
CANADA / JUDGMENT

Keiros-Meyer v. Canada (Attorney General)

2018 BCSC 1104

COURT

Supreme Court of British Columbia

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2018 BCSC 1104 Keiros-Meyer v. Canada (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Keiros-Meyer v. Canada (Attorney General),

2018 BCSC 1104

Date: 20180704

Docket: 27410

Registry: Vancouver

Between:

Albert Israel Keiros-Meyer

Applicant

And

Canada (Attorney General)

Respondent

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

Counsel for the Attorney General of Canada:

Mark East

The Applicant appearing in person:

Albert Israel Keiros-Meyer

Place and Date of Hearing:

Vancouver, B.C.

March 5 and 9 and

April 9 and 10, 2018

Place and Date of Judgment:

Vancouver, B.C.

July 4, 2018

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Introduction

- [1] The applicant Albert Keiros-Meyer is serving a life sentence for second degree murder. He has been incarcerated in the federal penitentiary system since November 1993. In August 2017, he was voluntarily transferred from the Minimum Security facilities at William Head Institution on Vancouver Island to the Minimum Security Unit of Mission Institution (Mission Minimum).

- [2] On January 24, 2018, Mr. Keiros-Meyer was involuntarily transferred, on an interim basis, to the Medium Security Unit of Mission Institution (Mission Medium). On February 12, 2018, the Warden of Mission Institution made a decision (the "Decision") that the transfer should be permanent. Mr. Keiros-Meyer now applies for a writ of habeas corpus with certiorari in aid seeking his release from Mission Medium and transfer back to Mission Minimum.

Position of the Parties

- [3] Mr. Keiros-Meyer submits that the Decision was made without jurisdiction and was unreasonable. He alleges 11 errors, which are set out in his written submission as follows:

PROCEDURAL ERRORS: The Institution:

1. acted without legally mandated transfer warrant;
2. acted to violate rights on arrest/detainment;
3. acted willfully to not record the Warden's Report;
4. acted to deny access to personal legal materials;
6. acted to improperly punish for tattooing under administrative disguise;
7. acted to deny or frustrate adequate disclosure;

MERITS ERRORS:

9. re Tattooing nowhere prohibited at law or policy;
 10. re KM tattooing his genitals is not basis to raise risk;
 11. re Healthcare representations were not sufficient basis to raise risk;
 12. re KM's alleged lack of insight relating to index offence not sufficient basis to raise risk;
 13. re Improper consideration of PLS [Prisoners' Legal Services] representations.
- [4] The respondent's position is that the Warden had the jurisdiction to make the Decision, that the procedure followed was procedurally fair to Mr. Keiros-Meyer and that the Decision was reasonable. The respondent concedes that it has the onus of establishing these positions.
- [5] The respondent submits that the standard of review on procedural fairness is whether the reviewing court concludes that it was fair, that true questions of jurisdiction are reviewable on a correctness standard and that the merits of the Decision are reviewable on a reasonableness standard.
- [6] For the reasons that follow, I allow the application on the narrow ground that the respondent has not demonstrated that it has complied with its own regulations governing the transfer of inmates to a higher level of security.

Background

- [7] On his arrival at Mission Minimum, Mr. Keiros-Meyer was provided with an updated Correctional Plan by his Case Management Team (CMT). One purpose of the Correctional Plan was to outline the Institution's expectations of Mr. Keiros-Meyer's behaviour while he resided at Mission Minimum.
- [8] A particular issue raised in the Correctional Plan was that when Mr. Keiros-Meyer dealt with healthcare staff, his interactions were to remain focused on medical issues and his conversations were to be appropriate for that purpose. In this document, Mr. Keiros-Meyer was informed that conversations with medical staff that were considered to be non-medical would result in a review of his evaluation against identified areas of risk. He was also informed that such a review could lead to a review of his security classification.
- [9] On January 23, 2018, Mr. Keiros-Meyer saw the doctor at Mission Minimum. The purpose of his appointment was to obtain antibiotic cream and band aids for his genitals. The doctor's consultation notes indicated that Mr. Keiros-Meyer tried to describe his masturbation practices to the doctor in excessive and uncomfortable detail, which the doctor described as "not an unusual thing". The doctor also noted that Mr. Keiros-Meyer had a heavily tattooed penis, including a tattoo of the words "your name" on the side. The doctor's note indicated that Mr. Keiros-Meyer seemed to enjoy saying "See, your name is on the side of my penis".
- [10] A male nurse who was present for the appointment also prepared a note confirming that this statement had been made and that the expression on Mr. Keiros-Meyer's face indicated that he was enjoying making the statement.
- [11] On January 24, 2018, Corrections Officers Ken Cochrane and Scott Clark were instructed to locate Mr. Keiros-Meyer within Mission Minimum and to escort him to the Institution's duty office.
- [12] Officer Cochrane deposes that Mr. Keiros-Meyer was taken to the duty office and strip-searched. He was then placed in a holding cell but was not otherwise restrained.
- [13] At approximately 14:43 that day, acting Corrections Manager Craig Martens and Institutional Parole Officer Kevin Johnson escorted Mr. Keiros-Meyer to the Visits and Correspondence Area of Mission Minimum. They then interviewed him in that area about his recent behaviour and in particular, his behaviour on January 23 at his doctor's appointment.
- [14] In the course of the interview, Acting Assistant Warden/Interventions Jason Strijack entered the room and informed Mr. Keiros-Meyer that he was being transferred to the open population of Mission Medium on an interim placement basis. At that time, Mr. Strijack provided Mr. Keiros-Meyer with a document entitled Notification of Access to Legal Counsel.

