

CANADA / JUDGMENT

Moazami v. Kent Institution (Warden)

2023 BCSC 61

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2023 BCSC 61 Moazami v. Kent Institution (Warden)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Moazami v. Kent Institution (Warden),

2023 BCSC 61

Date: 20230110

Docket: 33351

Registry: Vancouver

Between:

Reza Moazami

Applicant

And

The Warden of Kent Institution, The Warden of Mission Institution, and His Majesty the King
(Rex)

Respondents

Before: The Honourable Justice Branch

Oral Reasons for Judgment

Counsel for Applicant:

C. Haghighi

Counsel for Respondent:

S. Rapley

R. Islam

Place and Date of Hearing:

Vancouver, B.C.

December 8, 2022

Place and Date of Judgment:

Vancouver, B.C.

January 10, 2023

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I. OVERVIEW

- [1] This is an application for a writ of habeas corpus with certiorari in aid. The applicant, Reza Moazami, is serving a 21-year, 18-day aggregate sentence for 30 offences committed under the Criminal Code, R.S.C., 1985, c. C-46. The offences were of a violent and sexual nature.
- [2] These reasons address a challenge to the decision to transfer Mr. Moazami between two institutions on April 25, 2022 (the "Transfer Decision"). On that day, following a security incident, Mr. Moazami was involuntarily transferred on an emergency basis from Mission Institution, a medium security institution, to Kent Institution, a maximum security institution.

II. BACKGROUND

The April 25, 2022 Incident

- [3] On April 25, 2022, there was a security incident involving Mr. Moazami and a Correctional Service of Canada ("CSC") employee (the "Incident").
- [4] According to a CSC nurse at the Mission Institution (the "Nurse"), Mr. Moazami confronted her from a distance across an open outdoor walkway. He shouted in the direction of the Nurse, while gesturing and pointing at her, and then started aggressively walking towards her. The Nurse walked away from Mr. Moazami. The Nurse says she told him to back off as she attempted to get to a safer environment. However, he followed her until intercepted by another correctional officer.
- [5] Mr. Moazami suggests that the Incident only developed after he had been waiting in line for medication, but the Nurse left before she giving him his medication. Mr. Moazami alleges that he followed her outside so that he could tell her that she should not leave before he was given his medication. He claimed he was acting on his "own authority" to move around the institution. Mr. Moazami says that once outside, the Nurse told him to come to her so that she could explain the reason for her departure. Mr. Moazami alleges that the Nurse advised him that there had been an announcement that called his name, and since he did not come after the announcement, she did not provide the medication. Mr. Moazami says that after this, he wanted to cross over to the Correctional Manager's office, but the Nurse told him to stop. Mr. Moazami asserts that he immediately complied with this direction.
- [6] The Incident was captured on CCTV. I have reviewed the CCTV footage and summarize its contents as follows. In the video, Mr. Moazami is seen walking aggressively towards the Nurse. He briefly stops after another staff member and a correctional officer step within the view of the camera. Soon after, however, he starts aggressively following the Nurse once again in quick strides until a second correctional officer steps into the view of the camera and appears to call him over.

