

CANADA / JUDGMENT

Karol v. Mountain Institution (Warden)

2021 BCSC 393

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2021 BCSC 393 Karol v. Mountain Institution (Warden)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Karol v. Mountain Institution (Warden),

2021 BCSC 393

Date: 20210305

Docket: 31519

Registry: Vancouver

Between:

Ryan Karol

Applicant

And

Warden of Mountain Institution, Warden of Kent Institution

and the Attorney General of Canada

Respondents

Before: The Honourable Madam Justice Murray

Reasons for Judgment

Counsel for the Applicant:

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Place and Date of Hearing:

Vancouver, B.C.

February 19, 2021

Place and Date of Judgment:

Vancouver, B.C.

March 5, 2021

Introduction

- [1] The applicant, Mr. Karol, applies for an order in the nature of habeas corpus with certiorari in aid releasing him from a maximum security institution and returning him to a medium security institution. He claims that his involuntary transfer from Mountain Institution ("Mountain") to Kent Institution ("Kent") was procedurally unfair and unlawful for two reasons:
- 1) The warden of Mountain (the "Warden")/Correctional Service of Canada ("CSC") failed to provide him with the factual grounds for the interception of his telephone calls; and
 - 2) The Warden/CSC failed to provide him with written reasons for his decision on transfer within five days as provided by s. 13(2)(c) of the Corrections and Conditional Release Regulations, SOR/92-620 (CCRR).

Background

- [2] Mr. Karol is currently serving a sentence of four years, one month and 17 days imposed January 25, 2019 for several offences, including possession of a controlled substance for the purpose of trafficking. He was transferred to Mountain, a medium security prison, on June 19, 2019.
- [3] He soon came to the attention of Mountain's Security Intelligence Office ("SIO") for his involvement in the drug subculture in the institution. From November 2019 to mid-August, 2020, Mr. Karol was observed associating with known gang affiliates and on a number of occasions was found in possession of contraband, including unauthorised pills, handmade lighters, rolling papers and a toothpaste cap that tested positive for fentanyl. In addition, the SIO received source information that Mr. Karol was bringing contraband into Mountain and selling it inside the institution.

- [4] In July 2020, the SIO received confidential source information that Mr. Karol was selling drugs with another inmate ("Inmate 1"). An authorized telephone intercept of Inmate 1's phone calls on August 14 and 15, 2020 along with security video showed that Mr. Karol was letting Inmate 1 use his institutional phone card, which is strictly prohibited.
- [5] On August 18, 2020 the Warden approved an Authorization to intercept Mr. Karol's phone calls for 30 days pursuant to s. 94(1) of the CCRR. CSC's interception of Mr. Karol's telephone calls was part of an investigation of a number of inmates suspected of trafficking drugs and contraband that they smuggled into the institution. The Authorization was later extended to October 1, 2020 as the investigation was ongoing. The intercepts confirmed that Mr. Karol was involved in introducing and trafficking drugs and contraband in Mountain. I pause to note that Mr. Karol does not dispute this information.
- [6] On September 24, 2020, at the conclusion of their investigation, CSC staff conducted a search of the cells of the inmates under investigation. They found contraband including nicotine patches, a "hooter pen" and THC shatter, a cannabis product, in Mr. Karol's cell.
- [7] Information learned in the intercepted telephone calls was then used along with the other evidence gathered in the Assessment for Decision ("A4D") and Addendum, to support the recommendation that Mr. Karol be transferred to a higher security facility as the risk he posed could not be managed in a medium security institution.
- [8] On September 24, 2020 Mr. Karol and several other inmates - all of whom were suspected of trafficking in drugs and other contraband in the institution - were transferred from Mountain to maximum security at Kent. The transfer was done on an emergency involuntary basis as per s. 13 of the CCRR which provides:

13 (1) Section 12 does not apply where the Commissioner or a staff member designated in accordance with paragraph 5(1)(b) determines that it is necessary to immediately transfer an inmate for the security of the penitentiary or the safety of the inmate or any other person.

 - (2) Where the Commissioner or a staff member designated in accordance with paragraph 5(1)(b) determines that it is necessary to immediately transfer an inmate for the reasons set out in subsection (1), the institutional head of the penitentiary to which the inmate is transferred or a staff member designated by that institutional head shall
 - (a) meet with the inmate not more than two working days after the transfer to explain the reasons for the transfer and give the inmate an opportunity to make representations with respect to the transfer in person or, if the inmate prefers, in writing;
 - (b) forward the inmate's representations to the Commissioner or to a staff member designated in accordance with paragraph 5(1)(b); and
 - (c) give the inmate, within five working days after the final decision, written notice of the final decision respecting the transfer and the reasons for the decision.