- [15] This document informed him that he was being placed in Mission Medium on an interim basis, pursuant to Commissioner's Directive 710-2-4 ("CD 710-2-4"). The memorandum confirmed that he had a right to retain and instruct counsel, and that he would be provided with transfer documentation within the next two business days. Mr. Keiros-Meyer acknowledged receipt of the memorandum by signing a copy of the document.
- [16] At the conclusion of the interview, Mr. Keiros-Meyer was moved to Mission Medium where he has remained.
- [17] The Corrections and Conditional Release Act, S.C. 1992, c. 20 [CCRA] governs the manner in which the custody and control of inmates in the federal penitentiary system is administered.
- [18] CD 710-2-4 sets out two alternative but similar procedures for the movement of inmates to a higher security unit within an institution. Section 8 requires that an inmate be provided with advance notice of such a move and be given two working days to respond in writing to the movement.
- [19] Section 12 permits an inmate to be moved immediately if it is determined necessary to do so for security reasons or for the safety of the inmate or any other person. If an inmate is moved immediately, sections 13-18 provide him/her with essentially the same procedural rights provided under section 8, except that they are to be provided within two working days after the transfer.
- [20] Sections 13-18 provide as follows:
13. In such circumstances, within two working days after the movement, the Institutional Head or designate will:
 - a. meet with the inmate to explain the reasons for the movement
 - b. give the inmate written notice of the movement via a "Notice of Involuntary Transfer/Movement Recommendation" which will:
 - i. clearly state the reasons for the recommendation for the movement
 - ii. advise the inmate of his/her right to legal counsel without delay
 - iii. advise the inmate that he/she can prepare and make representations in person or in writing with respect to the movement in the next two working days
 - iv. advise the inmate of his/her right to request an extension of up to 10 working days to prepare and submit a rebuttal
 - v. be signed by the inmate and a copy will be provided to him/her.
 14. The Parole Officer/Primary Worker will complete the Assessment for Decision pursuant to Annex B of these Guidelines.
 15. The inmate will be provided with a copy of:

- a. the Assessment for Decision
 - b. the Security Reclassification Scale or Security Reclassification Scale for Women
 - c. the Security Reclassification Scale Functional Specification (scoring matrix) (or ensure that the inmate has access to it)
 - d. any other information that will be used in the decision-making process.
16. The inmate will be provided two working days to respond in person or in writing to the movement. When the inmate responds in person, the response must be documented in a "Casework Record - Rebuttal".
 17. The inmate's rebuttal, a copy of the most recent Correctional Plan Update (if required) and the Assessment for Decision will be forwarded to the appropriate decision maker as outlined in Annex C of these Guidelines.
 18. The inmate will be provided with a written notice of the final decision and the associated reasons via the CSC Board Review/Decision Sheet within five working days of the final decision.
- [21] On January 25, 2018, the day after he had been transferred to Mission Medium, Mr. Keiros-Meyer was given the Notice of Involuntary Transfer/Movement Recommendation referred to in section 13(b) of CD 710-2-4. This document informed him that Jon Hoogerdyk, the Manager Assessment Intervention, had recommended that he be studied for involuntary transfer to Mission Medium.
- [22] The Notice was contained in a form which stated that Mr. Hoogerdyk was acting pursuant to s. 29 of the CCRA. This was not an accurate description of the authority pursuant to which Mr. Hoogerdyk was acting. I will return to the significance of this error later in these reasons.
- [23] At the same time, Mr. Keiros-Meyer was given a copy of an Assessment for Decision (A4D), giving reasons for recommending that he be transferred to Mission Medium. In addition to referring to the circumstances of Mr. Keiros-Meyer's doctor's visit, this document reported that he has been secretly tattooing himself and that tattooing paraphernalia had been found in his cell when it was searched. It should be noted that Mr. Keiros-Meyer had informed prison staff of the presence of such paraphernalia when he had been interviewed on January 24.
- [24] An important tool used by Corrections staff in evaluating an inmate's security classification is a Security Reclassification Scale (SRS), alternatively known as General Statistical Information on Recidivism Scale (G-SIR). This scale consists of 15 questions, the answers to each of which result in a range of scores. The total score arrived at in this scale is very important in deciding what level of security is required for any particular inmate. When Mr. Keiros-Meyer was transferred to Mission Minimum, his score was consistent with him being housed in a minimum security institution.