Procedural steps taken prior to the emergency transfer

- [7] Following the Incident, CSC's Assistant Manager of Assessment and Intervention, Nich Stefan, interviewed Mr. Moazami. Mr. Moazami denied acting in an aggressive manner or breaking any rules. However, according to Mr. Stefan, Mr. Moazami was very agitated and loud during the interview. Mr. Stefan alleges that Mr. Moazami referred to the Nurse as a "piece of shit nurse", and stated "fuck you" to Mr. Stefan. I find that reaction lends credence to the Nurse's version of events i.e. their interaction was not a friendly chat. Rather, Mr. Moazami was angry with the Nurse.
- [8] Mr. Moazami was later interviewed a second time by CSC staff. Mr. Moazami again denied any wrongdoing and argumentatively asserted, "what are you gonna do about it". The respondents allege that Mr. Moazami made gestures in a physically challenging manner during this interview. Again, this supports the Nurse's version of events, at least in terms of reflecting Mr. Moazami's state of mind at the time.
- [9] Pursuant to paragraph 32 of Guidelines 710-2-3: Inmate Transfer Processes (the "Guidelines"), a case conference between institutional staff took place prior to Mr. Moazami's transfer from the Mission Institution. Based on the information collected, Mr. Stefan recommended an emergency involuntary transfer. A decision was made at this conference to transfer Mr. Moazami without delay. This decision was based both on the Incident, as well as other past troublesome conduct by Mr. Moazami.
- [10] Pursuant to paragraph 34 of the Guidelines, Mr. Stefan met with Mr. Moazami later that day. Mr. Stefan explained the reasons for the transfer, and advised him of his right to have a reasonable opportunity to retain and instruct counsel. However, it was explained to Mr. Moazami that the transfer being "without delay" meant immediately. Mr. Stefan explained to Mr. Moazami that he would be provided with the appropriate involuntary transfer documentation within two working days of his transfer. Mr. Moazami was provided with a memo explaining the reasons for his emergency transfer (the "Memo"). The Memo provides a chronology of the events leading up to the transfer. The Memo also reviews the history of behavioural issues that Mr. Moazami had in the Mission Institution. The key paragraphs of the Memo are set out below:

Pursuant to section 13 of the Corrections and Conditional Release Regulations (CCRR) and paragraph 32 of CD 710-2-3, I am authorizing an emergency involuntary transfer to Kent Institution, a Maximum Security facility. In accordance with the provisions of paragraph 33 of CD 710-2-3, prior to the transfer, the Institutional Head or designate of the sending institution will meet with the inmate to explain the reasons for the transfer. This Memo to file is a record of this meeting, and the following reasons have resulted in my decision recommend an Emergency Involuntary Transfer

2. At approximately 0830, after advising staff that you did not hear the medication announcements, you then took it upon yourself to leave your living unit unauthorized. A Staff member followed you and gave you an order to return to the living unit and you responded to the officer by telling them to 'fuck off'.
3. A review of CCT video shows you leaving your living unit and chasing after the nurse who you confront in the open walk way. The nurse reports she felt threatened for her safety by your mannerisms and conduct. The nurse is seen on CCT video walking away from you back toward the living unit. During this time a multi function Correctional Officer had been dispatched to intercept you as seen on CCT video. After a brief conversation with the intercepting officer you were taken to the holding cell.
7. Mr. MOAZAMI, you have had adjustment issues throughout most of your current sentence. You have a history of institutional incidents including disrespectful conduct, refusing staff direction, making suggestive gestures toward healthcare staff and multiple disciplinary problems.
8. It is noted Mr. MOAZAMI that you were placed on a Behaviour Management Plan on 2022-02-09 after refusing staff direction, refusing to move living units and challenging staff on the issue of wearing a mask. Your behaviour was noted as deteriorating over a number of days with multiple reports of you acting in a manner that was seen as belligerent, disrespectful, and inappropriate.

Your current behaviour is a concern as it relates to your ability to be managed within Mission Institution's population, including, but not limited to your Escape Risk and Public Safety. In terms of Institutional Adjustment concerns, your behaviour, failure to follow the conditions of your Behavior Management Plan, not following staff direction an acting in an aggressive/intimidating and targeted manner toward healthcare staff poses a significant concern for the safety and security of the institution as a whole. As a result, your security classification is being reassessed.

[11] The Warden signed a Transfer Warrant authorizing the transfer that same day. Later that day, Mr. Moazami was transferred from Mission Institution to Kent Institution.

Procedural steps taken following the transfer

[12] On April 26, 2022, Mr. Moazami's Security Reclassification Scale ("SRS") was increased to 24.5.