[Emphasis added.]

- [9] On the same day, Mr. Karol was provided with a document advising that he was being transferred to Kent on an emergency involuntary basis because he "had been identified through intelligence including interception of communications, source information, and observations as being directly involved with the introduction of contraband and other unauthorized items for distribution with Mountain Institution".
- [10] On September 27, 2020, CSC served Mr. Karol with a Notice of Interception of Communications and Correspondence as required by s. 94(3) of the CCRR.
- [11] On September 28 or 29, 2020, CSC provided Mr. Karol with the following disclosure pursuant to their obligations under s. 27 of the Corrections and Conditional Release Act, S.C. 1992, c. 20 (CCRA) and ss. 12 and 13 of the CCRR:
- 1) A4D;
 - 2) Notice of Involuntary Transfer Movement;
 - 3) Security Reclassification Scale ("SRS"); and
 - 4) SRS Instruction Sheet.
- [12] In addition, Mr. Karol was advised of his right to retain and instruct counsel. Mr. Karol indicated that he wished to make representations regarding his transfer.
- [13] There followed an exchange of submissions between Mr. Karol and CSC. Mr. Karol requested and was granted a 10-day extension to file a written rebuttal. On October 13, 2020, counsel for Mr. Karol filed comprehensive written submissions. On October 19, 2020, CSC provided a written Addendum that outlined more details about the activities of Mr. Karol that led to the decision to transfer him, including information received through the intercepts. On October 26, 2020, counsel for Mr. Karol provided further written submissions. The primary thrust of counsel's submissions was that Mr. Karol was not provided with reasons for the authorization to intercept his calls which compromised his ability to make meaningful representations in challenging the transfer decision.
- [14] The Warden's Review Board Hearing to review the transfer decision took place on October 28, 2020. Mr. Karol attended the hearing remotely. His counsel's written submissions were considered. At the Warden's Review Board Hearing Mr. Karol did not challenge the veracity of the information other than to say that he was not involved in the institutional subculture. After considering all of the information and submissions the Warden approved the decision to increase Mr. Karol's security rating to maximum and his involuntary transfer to Kent.
- [15] As per s. 13(2)(c) of the CCRR the Warden was to give Mr. Karol written reasons for his decision within five days of the hearing. As above, this was not done until December 14, 2020, after Mr. Karol filed a formal complaint.

Law

[16] In order to issue a writ of habeas corpus the court must be satisfied that:

- 1) There was a deprivation of liberty; and
- 2) The deprivation was unlawful

(Khela at para. 30).

[17] The burden is on the applicant to show that there has been a deprivation of his liberty and that there is a legitimate ground on which to question the legality of that deprivation. The onus then shifts to the respondents to justify the lawfulness of the deprivation: *May v. Ferndale Institution*, 2005 SCC 82 at para. 71; *Khela* at para. 30.

[18] As Winteringham J. stated in *Bromby v. Warden of William Head Institution*, 2020 BCSC 1851 at para. 38 (citing *May* at paras. 74-77), "[a] deprivation of liberty will only be lawful if it occurred in a manner consistent with the Charter, the common law duty of procedural fairness, and the administrative decision maker's statutory jurisdiction." If the respondents cannot demonstrate that the deprivation of liberty is lawful, the applicant is entitled to be released from the unlawful deprivation of liberty and returned to his prior status: *Howdle v. Mission Medium Institution (Warden)*, 2020 BCCA 334 at para. 42.

[19] Procedural fairness requires, inter alia, that an inmate be given all information considered by the CSC in an emergency involuntary transfer decision within a reasonable time (CCRA, s. 27(1)) and an opportunity to make representations (CCRR, s. 13(2)(a)): *Howdle* at para. 45. However, the Supreme Court of Canada has emphasized that "[t]he requirements of procedural fairness must be assessed contextually in every circumstance": *May* at para. 90; *Khela* at para. 83.

[20] The respondents concede that the transfer from a medium security institution to a maximum security institution constitutes a deprivation of liberty. Accordingly, the issues on this application concern the lawfulness of the Warden's transfer decision.

Issues

[21] The two issues to be decided are:

- 1) whether the transfer decision is unlawful because the CSC did not satisfy the procedural requirements for the authorization of interception of Mr. Karol's communications under s. 94 of the CCRR; and
- 2) whether the transfer decision is unlawful because CSC did not provide Mr. Karol with written reasons for the transfer decision in the time period prescribed by paragraph 13(2)(c) of the CCRR?

[22] I will consider each issue in turn.