- [25] Following Mr. Keiros-Meyer's behaviour on January 23, 2018, his SRS score was raised to 20.5, which put him in the mandatory medium security category. Mr. Keiros-Meyer was also provided with a functional specification showing how the scores for each of the questions on the SRS were determined.
- [26] I am satisfied that Mr. Keiros-Meyer was also provided with copies of the following documents by January 30, 2018:
1. Psychology Report dated May 18, 2017;
 2. Psychology Report dated August 27, 2012; and
 3. A document entitled SRS scoring criteria, which explained how the scores in the SRS are determined.
- [27] Mr. Keiros-Meyer acknowledged receipt of these documents by initialling an Information Sharing Checklist Update on that date.
- [28] After delivery of these documents, Mr. Keiros-Meyer consulted with Prisoners' Legal Services and with their assistance prepared an Inmate's Representations Rebuttal and submitted it on February 5, 2018.
- [29] A Warden's Review Board hearing was held on February 6, 2018 to address the recommendation of Mr. Keiros-Meyer's CMT to reclassify him as a medium security inmate and involuntarily transfer him to Mission Medium.
- [30] The following persons attended the Warden's Review Board hearing;
1. The Warden, Shawn Huish;
 2. Acting Assistant Warden, Interventions, Jason Strijack;
 3. Security Intelligence Officer D. Singh;
 4. Institutional Parole Officer Kevin Johnson;
 5. A/MAI C. McKenzie;
 6. Elder Bill Senger; and
 7. Mr. Keiros-Meyer.
- [31] At the Warden's hearing, Mr. Keiros-Meyer made oral submissions and a submission was filed on his behalf by Prisoners' Legal Services.
- [32] In the Decision, the Warden approved the recommendation and ordered that Mr. Keiros-Meyer be classified as medium security and involuntarily transferred to Mission Medium.

Legal Principles

- [33] The respondent concedes that Mr. Keiros-Meyer suffered a deprivation of his liberty when he was involuntarily transferred from a minimum to a medium security facility and that Mr. Keiros-Meyer is entitled to seek the remedy of habeas corpus in this court, notwithstanding that he could have sought judicial review of the Decision in the Federal Court. In *May v. Ferndale Institution*, 2005 SCC 82, the Court held that inmates are entitled to choose whether to challenge an unlawful restriction of liberty by way of habeas corpus in a provincial superior court or by way of judicial review in Federal Court (at para. 33).
- [34] On an application for habeas corpus, the applicant must show that he has suffered a deprivation of liberty and some basis to question the legality of that deprivation. If the applicant does so, the respondent must show that the deprivation was lawful: *May*, at paras. 71, 74, 77; and *Mission Institution v. Khela*, 2014 SCC 24 at paras. 30 and 41.
- [35] A deprivation of liberty is unlawful if it was made without jurisdiction or in breach of the principles of procedural fairness. A decision to deprive a person of his residual liberty which is unreasonable will also be subject to relief by way of habeas corpus.
- [36] The principles are summarized in *Khela*:
- [40] Further, on an application for judicial review, it is the applicant who must show that the federal decision maker made an error (*May*, at para. 71, citing to s. 18.1(4) of the FCA), whereas, on an application for habeas corpus, the legal burden rests with the detaining authorities once the prisoner has established a deprivation of liberty and raised a legitimate ground upon which to challenge its legality (*May*, at para. 71; *Farbey, Sharpe and Atrill*, at pp. 84-86). This particular shift in onus is unique to the writ of habeas corpus. Shifting the legal burden onto the detaining authorities is compatible with the very foundation of the law of habeas corpus, namely that a deprivation of liberty is permissible only if the party effecting the deprivation can demonstrate that it is justified. The shift is particularly understandable in the context of an emergency or involuntary inmate transfer, as an individual who has been deprived of liberty in such a context will not have the requisite resources or the ability to discover why the deprivation has occurred or to build a case that it was unlawful. On an application for judicial review, on the other hand, the onus remains on the individual challenging the impugned decision to show that the decision was unreasonable.
- [41] Finally, judicial review is an inherently discretionary remedy (C. Ford, "Dogs and Tails: Remedies in Administrative Law", in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2nd ed. 2013), 85, at pp. 107-9). On an application for judicial review, the court has the authority to determine at the beginning of the hearing whether the case should proceed (D. J. Mullan, *Administrative Law* (2001), at p. 481). In contrast, a writ of habeas corpus issues as of right if the applicant proves a deprivation of liberty and raises a legitimate ground upon which to question the legality of the deprivation. In other words, the matter must proceed to a hearing if the inmate shows some basis for concluding that the detention