[13] Pursuant to paragraph 34 of the Guidelines, on April 27, 2022, Mr. Moazami was provided with a Notice of Emergency Involuntary Transfer, Assessment for Decision, and his new SRS score.

[14] On May 11, 2022, Mr. Moazami was permitted to review the CCTV footage. Mr. Moazami viewed the footage twice, and made notes while doing so.

The Warden's Board meeting

[15] On May 17, 2022, Mr. Moazami attended a Warden's Board by video conference and without counsel. The participants reviewed the Incident, Mr. Moazami's institutional history, and other relevant documentation. After the Warden's Board and upon review of the Memo of Involuntary Transfer, Notice of Involuntary Transfer, Assessment for Decision, the SRS score, and Mr. Moazami's submissions, the Warden of Mission Institution increased Mr. Moazami's security classification from "medium" to "maximum", and formally approved the transfer.

[16] The Warden reviewed Mr. Moazami's position in the following paragraphs:

Your written rebuttal indicates you were not provided medication the morning of the incident and that no steps were taken regarding your previous complaints and grievances regarding this specific nurse. You deny any problematic or aggressive behavior and indicate you complied with staff direction. You indicate you were not provided with access to a legal call and that you were not shared video footage of the incident prior to your transfer. You indicated you did not believe your Security Reclassification Score was accurate. You requested to have access to all of the information utilized in making the decision to recommend your Emergency Involuntary Transfer.

During your Warden's Board on 2022-05-17, we discussed how you could have handled the situation regarding your medication on 2022-04-25 better. You deflected blame to the nurse, indicating that she should have provided you with your medication. Despite attempts to redirect the conversation, you spoke over the Warden and were aggressive in your presentation. This was noted to you by the Warden in an attempt to have you reflect on your own behaviour. You agreed you could have come to the console earlier to receive your medication, but again returned to blaming the staff involved in the incident and dispute the video footage. You focused on your previous issues with this staff member, your perception of the incident, and that you did not receive your medication that morning as an explanation for your behaviour. You did not address the problematic and aggressive behavior you displayed while in the holding cell. You demonstrated no insight into your behavior and did not provide any examples of how you would better manage your behavior if returned to a Medium security facility

.

The concerns with your behaviour are that you refused a direct order, were disrespectful towards staff, and displayed aggressive behavior towards a staff member. This speaks to a larger pattern of problematic and disrespectful institutional behavior. It is noted that your aggressive behavior on 2022-04-25 was not the first time you have required intervention regarding your behavior and that this incident is just one in a pattern of problematic institutional behavior. Given the seriousness of your actions, alternatives such as mediation are not viable solutions to manage the risk you present. During your Warden's Board presentation, you continued to blame the staff member for your behavior, reaffirming that mediation is not an appropriate alternative to address your institutional behavior.

[17] The new security rating was broken down as follows:

- a) Institutional adjustment: reassessed to High;
- b) Escape risk: maintained as Moderate; and
- c) Public safety risk: maintained as High.

CCTV Disclosure for the Habeas Corpus Application

[18] On November 14, 2022, Mr. Moazami's counsel requested a copy of the CCTV footage. The respondents' counsel responded the same day noting that, "CSC can provide and facilitate access to the video recordings, but as a matter of practice does not provide copies to counsel".

[19] Mr. Moazami was not given a copy of the video until after the habeas corpus submissions were received from Mr. Moazami's counsel on or around November 21, 2022. Respondents' counsel put the footage into evidence on the application after learning that Mr. Moazami was seeking an adverse inference from not having being given a copy of the footage.

III. LEGAL PRINCIPLES

The Regulatory Framework

[20] The statutory authority for the decision made by the Warden in this case can be found in the Corrections and Conditional Release Act, S.C. 1992, c. 20, s. 29 ("CCRA"), which provides as follows in material part:

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

- (c) to another penitentiary, in accordance with the regulations made under paragraph 96(d), subject to section 28.