Issue 1: Whether the transfer decision is unlawful because the CSC did not satisfy the procedural requirements for the authorization of interception of Mr. Karol's communications under s. 94 of the CCRR

- [23] Mr. Karol submits that he was not provided the factual grounds of the authorization to intercept his telephone calls at the time of the authorization, as required.
- [24] He points to two procedural rights that make such disclosure mandatory. First, s. 94(3) of the CCRR mandates that where a communication is intercepted the warden "shall promptly inform the inmate, in writing, of the reasons for the interception and shall give the inmate an opportunity to make representations with respect thereto, unless the information would adversely affect an ongoing investigation, in which case the inmate shall be informed of the reasons and given an opportunity to make representations with respect thereto on completion of the investigation". While Mr. Karol was provided with a Notice of Interception, it only stated the statutory grounds upon which the authorization was based as opposed to the reasons for the interception. In other words, in Mr. Karol's submission, the mere identification of the statutory grounds in s. 94(1) is insufficient to discharge the Warden's duty to provide written reasons.
- [25] Second, s. 27 of the CCRA puts a corresponding duty on the CSC to disclose information where an inmate's rights to receive reasons and make representations under s. 94(3) is triggered. The relevant portions read as follows:
- (2) Where an offender is entitled by this Part or the regulations to be given reasons for a decision taken by the Service about the offender, the person or body that takes the decision shall, subject to subsection (3), give the offender, forthwith after the decision is taken, all the information that was considered in the taking of the decision or a summary of that information.
 - (3) Except in relation to decisions on disciplinary offences, where the Commissioner has reasonable grounds to believe that disclosure of information under subsection (1) or (2) would jeopardize
 - (a) the safety of any person,
 - (b) the security of a penitentiary, or
 - (c) the conduct of any lawful investigation,

the Commissioner may authorize the withholding from the offender of as much information as is strictly necessary in order to protect the interest identified in paragraph (a), (b) or (c).

[Emphasis added.]

- [26] Mr. Karol argues that the failure to provide the grounds for the authorization until the final written decision compromised his right to challenge same. As such it amounted to a violation of procedural fairness and rendered the transfer unlawful.

[27] The respondents counter that Mr. Karol was given the reasons for the intercept both in the A4D and the Addendum. I agree.

[28] The A4D provides a summary of information gathered about Mr. Karol from November 2019 to mid-August, 2020 including that:

- 1) Mr. Karol was observed associating with known gang affiliates;
- 2) on a number of occasions he was found in possession of contraband, including unauthorised pills, rolling papers and a toothpaste cap that tested positive for fentanyl;
- 3) source information was received that he was bringing contraband into Mountain and selling it inside;
- 4) in July 2020 the SIO received confidential source information that Mr. Karol was selling drugs in the institution with Inmate 1; and
- 5) the authorized phone intercept of Inmate 1's phone calls on August 14 and 15, 2020 along with security video showed Mr. Karol allowing Inmate 1 to use his institutional phone card.

[29] This information is set out in the A4D and then is immediately followed by this passage:

On 2020-08-15 Mr. Karol was placed on authorised telephone intercept for a 30-day period, due to there being sufficient grounds that his calls would contain information regarding the safety and security

[30] It is clear that the preceding summary comprised the reasons for the authorization.

[31] The Addendum written in response to Mr. Karol's written submissions provides further information.

[32] Mr. Karol submits that he was finally given the reason for the intercepts in the Warden's final written decision, which reads as follows:

As outlined the rebuttal provided on behalf of Mr. KAROL noted that there was a lack of information on the telephone intercepts and questioned whether there were reasonable grounds to authorize the telephone intercepts. As outlined the Assessment for Decision, Addendum, and by the Security Intelligence Department his Wardens Board, there were grounds to authorize a telephone intercept. Mr. KAROL was allowing another inmate to use his phone card to make calls which was verified by the other inmates telephone intercept and CCTV footage. As outlined in the Assessment for Decision, Mr. KAROL is seen making a phone call and handing to the inmate. Furthermore, and as outlined in the preceding paragraph there is source information linking Mr. KAROL to the Institutional subculture.

[33] I note that this is a restatement of what is contained in the A4D and Addendum.

[34] The duty on the institution is to provide the reasons for the authorization. There is no form prescribed by either the CCRR or the CCRA. I have reviewed a confidential affidavit provided by the respondents containing the information used by the SIO to obtain the telephone

intercept authorization and can confirm that the reasons for the authorization are set out in the A4D and Addendum. As was stated in both the A4D and Addendum, only information required to protect the safety and security of a person was withheld pursuant to s. 27(3) of the CCRA.

[35] I am satisfied that Mr. Karol was provided with the reasons for the intercept. I reject this argument.

[36] I now turn to the next issue.