is unlawful (May, at paras. 33 and 71; Farbey, Sharpe and Atrill, at pp. 52-54).

Discussion of Mr. Keiros-Meyer's Arguments

There was no legally mandated Transfer Warrant

[37] Mr. Keiros-Meyer submits that he was transferred from one institution to another and that such a transfer may only be effected by the Commissioner, defined in the CCRA as the Commissioner appointed pursuant to s. 6(1).

[38] Mr. Keiros-Meyer bases this argument on the fact that the document that initiated his transfer, the Notice of Involuntary Transfer, states that it was issued pursuant to s. 29 of the CCRA. Section 29 provides as follows:

29 The Commissioner may authorize the transfer of a person who is sentenced, transferred or committed to a penitentiary to

- (a) another penitentiary in accordance with the regulations made under paragraph 96(d), subject to section 28; or
- (b) a provincial correctional facility or hospital in accordance with an agreement entered into under paragraph 16(1)(a) and any applicable regulations.

[39] Mr. Keiros-Meyer's submission is that the person who signed the Notice of Involuntary Transfer, Jon Hoogerdyk, was not the Commissioner and had no jurisdiction to order it. In addition, he submits that a transfer from one institution to another requires a Warrant and no such Warrant was issued in this case.

[40] I do not accept this argument.

[41] I accept the respondent's submission that Mr. Keiros-Meyer was not transferred from one institution to another and that s. 29 of the CCRA is therefore not applicable to him. I find that Mission Institution is a clustered institution as defined in Commissioner's Directive 706. Section 97 of the CCRA gives the Commissioner the authority to make rules. Commissioner's Directive 706 is such a rule. Therefore no warrant was required to effect his transfer from one unit to another within a clustered institution.

[42] I am satisfied that Mr. Keiros-Meyer's transfer was governed by CD 710-2-4, which governs movement of inmates within clustered institutions.

[43] I find that the reference to s. 29 of the CCRA in the Notice of Involuntary Transfer was an immaterial error that did not affect the validity of the Notice or deprive the Institutional Head of the jurisdiction to proceed with the transfer.

[44] I am also satisfied that Mr. Keiros-Meyer was not prejudiced by the reference to s. 29, nor was it unfair to him for the Institution to proceed with the process after issuing this document.