[21] Section 13 of the Corrections and Conditional Release Regulations, SOR/92-620 ("CCRR"), paragraphs 32 and 33 of the Guidelines, and paragraph 2 of Commissioner's Directive 710-2: Transfer of Inmates ("CD 710-2") inform the procedure to be adopted for an emergency involuntary transfer. Emergency involuntary transfers may be carried out where necessary to transfer an inmate for the security of the penitentiary or the safety of the inmate or any other person. The authority to order the transfer rests with the Institutional Head, which in this case, was the Warden of Mission Institution.

[22] The relevant portions of the Guidelines and CD 710-2 are excerpted below:

Guidelines 710-2-3 (Inmate Transfer Processes)

Emergency Transfer

32. For a transfer, pursuant to section 13 of the CCRR, when it is determined that it is necessary to immediately transfer an inmate, a case conference between institutional staff will take place prior to the inmate's transfer or as soon as possible thereafter.
33. Prior to the transfer, the Institutional Head or designate of the sending institution will meet with the inmate to explain the reasons for the transfer.
34. Not more than two working days after the transfer, the Institutional Head of the receiving institution or designate will ensure the procedural fairness process is completed with the inmate by:
 - a. meeting with the inmate to explain the reasons for the transfer, and pursuant to CD 701 - Information Sharing, providing them all documentation that will be used in the decision-making process
 - b. advising the inmate of their right to legal counsel
 - c. providing the inmate two working days to respond to the transfer, in person or in writing. The Institutional Head can grant, within one working day of receiving the request, an extension of up to 10 working days. When the inmate responds in person, the response must be documented in a "Casework Record - Rebuttal".
35. 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 indicated in Annex B.
36. The inmate will be provided with the written final decision and the associated reasons via the CSC Board Review/Referral Decision Sheet within five working days after the final decision.
37. In cases where an inmate is transferred for a short period to another facility, pursuant to section 13 of the CCRR, for observation purposes that cannot be met at the primary institution, no Assessment for Decision is required. However, the CSC Board Review/Referral Decision Sheet must include the reasons for the transfer and confirm procedural safeguards including the right to rebut were provided.

CD 710-2 (Transfer of Inmates)

2. The Institutional Head, or after working hours the Correctional Manager in charge, will sign all transfer warrants.

Emergency transfer: the involuntary transfer of an inmate who cannot be managed effectively in the sending institution and who therefore poses an immediate safety risk to the public, staff and/or inmate(s) of the sending institution.

[23] Sections 12 to 18 of the CCRR are also relevant:

12 Before the transfer of an inmate pursuant to section 29 of the Act, other than a transfer at the request of the inmate, an institutional head or a staff member designated by the institutional head shall

- (a) give the inmate written notice of the proposed transfer, including the reasons for the proposed transfer and the proposed destination;
- (b) after giving the inmate a reasonable opportunity to prepare representations with respect to the proposed transfer, meet with the inmate to explain the reasons for the proposed transfer and give the inmate an opportunity to make representations with respect to the proposed transfer in person or, if the inmate prefers, in writing;
- (c) forward the inmate's representations to the Commissioner or to a staff member designated in accordance with paragraph 5(1)(b); and
- (d) give the inmate written notice of the final decision respecting the transfer, and the reasons for the decision,
- (i) at least two days before the transfer if the final decision is to transfer the inmate, unless the inmate consents to a shorter period; and
- (ii) within five working days after the decision if the final decision is not to transfer the inmate.

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.

13.1 (1) Once the obligations set out in subsection 34(3) of the Act have been fulfilled, the Service shall provide the inmate with an opportunity to make representations with respect to their transfer to a structured intervention unit in person or, if the inmate prefers, in writing, and those representations shall be sent to the institutional head so that they may make their determination within the timelines set out in subsection 29.01(2) of the Act.

