

CANADA / JUDGMENT

McGahey v. Warden Joyceville Penitentiary

2002 FCT 966

COURT

Federal Court

DECIDED

19 September 2002

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McGahey v. Warden Joyceville Penitentiary Court (s) Database Federal Court Decisions Date 2002-09-19 Neutral citation 2002 FCT 966 File numbers T-2345-00 Notes Digest Decision Content Date: 20020919 Docket: T-2345-00 Neutral citation: 2002 FCT 966 BETWEEN: MARY BETH McGAHEY Applicant

- and - WARDEN JOYCEVILLE PENITENTIARY and D. WHITTON, UNIT (4) MANAGER and CARMINE TEDESCO/WOOD and J. MOULTON, INSTITUTIONAL PREVENTIVE SECURITY OFFICER and THE VISITING REVIEW BOARD and COMMISSIONER OF CORRECTIONS Respondents REASONS FOR ORDER GIBSON J.:

[1] By Notice of Application filed the 18th of December, 2000, the applicant sought judicial review "...in respect to the decision of the Respondent D. Whitton and the Visitor Review Board made on 05/10/2000, and was not officially notified until 25/10/2000... ." Counsel for the respondent interprets the foregoing, and I am satisfied that he is correct in his interpretation, to refer to a decision of the Visitor Review Board in relation to Joyceville Penitentiary dated the 11th of October, 2000 whereby the applicant's husband Charles McGahey, an inmate at Joyceville Penitentiary was advised as follows: Please be advised the visiting privileges of Mary McGahey have been suspended for a period of thirty days following an incident which occurred on September 30, 2000 whereby it was necessary to summon the police agency of jurisdiction to escort Mrs. McGahey from the property as she refused the leave the property. A risk assessment has been completed on your visitor and reviewed by the Warden. I have informed Mrs. McGahey in writing at ...[address deleted].[1]

[2] It was not in dispute before me that the decision to suspend the applicant's visiting privileges at Joyceville Penitentiary was not communicated to her husband until the 24th of October, 2000, and to the applicant until the 25th of October, 2000.

BACKGROUND

[3] The facts underlying this application for judicial review were essentially not in dispute. The following summary of those facts is extracted primarily from the respondents' Memorandum of Fact and Law.

- [4] At all times relevant to this application for judicial review, the applicant's husband was an inmate at Joyceville Institution, a penitentiary in the region of Kingston, Ontario, operated by the Correctional Service of Canada. The applicant's husband was undergoing a long term of imprisonment.
- [5] On the 30th of September, 2000, the applicant and her daughter went to Joyceville Institution to visit the applicant's husband. That day was apparently a special visiting day at the Institution but the applicant and her daughter were not there by reason of the special events but rather for a "regular visit in the visiting room".
- [6] A "drug sniffing" dog was being utilized in Joyceville Institution that day, perhaps by reason of the special events and the resultant number of visitors attending. The applicant and her daughter were escorted, along with other visitors, into the area where the dog was employed. When the dog approached the applicant, it became excited, or made a "positive hit", reacting to what was believed to be the scent of drugs. The applicant was advised that the supervising Correctional Officer had reason to believe that she had drugs in her possession or had come into contact with drugs. The applicant professed her innocence of both concerns and of any association with drugs, and offered a possible explanation for the dog's reaction. When told that she would not be allowed an open visit with her husband but only a "closed visit", that is, a visit from behind glass, she refused the closed visit and requested that she be "strip searched". Her request was declined. She was advised that if she was not prepared to settle for a "closed visit", she would have to leave the Institution. The applicant again requested a "strip search". Her request was again denied. She was ordered to leave the Institution.
- [7] The applicant refused to leave the Institution. In the result, Kingston police were contacted, eventually arrived at the Institution, and escorted the applicant out of the Institution.
- [8] Subsequently, and apparently without notice either to the applicant or her husband, a "risk assessment" was completed at the Institution with a view to determining the applicant's future visiting status. In the risk assessment, it was noted that, while there was no current intelligence to suggest that the applicant was bringing drugs into the Institution, this had been the second time that a "positive drug hit" had been encountered with a member of Mr. McGahey's family. Nonetheless, it was determined that the risk posed by the applicant was manageable and that the applicant could be allowed to have open visits. Despite this, as part of the risk assessment, it was determined that there were other factors which militated against immediate resumption of full visiting privileges for the applicant. The following appears on the face of the written risk assessment: Mrs. McGahey's problematic behaviour when being refused open access to the institution needs to be considered. The fact that the police were required to remove Mrs. McGahey from the reserve should result in the restriction of her visiting program for a period of time.
- [9] In the result, with the concurrence of the warden of Joyceville Institution and the applicant's husband's unit manager, the decision under review issued.