Violation of Section 10 of the Charter

- [45] Mr. Keiros-Meyer submits that his rights pursuant to s. 10 of the Canadian Charter of Rights and Freedoms, entitled him to obtain legal counsel when he was placed in the holding cell on January 24, 2018, or alternatively when he was interviewed by CM Martens and PO Johnston on the same day.
- [46] The main point made by Mr. Keiros-Meyer was that his being taken to a holding cell, interviewed and involuntarily transferred to medium security entitled him to the same rights he would have had on arrest.
- [47] The respondent submits that Mr. Keiros-Meyer's rights with respect to access to legal counsel were governed by the regulatory regime applying to inmates on a change of security classification, and that he was afforded those rights, that is, the rights set out in CD 710-2-4.
- [48] Subject to my conclusion that the respondent has not demonstrated that it was necessary for security reasons to immediately move Mr. Keiros-Meyer, I am satisfied that he was given a reasonable opportunity to retain and instruct counsel without delay. He was provided with notice of that right by a memorandum on January 24, 2018, the same day he was transferred to Mission Minimum.
- [49] Mr. Keiros-Meyer acknowledged receipt of the memorandum by signing a copy of the document. He did consult with Prisoners' Legal Services, who assisted him in preparing his rebuttal.
- [50] Mr. Keiros-Meyer also relied on the provisions of CD 581, which deals with Violations of the Law by inmates. In my view those provisions did not apply to the steps taken with respect to increasing his security classification.
- [51] Similarly, I do not consider that s. 10 of the Charter was engaged in this case. Mr. Keiros-Meyer was not arrested or detained. He clearly was not arrested and was already detained by virtue of being an inmate in a penitentiary. In *Richer v. Pinel*, 2003 FC 887, Justice Russell explained the limited role of s. 10 of the Charter to administrative measures taken in custodial institutions:
- [14] As regards an inmate's right to counsel under section 10 of the Charter, this has been dealt with in *Bryan Rolston Latham (Applicant) v. Solicitor General of Canada and his agents, National Parole Board and Correctional Service of Canada*, part of which used to be called *Parole Service of Canada (Respondents)*, [1984] 2 F.C. 734 (T.D.) and cases that have followed it. In *Latham*, supra, where an inmate had his parole revoked and suffered a significant loss of freedom as a result, Strayer J. ruled that there was no right to counsel:

I have concluded that this guarantee does not apply to the present situation. While counsel cited no authority on this point, it appears to me that this paragraph is designed to cover the situation of initial arrest or detention. The phrase "on arrest or detention" would suggest as much. Otherwise, in the context of prison there would be a continuing duty, day by day, for prison authorities to advise inmates of their right to counsel.

[151] This approach has been followed in *Everingham v. Ontario*, [1993] O.J. No. 55, and by this Court in *Olson v. Canada* 39 F.T.R. 77 and *Henry v. Canada* 29 C.R.R. 149 where, at page 155, Strayer J. again addressed the scope of section 10(b) of the Charter.

Section 10(b) with respect to the right to "retain and instruct counsel" is irrelevant as it applies only "in arrest and detention". This clearly is designed to protect a person when first arrested or detained and does not apply to a person imprisoned on a continuing basis subsequent to conviction, which is the situation in the present case where the plaintiff complains of improper interference with his correspondence with barristers and solicitors in respect of various proceedings he wishes to take to reopen his convictions (unsuccessfully appealed already) and to obtain remedies concerning the conditions of his confinement.

Failure to Record Warden's Board Proceedings

- [52] Mr. Keiros-Meyer deposes that he requested that the proceedings at the Warden's Board hearing be recorded but that his request was refused. He submits that he has been prejudiced by the unavailability of a recording or transcript of what occurred during the hearing. In particular, he complains that he was interrupted and cut off when making his submissions to the Warden. In oral argument he asserted that the Warden did not review his written submission.
- [53] As the respondent points out, there is no specific requirement in the CCRA, CCRR nor any Commissioner's Directive requiring that proceedings at a Warden's court be recorded.
- [54] I conclude that failure to record or transcribe the Warden's Board proceedings does not constitute a standalone ground for overturning the Decision. The lack of a record of the oral evidence at a hearing could in some circumstances lead to a conclusion that a person had been denied procedural fairness or lead the court to conclude that there was not a sufficient record on which to determine whether the decision was reasonable. However, I do not find this to be such a case.
- [55] Mr. Keiros-Meyer deposes that he was treated in a dismissive and demeaning manner by the Institution's employees during his oral hearing before the Warden. I have considered this evidence but am not persuaded by it that he was denied a fair hearing. Most of the evidence relied upon by Mr. Keiros-Meyer relates to comments made by persons other than the Warden. In addition, the substance of the comments alleged to have been made was to point out to Mr. Keiros-Meyer that it was his lack of insight into the implications of his behaviour that had prompted the review of his security classification.

[56] In this case, I am satisfied that there is an adequate record for the court to assess whether Mr. Keiros-Meyer received a fair hearing. Taking into account all the evidence, including the Decision, I conclude that the hearing was fair.

[57] I therefore would not give effect to this argument.

Denial of Access to Legal Materials

[58] Mr. Keiros-Meyer submits that he was denied access to legal materials that were crucial to his defence. In his written submission he makes generic reference to what he describes as crucial evidence, information and records which were in his cell at the time of his involuntary transfer.

[59] The difficulty I have with this submission is that Mr. Keiros-Meyer has not shown how any of this information was relevant to the issue of his reclassification.

[60] Mr. Keiros-Meyer's submissions are to a large extent based on the premise that his reclassification process amounted to a disciplinary hearing about his conduct. In my view that is not a correct characterization of the process he was undergoing.