Issue 2: Whether the transfer decision is unlawful because CSC did not provide Mr. Karol with written reasons for the transfer decision in the time period prescribed by paragraph 13(2)(c) of the CCRR

[37] As set out above, s. 13(2)(c) of the CCRR provides that the Warden shall give the inmate written notice of the final decision respecting the transfer and the reasons for same within five days of the final decision. In this case, the Warden made the final decision on October 28, 2020 but did not provide Mr. Karol with his written decision until December 14, 2020, nearly two weeks after Mr. Karol had filed a formal complaint.

[38] Mr. Karol contends that this delay caused him prejudice as he was not able to get approved for legal aid until he had the written reasons and accordingly, was delayed in having counsel to bring this application. Mr. Karol telephoned Legal Aid BC on November 5, 2020 to apply for legal aid to bring this application. Legal Aid sent him a letter dated November 9, 2020 informing him that he must obtain and send a copy of the Warden's written decision. Mr. Karol submitted the material to Legal Aid on December 18, 2020. He was approved for legal aid on January 6, 2021.

[39] Mr. Karol relies on Bromby for the proposition that six weeks' delay is a breach of procedural fairness. Bromby involved an inmate who brought a habeas corpus application challenging his emergency involuntary transfer from a minimum security to a medium security institution. An oral hearing was conducted on January 21, 2020, but written reasons for the warden's decision were not provided to Mr. Bromby until approximately three weeks later on February 20, 2020. Winteringham J. determined that the delay was likely the result of the warden ensuring his reasons were optimally drafted in anticipation of defending his decision against Mr. Bromby's impending legal challenge. She noted that compliance with the five-day timeline ensures fairness and assists inmates in instructing counsel in a timely manner should review be necessary (para. 55). Looking at the process as a whole to determine whether it was procedurally unfair, Winteringham J. held that, although the warden's failure to provide timely written reasons was "extremely close to the line," the decision-making process did not constitute a breach of procedural fairness (para. 56).

- [40] Mr. Karol submits that if three weeks in Bromby was held to be "extremely close to the line", the almost six weeks here is clearly a breach which renders the transfer decision unlawful. Also, Mr. Karol submits that Mr. Bromby did not need to make a complaint regarding the delay whereas he did.
- [41] The respondents acknowledge that they failed to meet the deadline. On December 21, 2020, CSC wrote to Mr. Karol expressly acknowledging the delay in the sharing of his transfer decision documents. An affidavit filed on this hearing by the staff member tasked with writing the reasons explains that the delay was due to personal and work-related reasons. This information was not provided to absolve the Warden of his responsibility but rather to show that the delay was the result of oversight or inadvertence- unlike in Bromby, where the delay was caused by the warden's efforts to prepare for a legal challenge.
- [42] Not every breach of the CCRA and CCRR is unfair: Khela at para. 90; Bromby at para. 55. The task for the reviewing judge is to determine whether an error or technical breach of statute rendered the decision procedurally unfair in all of the circumstances: Khela at para. 90; Bromby at para. 56.
- [43] Here, Mr. Karol already had counsel who had filed two written submissions for the Warden's hearing. Unlike in Bromby, where the applicant raised a number of substantive challenges, Mr. Karol's only ground for challenging the transfer decision (as opposed to the authorization for intercept) is the delay in delivering written reasons. As pointed out by the respondents on this application, Mr. Karol took no issue with the accuracy, reliability or credibility of the information upon which the Warden based his transfer decision. If there was prejudice, it was that the filing of Mr. Karol's application was delayed a few weeks as he does not dispute the fairness of the Warden's Board Review Hearing.
- [44] Having considered all of the circumstances, I am satisfied that the delay does not constitute a breach of procedural fairness.
- [45] As in Bromby, this finding should not be taken to justify the Warden's six-week delay in providing Mr. Karol with written reasons. In my view, while the Warden's oversight or inadvertence is worthy of rebuke, the ultimate effect of this irregularity on Mr. Karol's right to procedural fairness was minor. No substantial wrong or prejudice was caused by it. Mr. Karol knew the case he had to meet and he was also provided with a full and meaningful opportunity to respond to the Warden's decision with the assistance of counsel.

Conclusion

[46] For the reasons above, I am satisfied that the respondents have demonstrated that Mr. Karol was provided the procedural rights he was entitled to under the CCRA and the CCRR. Mr. Karol was promptly provided extensive information regarding the reasons for his emergency involuntary transfer from medium security at Mountain to maximum security at Kent. He was also provided ample opportunity to make full submissions before the Warden. As such, I am of the view that the Warden acted lawfully in transferring him to Kent.

[47] In all of the circumstances, I am satisfied that the Warden's decision to authorize the emergency involuntary transfer of Mr. Karol to Kent was procedurally fair. Mr. Karol's habeas corpus application is dismissed.

"The Honourable Madam Justice Murray"

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