the appellant would not necessarily be appropriate for all inmates at Ferndale. He concluded that it was not unreasonable, therefore, for the Commissioner to deal with the validity of the policy itself, leaving the question of whether there were appropriate alternatives in individual cases to a separate inquiry: Reasons at para. 29.

[5] The Federal Court judge further found reasonable the Commissioner's conclusion that the rule relating to the supervision of children's visits with inmates was validly established in the interests of safety and security, given that there could be individual exceptions to that rule where

safety and security concerns could be otherwise met: Reasons at paras. 31-32. He consequently dismissed the judicial review application.

[6] The appellant raises before us a single ground of appeal. He submits that the Federal Court judge erred by applying the standard of reasonableness set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 ("*Dunsmuir*"). The appellant further submits that the appropriate standard of review in this case is not to be found in *Dunsmuir*, but rather in the *Corrections and Conditional Release Act*, S.C. 1992. c. 20 ("Act").

[7] The appellant notably refers to paragraphs 4(*d*) of the Act as it read prior to the amendments brought by the *Safe Streets and Communities Act*, 2012, c.1 s. 54. That paragraph, which is no longer incorporated into the Act, provided that in achieving the purpose of the federal correctional system, the Correctional Service of Canada must be guided by the principle that it must use the least restrictive measures consistent with the protection of the public, staff members and offenders. The appellant also refers to paragraph 4(*g*) of the Act (now numbered paragraph 4(*f*)) under which correctional decisions are to be made in a forthright and fair manner, with access by the offender to an effective grievance procedure.

[8] The Supreme Court of Canada in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 ("*Khosa*") has held that while Parliament may establish a standard of review by statute for courts reviewing federal administrative decisions, it must do so through clear

language. Failing legislative language reflecting a clear intention by Parliament, the *Dunsmuir* principles apply. As noted in *Khosa* at para. 51:

> [51] As stated at the outset, a legislature has the power to specify a standard of review, as held in *Owen* [*R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779], if it manifests a clear intention to do so. However, where the legislative language permits, the courts (a) will *not* interpret grounds of review as standards of review, (b) will apply *Dunsmuir* principles to determine the appropriate approach to judicial review in a particular situation, and (c) will presume the existence of a discretion to grant or withhold relief based on the *Dunsmuir* teaching of restraint in judicial intervention in administrative matters (as well as other factors such as an applicant's delay, failure to exhaust adequate alternate remedies, mootness, prematurity, bad faith and so forth).

[9] Read in the overall context of the Act, section 4 is a provision that outlines the principles which guide the Correctional Service of Canada in achieving the legislated general purpose of the federal correctional system as set out in section 3 of the Act. Nowhere in section 4 are there references to a court or its powers to review administrative decisions made under the Act, including decisions regarding offender grievances. The Federal Court's authority and power to carry out such judicial reviews are rather to be found in the *Federal Courts Act*, R.S.C. 1985, c. F-7. As decided in *Khosa*, the applicable standards of review in such circumstances are those set out in *Dunsmuir*.

[10] This has been the approach adopted by our Court and the Federal Court, both prior and subsequent to *Dunsmuir*, in regard to judicial review applications challenging decisions made within the framework of the offender grievance procedure provided for under the Act: see notably *Sweet v. Canada (Attorney General*), 2005 FCA 51, 332 N.R. 87, at paras. 14 to 16; *Johnson v. Canada (Attorney General)*, 2008 FC 1357, 337 F.T.R. 306, at paras 36 and 39; *Yu v. Canada (Attorney General)*, 2011 FCA 42, 414 N.R. 283, at paras. 19 to 21.

[11] The principal issues before the Federal Court judge in the judicial review proceedings were (a) whether the Commissioner erred in finding that the impugned change to the Inmate Handbook reflected national policy regarding the safety and security of federal penitentiary institutions, and (b) whether the Commissioner's refusal to consider alternative proposals was justified considering that such alternatives could be considered within the framework of the appellant's individual request for personal unsupervised visits with his minor child. Both these issues involved consideration by the Commissioner of the proper method for ensuring safety and security in federal institutions, a matter on which the Federal Court should show deference to the Commissioner.

[12] In these circumstances, the Federal Court judge applied the proper standard of review.

[13] I would consequently dismiss this appeal with costs in the lump sum amount of $800, including disbursements and taxes.

"Robert M. Mainville"

J.A.

"I agree
Pierre Blais C.J."

"I agree
K. Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-63-12
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APPEARANCES:

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