[61] I will return to this point when assessing the reasonableness of the Decision. However, at this point, it is sufficient to state that the issue before the Warden was an overall assessment of Mr. Keiros-Meyer's security classification. The Decision was based on his behaviour in January 2018, the implications of his conduct in secretly tattooing himself as a coping mechanism in the two-year period leading up to that time, as well as an assessment of his insight into his behaviour.

[62] I can see no relevance to the information to which Mr. Keiros-Meyer says he was denied access. In addition, Mr. Keiros-Meyer expressly declined to seek a postponement of the Warden's hearing to obtain this material.

[63] I would therefore not give effect to this argument.

Warden acted to Punish under Administrative Disguise

[64] Mr. Keiros-Meyer submits that his reclassification is an improper attempt to punish him for tattooing himself. He submits that there is no prohibition against inmates tattooing themselves and points out that Corrections provides services to reduce the risk of harm from infected instruments or ink used in tattooing.

[65] He denies that his possession of the items he used to tattoo himself was unlawful because he had fabricated that equipment from items which he was authorized to possess in pursuit of hobbies.

[66] I find that the issue of tattooing was of concern because it demonstrated a lack of ability to deal constructively with adversity.

[67] In my view, Mr. Keiros-Meyer has misconceived the significance of his tattooing to the decision to reclassify him. I find it was not intended to punish Mr. Keiros-Meyer for tattooing. There is nothing in the record on which the Warden based the Decision nor in the evidence filed on this application that supports the conclusion that the movement to Mission Medium was punishment for that activity.

[68] I therefore reject this alleged error.

Denial of Adequate Disclosure of Material Relied Upon

[69] Mr. Keiros-Meyer submits that the respondent has not demonstrated that he was provided with all information that the Warden relied upon in making the Decision. He relies on *Russell v. Ferndale Institution (Warden)*, 2013 BCSC 957. In that case, Justice McEwan set aside a Warden's decision to transfer an inmate from a minimum to a medium security facility because the respondent institution had not established that it had provided the inmate with all of the information that the Warden had relied on in making the decision.

[70] I accept the respondent's submission that s. 27 of the CCRA requires the Warden to provide a copy of all the information or a summary of the information relied on in making the Decision.

[71] In this case, Jason Strijack, the Acting Assistant Warden, Interventions at Mission Institution has deposed that he was present at the Warden's hearing and that Mr. Keiros-Meyer was provided with all the information relied on by the Warden in making his decision, or a summary thereof.

[72] In addition, the Decision sets out the information the Warden relied upon and the record shows that all of that information or a summary of it was provided to Mr. Keiros-Meyer prior to the Warden's Board hearing.

[73] Mr. Keiros-Meyer also submits that adequate disclosure was not made because the Warden failed to disclose what other options were considered to resolve the matter under consideration. However, in my view that submission ignores the fact that the matter under consideration was his proper classification. The Warden was not imposing a punishment on Mr. Keiros-Meyer. In my view, this argument goes to the reasonableness of the Decision, which I will address later in these reasons.

[74] Mr. Keiros-Meyer also submits that the copy of the scaling tool used to determine his rating was not provided to him; that he was only provided with a heavily redacted version. However, I accept the submission of respondent's counsel that the only redactions in the version provided to Mr. Keiros-Meyer were the instructions to persons on how to input the information into the scaling tool. I find that the redacted material was not relevant to the matters under consideration by the Warden.

[75] I therefore find that the respondent has established that all information or a summary thereof was provided to Mr. Keiros-Meyer in compliance with s. 27 of the CCRA.

[76] I therefore do not accept the procedural errors arguments raised by Mr. Keiros-Meyer as framed by him.

Non-compliance with CD 710-2-4

[77] However, I have also concluded that the respondent has not established that it complied with CD 710-2-4 in this case.

[78] Commissioner's Directive 710-2 (CD 710-2) deals with all transfers of inmates. Its stated purpose is to manage institutional populations by transferring inmates to an environment consistent with their security requirements, including movements of inmates within clustered and multi-level institutions. Paragraph 7(k) of CD 710-2 requires the head of an institution to ensure that the processes outlined in CD 710-2-4 be respected.

[79] The respondent was therefore required to comply with the requirements of CD 710-2-4 in the process of transferring Mr. Keiros-Meyer from minimum to medium security within Mission Institution. The respondent has the burden of establishing that Mr. Keiros-Meyer was dealt with in accordance with those provisions.