- [10] It was not in dispute before me that neither the applicant nor her husband was given notice that a risk assessment was being conducted, was provided with a copy of the risk assessment or was provided an opportunity to respond to it. Further, neither the applicant nor her husband was provided a hearing or any opportunity to make written representations in the course of the process leading up to the decision under review. THE STATUTORY SCHEME, BRIEFLY STATED
- [11] Sections 3 and 4 of the Corrections and Conditional Release Act[2] set out the purpose of Canada's correctional system and the principles that should guide the Correctional Service of Canada in achieving the purpose of Canada's correctional system. Section 3 and what I consider to be the relevant portions of section 4 read as follows:
3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by
 - (a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and
 - (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.
 4. The principles that shall guide the Service in achieving the purpose referred to in section 3 are ...
 - (c) that the Service enhance its effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system, and through communication about its correctional policies and programs to offenders, victims and the public;
 3. Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.
 4. Le Service est guidé, dans l'exécution de ce mandat, par les principes qui suivent_: ...
 - c) il accroît son efficacité et sa transparence par l'échange, au moment opportun, de renseignements utiles avec les autres éléments du système de justice pénale ainsi que par la communication de ses directives d'orientation générale et programmes correctionnels tant aux délinquants et aux victimes qu'au grand public;
 - (d) that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders;

- (e) that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence; ...
 - (g) that correctional decisions be made in a forthright and fair manner, with access by the offender to an effective grievance procedure; ... [emphasis added]
 - d) les mesures nécessaires à la protection du public, des agents et des délinquants doivent être le moins restrictives possible;
 - e) le délinquant continue à jouir des droits et privilèges reconnus à tout citoyen, sauf de ceux dont la suppression ou restriction est une conséquence nécessaire de la peine qui lui est infligée; ...
 - g) ses décisions doivent être claires et équitables, les délinquants ayant accès à des mécanismes efficaces de règlement de griefs; ... [je souligne]
- [12] I am satisfied that the reference in paragraph 3(b) to "...the provision of programs in penitentiaries..." includes visiting programs. I am further satisfied that the decision here under review is a "correctional decision" within the ambit of paragraph 4(g) that is to be made in a forthright and fair manner.
- [13] Subsection 71(1) of the Corrections and Conditional Release Act provides as follows:
- 71. (1) In order to promote relationships between inmates and the community, an inmate is entitled to have reasonable contact, including visits and correspondence, with family, friends and other persons from outside the penitentiary, subject to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons.
 - 71. (1) Dans les limites raisonnables fixées par règlement pour assurer la sécurité de quiconque ou du pénitencier, le Service reconnaît à chaque détenu le droit, afin de favoriser ses rapports avec la collectivité, d'entretenir, dans la mesure du possible, des relations, notamment par des visites ou de la correspondance, avec sa famille, ses amis ou d'autres personnes de l'extérieur du pénitencier.
- [14] While subsection 71(1) provides a right to inmates, subject to safety and security concerns, it also, at the very least, provides a privilege to visitors, that privilege being to visit correctional institutions that are generally closed to the public. It may even provide a right to close family members as members of the only clearly defined class of persons referred to in the subsection. In any event, such privilege or right is subject once again to safety and security concerns.
- [15] In *Davison v. Commissioner of Corrections (Canada)*[3], my colleague Justice Campbell wrote at paragraphs [3] and [4]: ...while Mr. Davison might be, in a practical sense, directly affected by the decision taken in this case, the question is whether this alone provides him with legal standing to bring a judicial review application. With respect to the phrase "by the matter in respect of which relief is sought," I find that in the context here, the matter in

respect of which relief is sought has to be the wrongful infringement of a visiting right or privilege. [emphasis added] Justice Campbell's words appear in the context of a discussion of the standing of a visitor to bring an application for judicial review such as that before me. I will shortly have more to say on that subject. For the moment, I quote Justice Campbell's words simply to note his reference to visiting as a "right or privilege". That being said, Justice Campbell does go on in paragraph [5] to comment that visitation is "...clearly a personal right of a particular inmate ...and not that of a visitor, whatever his or her credentials." Justice Campbell was not considering visitation by a family member.

ANALYSIS

(a) Standing of the Applicant

[16] Subsection 18.1(1) of the Federal Court Act[4] provides that an application for judicial review such as this application may be made by the Attorney General of Canada or, of more significance for the purposes of this matter, "...by anyone directly affected by the matter in respect of which relief is sought." In Davison, supra, on quite different facts, Justice Campbell concluded in relation to standing at paragraph [6]: In a case such as this, for someone else [other than an inmate] to [bring an application for judicial review] as a person "directly affected," it is still necessary as a condition precedent to that person gaining standing that the inmate, in respect of whom the decision regarding visitation has been taken, has made a clear objection to the action taken. Since this has not occurred, I find Mr. Davison does not have standing to bring this application. Here, as earlier noted, the applicant's husband had no opportunity to record a "clear objection" to the decision under consideration to suspend the applicant's visiting rights or privileges, and thus his right to receive visits from a close family member. For that matter, neither did the applicant. Neither the applicant nor her husband was given notice that consideration was being given to suspending the applicant's visiting rights or privileges. In the result, I conclude that the Davison decision is distinguishable and that the applicant in this matter has standing to bring this application for judicial review. That right to standing arises by reason of the impact of the decision under review on her own visitation right or privilege, quite apart from the right of her husband.