- (2) When the institutional head makes the determination set out in subsection 29.01(2) of the Act, they shall consider the inmate's representations and the staff member's reasons for granting the authorization and any alternative that was considered.
- (3) No later than one working day after the day on which a determination was made under subsection 29.01(2) of the Act, the inmate shall be orally advised of the determination, including the reasons for the determination, and no later than two working days after the day on which the determination was made, they shall be provided with those reasons in writing.

14 Where an inmate is transferred pursuant to section 29 of the Act for assessment purposes and after the assessment a recommendation is made to keep the inmate in the penitentiary in which the assessment was made, the institutional head of that penitentiary or a staff member designated by the institutional head shall

- (a) give the inmate written notice of the recommendation, including the reasons for the recommendation;
- (b) after giving the inmate a reasonable opportunity to prepare representations with respect to the recommendation, meet with the inmate to explain the reasons for the recommendation and give the inmate an opportunity to make representations with respect to the recommendation in person or, if the inmate prefers, in writing;
- (c) forward the inmate's representations to the Commissioner or to a staff member designated in accordance with paragraph 5(1)(b); and
- (d) give the inmate written notice of the final decision respecting the recommendation and the reasons for the decision, within two working days after the final decision.

15 Where an inmate submits a request for a transfer referred to in section 29 of the Act, the Commissioner or a staff member designated in accordance with paragraph 5(1)(b) shall consider the request and give the inmate written notice of the decision, within 60 days after the submission of the request, including the reasons for the decision if the decision is to deny the request.

16 The following transfers shall be effected by a warrant signed by,

- (a) in the case of a transfer effected under paragraph 29(a) or (c) of the Act, the Commissioner or a staff member designated in accordance with paragraph 5(1)(b); or
- (b) in the case of a transfer under subsection 29.01(1) of the Act to a structured intervention unit located in a penitentiary other than the one in which the inmate is held, the staff member referred to in that subsection.

Security Classification

17 For the purposes of section 30 of the Act, the Service shall consider the following factors in assigning a security classification to each inmate:

- (a) the seriousness of the offence committed by the inmate;
- (b) any outstanding charges against the inmate;
- (c) the inmate's performance and behaviour while under sentence;
- (d) the inmate's social, criminal and, if available, young-offender history and any dangerous offender designation under the Criminal Code;
- (e) any physical or mental illness or disorder suffered by the inmate;
- (f) the inmate's potential for violent behaviour; and
- (g) the inmate's continued involvement in criminal activities.

18 For the purposes of section 30 of the Act, an inmate shall be classified as

- (a) maximum security where the inmate is assessed by the Service as
 - (i) presenting a high probability of escape and a high risk to the safety of the public in the event of escape, or
 - (ii) requiring a high degree of supervision and control within the penitentiary;
- (b) medium security where the inmate is assessed by the Service as
 - (i) presenting a low to moderate probability of escape and a moderate risk to the safety of the public in the event of escape, or
 - (ii) requiring a moderate degree of supervision and control within the penitentiary; and
- (c) minimum security where the inmate is assessed by the Service as
 - (i) presenting a low probability of escape and a low risk to the safety of the public in the event of escape, and
 - (ii) requiring a low degree of supervision and control within the penitentiary.

[24] Section 27 of the CCRA sets out the requirements for the information that must be provided to the inmate:

Information to be given to offenders

27 (1) Where an offender is entitled by this Part or the regulations to make representations in relation to a decision to be taken by the Service about the offender, the person or body that is to take the decision shall, subject to subsection (3), give the offender, a reasonable period before the decision is to be taken, all the information to be considered in the taking of the decision or a summary of that information.

Idem

- (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.

[Emphasis added.]

[25] Section 30 of the CCRA deals with security classification:

Service to classify each inmate

30 (1) The Service shall assign a security classification of maximum, medium or minimum to each inmate in accordance with the regulations made under paragraph 96(z.6).