[80] Section 8 of CD 710-2-4 sets out the procedure that must be followed by the institution when an inmate is moved to a higher security level location. Section 8 requires that the institution provide the inmate with a number of procedural safeguards before the movement takes place. Section 8(d) requires that the inmate be provided with at least two working days to respond to the proposed movement before he/she is moved. In this case these provisions were not complied with.

[81] Section 12 of CD 710-2-4 permits the immediate movement of an inmate for security reasons. It provides as follows:

12. When it is determined necessary to immediately move an inmate for security reasons or the safety of the inmate or any other person, the inmate will:
 - a. be placed in administrative segregation, when the criteria for a segregation placement are deemed to have been met pursuant to CD 709 - Administrative Segregation, or
 - b. be moved to the higher security level location on an interim placement pending a review of his/her security classification level. A Threat Risk Assessment will be completed prior to integrating the inmate.

[82] Section 13 provides that an inmate who has been moved immediately, is entitled to the same procedural rights contained in section 8, except that those rights must be provided within two working days after the movement. As I have indicated elsewhere in these reasons, I am satisfied that Mr. Keiros-Meyer was accorded the procedural rights set out in section 13 after he had been moved to Mission Medium.

- [83] However, there is nothing in the respondent's evidence explaining why it was determined necessary to move Mr. Keiros-Meyer immediately. In his submissions, counsel for the respondent stated that Mr. Keiros-Meyer had been moved pursuant to section 12, but did not give any reason for that movement or refer me to any evidence showing why an immediate move was necessary.
- [84] I have reviewed the record filed on this application and there is no explanation for the immediate movement and no evidence on which I could infer that security reasons required Mr. Keiros-Meyer's immediate movement.
- [85] Neither Mr. Hoogerdyk nor Mr. Johnson state why it was necessary to move Mr. Keiros-Meyer immediately.
- [86] The first affidavit of Jon Hoogerdyk simply states that Mr. Keiros-Meyer was informed on January 24, 2018 that he was to be involuntarily moved to Mission Medium. At that time no reasons were given to him as to why the movement had to take place immediately. Later in this affidavit, Mr. Hoogerdyk mistakenly stated that Mr. Keiros-Meyer was transferred to Mission Medium the next day. However, that mistake was corrected in a subsequent affidavit of Kevin Johnson, which confirmed that he was in fact moved on January 24.

[87] The Decision states:

On 2018-01-25, [the day after the movement] you were provided with all documentation pertaining to the Involuntary Transfer. You received a Security Reclassification Scale (SRS), an Assessment for Decision (A4D), and Notice of Involuntary Transfer Recommendation, as well as a copy of the Security Classification Scale Functional Specification. The reports outline the reasons why the Case Management Team believes you are no longer suitable for minimum security and the rationale for the Involuntary Transfer recommendation.

- [88] I have concluded that the failure of the respondent to establish that it complied with its own procedural rules (i.e. the failure to establish why the inmate transfer had to occur "immediately" rather than follow the procedure set out in section 8 of CD 710-2-4) means that the remedy of habeas corpus must be granted. Section 8 of CD 710-2-4 clearly requires that an inmate should have reasonable notice before being moved to a higher security location. The respondent acknowledges the settled law that such a move constitutes a restriction of an inmate's liberty. It also requires the inmate to vacate his/her existing place of residence. It is, therefore, a move that has a significant impact on the inmate's life.
- [89] Section 12 of CD 710-2-4 provides the institution with a means of addressing issues that require immediate attention for security reasons, or because of a risk of harm to the inmate or other inmates.
- [90] A decision to immediately move an inmate would be reviewable on a reasonableness standard, with very considerable deference given to the decision-maker. However, that does not mean that the court can assume that the decision-maker addressed those issues without some evidence to support that conclusion. On the material before me, I cannot conclude

that the decision-maker addressed whether an immediate transfer was necessary, or whether the criteria justifying an "immediate" transfer had been complied with. As I have already indicated, there is nothing in the Decision that shows that it was considered.