(b) Mootness

[17] There can be no dispute that the direct impact of the decision under review has long since expired since the decision, dated the 11th of October, 2000, was to suspend the applicant's visiting privileges for a period of thirty (30) days following the events of the 30th of September, 2000. At the same time, arguably at least, given the reality that the applicant's husband will likely remain subject to incarceration for some time, there is an indirect ongoing impact of the suspension decision and of the events of the 30th of September, 2000, that gave rise to that decision.

- [18] Counsel for the respondent urges that, even if the Visitor Review Board erred in a patently unreasonable manner in arriving at the decision under review, I should rely on the concept of mootness to dismiss this application and should be disinclined to exercise my discretion to consider the substance of the application, notwithstanding that it is moot. I would accept without reservation the submission on behalf of the respondents, but for concerns that I have with regard to the sensitivity and fairness with which the respondents acted in the autumn of 2000.
- [19] *Borowski v. Canada (Attorney General)*[5] is the seminal decision on the issue of mootness. In reasons for decision on behalf of the Court in *Borowski*, Mr. Justice Sopinka, wrote at page 353: The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant. [emphasis added] I am satisfied that, on this application for judicial review, there is no "live controversy" that continued on the day that the application was heard. I nonetheless elected to address the application on the ground that I am satisfied that the circumstances warrant. Those circumstances, as previously indicated, surround the issue of sensitivity and fairness in the actions of the respondents in the autumn of the year 2000, as well as the continued indirect impact of the suspension on the applicant.
- [21] I have no evidence of the pressures that were on officials of the Correctional Service of Canada at the "sally port" or visitor's entrance to Joyceville Penitentiary on the 30th of September, 2000. I will assume, for purposes of argument, that, because of the special events of the day, the pressures may well have been significant. Nonetheless, the evidence before me would appear to indicate that, once the drug-sniffing-dog made a "positive hit" on the applicant, she was confronted with that fact in the presence of others including her young daughter who was of an impressionable age. An emotional confrontation apparently ensued.
- [22] Whether an alternative procedure was available to the respondents to advise rather than "confront" the applicant with the concerns that the respondents had as a result of the "positive hit", I do not know. But I am satisfied that, assuming such an alternative might well have been available to the respondents, they failed in their duty of sensitivity which I find to be implicit in the provisions of sections 3 and 4 of the Corrections and Conditional Release Act that are cited earlier in these reasons, both to the applicant and to her husband, in acting as they did.

[23] Perhaps more important, is what I find to be the complete absence on the part of the respondents of any semblance of fairness in considering, and eventually determining, to suspend the applicant's visiting privileges for a period of thirty (30) days. As earlier noted in these reasons, no notice was given either to the applicant or to her husband that such a suspension was under consideration. When a risk assessment leading to the suspension of the applicant's visiting privileges was completed, recommending such a suspension, no notification of that recommendation, and the basis for it, was given, once again either to the applicant or her husband. It follows that no opportunity to respond to the recommendation was provided. No opportunity to be heard was provided either to the applicant or her husband.

[24] I conclude that the respondents failed in their duty to the applicant and/or her husband to act fairly in arriving at the decision to suspend the applicant's visiting privileges. On that ground alone, but for the fact that the decision under review is clearly moot, I would have set aside that decision.

(c) Other considerations

[25] Notwithstanding the many other issues raised by the applicant in her materials, I find no error on the part of the respondents, other than as above noted, that would warrant setting aside the decision under review.

CONCLUSION

[26] Based on the foregoing brief analysis, notwithstanding my concerns regarding sensitivity, and more particularly, fairness, on the basis of mootness, I conclude that this application for judicial review must be dismissed. That conclusion is not intended in any way to minimize the concerns that I have expressed in these reasons regarding what I consider to be issues of sensitivity and fairness. I am satisfied that those issues are inherent in the expression of the purpose of Canada's correctional system reflected in section 3 of the Corrections and Conditional Release Act, earlier quoted, and in the principles reflected in section 4 of that Act, also as earlier quoted. COSTS

[27] There will be no order as to costs.

J. F.C.C. Ottawa, Ontario September 19, 2002 FEDERAL COURT OF CANADA TRIAL DIVISION
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[1] Applicant's Record, page 13.

[2] S.C. 1992, c. 20.

[3] (1997), 144 F.T.R. 184.

[4] R.S.C. 1985, c. F-7.

[5] [1989] 1 S.C.R. 342.

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