Service to give reasons

- (2) The Service shall give each inmate reasons, in writing, for assigning a particular security classification or for changing that classification

Habeas Corpus

[26] Two elements must be met in order to support a writ of habeas corpus:

- a) there must be a deprivation of liberty; and
- b) the deprivation must be unlawful.

[27] Once a deprivation of liberty is proven, the applicant must raise a legitimate ground upon which to question the legality of the detention. If the applicant raises such a ground, the onus shifts to the respondent authorities to show that the deprivation of liberty was lawful: *Mission Institution v. Khela*, 2014 SCC 24 [Khela] at para. 30.

[28] Here, the respondents concede that Mr. Moazami's involuntary movement from a medium-security institution to a maximum-security institution resulted in a deprivation of residual liberty. Accordingly, the issues on this application concern the lawfulness of the transfer decision, both procedurally and substantively.

[29] In *Khela* at para. 52, the Supreme Court of Canada stated that when determining whether or not the decision was lawful, the court may consider:

- a) if the decision maker lacked jurisdiction to order the deprivation of liberty;
- b) whether there was a breach of procedural fairness; and
- c) whether the decision was reasonable.

Standard of Review

[30] When determining whether the decision maker complied with a duty of procedural fairness, the standard is "correctness": *Khela* at para. 79.

[31] The standard of review in relation to the substantive aspects of the decision is "reasonableness". In *Khela*, the Supreme Court of Canada discussed the scope of the reasonableness review in the context of a transfer decision at paras. 73-75:

[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. Similarly, a decision that lacks "justification, transparency and intelligibility" will be unlawful. For it to be lawful, the reasons for and record of the decision must "in fact or in principle support the conclusion reached".

[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. 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.

[Citations omitted]

[32] The Supreme Court of Canada has emphasized that when conducting a reasonableness review, the court must consider both the rationale for, and outcome of, the administrative decision: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 96.

IV. ANALYSIS

A. Overview

[33] The issues raised on this application for habeas corpus are as follows:

- a) whether the proper decision maker exercised the statutory power to transfer Mr. Moazami;
- b) whether Mr. Moazami's right to procedural fairness was breached because he was unable to make submissions before he was transferred on an emergency involuntary basis;
- c) whether Mr. Moazami's right to procedural fairness was breached because he did not receive advance notice that he was being considered for an emergency involuntary transfer;
- d) whether the failure to initially produce the CCTV footage breached Mr. Moazami's procedural rights;
- e) whether Mr. Moazami's right to counsel was breached;
- f) whether Mr. Moazami is in a position to seek relief regarding his SRS score; and
- g) whether the decision to transfer Mr. Moazami was substantively reasonable.

B. The proper decision maker made the decision to transfer

[34] I find that the Warden was the person who ultimately authorized the transfer by signing the Transfer Warrant, and he was the proper person to make this decision.

[35] The Warden clearly has jurisdiction under the CCRA and CCRR to authorize a transfer. There is nothing in the CCRA, CCRR, or the Commissioner's Directives barring someone other than the Warden from preparing the Notice of Emergency Involuntary Transfer. The fact that in the Memo Mr. Stefan purported to be making the decision to transfer does not change the fact that it was in fact the Warden who made the actual decision through his execution of the Transfer Warrant.

[36] The Transfer Warrant was not included in the bundle of documents initially provided to Mr. Moazami following his transfer. However, the respondents submit, and I accept, that the Transfer Warrant was merely an administrative document which contained no substantive information or reasons for the transfer. The Transfer Warrant was simply the vehicle providing authorization for the Transfer pursuant to the earlier reasons provided to Mr. Moazami by way of the Memo. Therefore, there was no requirement under the Guidelines and section 27 of the CCRA to disclose the Transfer Warrant to Mr. Moazami before the emergency transfer.