- [91] I also note that one of Mr. Keiros-Meyer's complaints is that he was denied access to material contained in his cell that might have been of assistance to him in preparing his rebuttal. While I am skeptical about the substance of this complaint, it does support the conclusion that the notice period before a move is of significant benefit to an inmate.
- [92] The concerns I have about this case are similar to those expressed by Justice McEwan in Russell. In dealing with the failure of the institution to satisfy the court that all relevant material or a summary thereof was provided to the inmate, Justice McEwan stated:
- [19] The institution may have information it is not obliged to disclose as long as it did not rely on it; it may also summarize information rather than present it verbatim, as long as the summary is fair and provides a sufficient opportunity to respond. It is, however, obliged to disclose the information it relied upon. When that disclosure is challenged, the institution, at a minimum, ought to state that the information that has been disclosed as all the information it relied upon, and a competent person ought to swear to it. Regrettably, the material provided by the respondents in this case leaves the court to infer that what has been disclosed is all the information the institution relied upon. The respondents' submission that the applicant was provided "with the necessary information considered by the warden" must be taken on faith, because Assistant Warden Mattson never avers that the "necessary information," is all the information that was considered.
- [93] There is no evidence before me that Mr. Keiros-Meyer was moved for security reasons. The evidence simply states that he was moved to Mission Medium the day after the incident with the doctor. While counsel for the respondent submitted to me that Mr. Keiros-Meyer was moved for security reasons, there is nothing in the record to support that submission.
- [94] Section 12 of CD 710-2-4 is clearly an exception to the usual procedural rights granted to an inmate to be granted time to respond to a proposed movement before it occurs. On its face it is intended to apply only in particular circumstances. It would have been open to the respondent to lead evidence to establish that it was necessary to move Mr. Keiros-Meyer immediately for security reasons but it failed to do so.
- [95] I therefore conclude that the respondent has not demonstrated that movement was lawful and I must grant the remedy of habeas corpus.

Was the Decision Reasonable

- [96] In the event that I am wrong in my conclusion that the respondent has not established that it complied with CD 710-2-4, I will address the merits errors alleged by Mr. Keiros-Meyer. The merits errors challenge the correctness of the Decision. This raises the issue of whether it is appropriate for me to do so.

- [97] The authorities have established that the court should apply a reasonableness standard to the review of decisions made by penitentiary officials. It is not the function of the court to micromanage the administration of penal institutions. In *Khela*, the standard of review is addressed:
- [73] A transfer decision that does not fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" will be unlawful (*Dunsmuir*, at para. 47). Similarly, a decision that lacks "justification, transparency and intelligibility" will be unlawful (*ibid.*). For it to be lawful, the reasons for and record of the decision must "in fact or in principle support the conclusion reached" (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 12, quoting with approval D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304).
- [74] As things stand, a decision will be unreasonable, and therefore unlawful, if an inmate's liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion, although I do not foreclose the possibility that it may also be unreasonable on other grounds. Deference will be shown to a determination that evidence is reliable, but the authorities will nonetheless have to explain that determination.
- [75] A review to determine whether a decision was reasonable, and therefore lawful, necessarily requires deference (*Dunsmuir*, at para. 47; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59; *Newfoundland and Labrador Nurses' Union*, at paras. 11-12). An involuntary transfer decision is nonetheless an administrative decision made by a decision maker with expertise in the environment of a particular penitentiary. To apply any standard other than reasonableness in reviewing such a decision could well lead to the micromanagement of prisons by the courts.
- [98] The test for what is considered to be a reasonable decision is set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9:
- [46] What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?
- [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In

judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

- [99] In this case, the Decision meets the reasonableness test set out in *Dunsmuir*. The Decision sets out the basis on which the decision is made and identifies the objectives of properly classifying the security requirements of Mr. Keiros-Meyer. The reasons are clearly articulated, intelligible and transparent.
- [100] Essentially, the Decision came down to assessing the security implications of Mr. Keiros-Meyer's conduct towards the doctor at his medical appointment, his practice of secretly tattooing as a coping mechanism and his failure to appreciate the significance of these behaviours. This assessment engaged the particular expertise of the management of the Institution.
- [101] I have concluded that there was evidence before the Warden on which he could reasonably have concluded that Mr. Keiros-Meyer was unmanageable in a minimum security facility and that justified the changes made to his SRS scale. The Decision therefore meets the reasonableness test.
- [102] The merits errors alleged by Mr. Keiros-Meyer essentially ask this court to reweigh the evidence that the Warden relied on in making the Decision. However, the reasonableness standard of review does not permit me to do so.
- [103] I am therefore satisfied that the Decision would have been reasonable if the Institution had complied with CD 710-2-4.

Disposition

- [104] The application for a writ of habeas corpus is granted. Mr. Keiros-Meyer is to be returned to the minimum security unit at Mission Institution.
- [105] Nothing in these reasons is intended to prevent further consideration of the appropriate level of security for Mr. Keiros-Meyer in accordance with the CCRA and the procedure set out in CD 710-2-4.

"Sewell J."

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