C. There was no breach of procedural fairness in relation to notice or the right to make submissions

- [37] As stated recently by Justice Murray in *Larue v. Kent Institution (Warden)*, 2022 BCSC 1672 at para. 13, procedural fairness in the context of a transfer requires that an inmate be given all information considered by the CSC in an involuntary transfer decision within a reasonable time (CCRA, s. 27(1)) and an opportunity to make representations (CCRR, s. 13(2)(a)). The requirements of procedural fairness must be assessed contextually.
- [38] I find that Mr. Moazami's procedural fairness rights were not breached.
- [39] There is no requirement under the legislation or established by case law for an inmate being transferred on an emergency involuntary basis to be able to make submissions prior to said transfer. By definition, emergency transfers arise in situations where time is of the essence, leaving no time for a full hearing.
- [40] Mr. Moazami was given an opportunity to make submissions in relatively short order following the transfer. He took advantage of this opportunity: *R. v Elliott*, 2022 BCSC 1946 at para. 119. As outlined above, the Warden considered Mr. Moazami's submissions in detail at that time.
- [41] In terms of the provision of information, Mr. Moazami was provided, in a timely manner, with each of the internal CSC written documents leading to the Warden's decision. Most importantly, on the very day of the Incident, Mr. Moazami received the Memo, which contained the reasons for his transfer as well as a summary of the video.
- [42] As noted, a point of contention was the failure to produce the actual CCTV footage before the Warden's Board hearing, and whether this breached Mr. Moazami's procedural rights under the common law or under s. 27 of the CRRA.
- [43] It is important to distinguish the issues that arise from the timing of the production of a copy of the video for the habeas corpus application from the earlier required disclosure to Mr. Moazami under the Guidelines and the legislation.
- [44] As for the production of a copy of the CCTV footage for the habeas corpus application, I find that Mr. Moazami's counsel received the video in a timely enough manner to conduct the habeas corpus application effectively. He was able to make helpful submissions about its contents at the hearing before me. Further, I note that respondents' counsel had earlier offered Mr. Moazami's counsel the opportunity to view the video in-person at CSC. Mr. Moazami's counsel did not respond to the email containing this offer.
- [45] As to the level of disclosure required earlier under the Guidelines and the legislation, I make the following findings:
- a) Mr. Moazami received a summary of the video in the Memo as outlined above, within the required time limits. The Memo accurately described the contents of the video and s. 27 of the CCRA only requires a summary.

- b) Mr. Moazami viewed the video twice and made notes before the Warden's Board was held, and was able to comment upon it before any decision was reached.
 - c) Mr. Moazami is the subject of the video and hence would have had the benefit of his own recollection in any event.
- [46] I decline to find that there was a mandatory duty of disclosure of the video itself, so long as it has been accurately and sufficiently summarized for the inmate, as the Guidelines and s. 27 of the CRRA require.
- [47] Mr. Moazami cites *Dorscheid v Warden of Kent Institution*, 1998 CanLII 4576 (B.C.S.C) [Dorscheid]. In *Dorscheid*, the court accepted that the Warden had authority to withhold certain information from a prisoner. However, the amount of information withheld there was found to be far more than was strictly necessary under s. 27 of the CCRA (at para. 72).
- [48] *Dorscheid* is distinguishable from the case at bar. In *Dorscheid*, there was a total of 9 documents that were considered by institutional staff members in making decisions on the security reclassification and involuntary transfer, but which were not disclosed to Mr. Dorscheid: *Dorscheid* at para. 32.
- [49] In contrast, the Memo provided here gave specific details of the CCTV footage and as such, I find that any late disclosure of the video itself did not have a material impact on Mr. Moazami's ability to make fulsome submissions. As noted above, the video itself is largely confirmatory of the Nurse's version of events, and Mr. Moazami's subsequent conduct was further support for the finding that Mr. Moazami did not conduct himself appropriately on the day in question. Mr. Moazami did not suggest that the summary of the evidence in the Memo was undermined by the content of the video itself.
- [50] Hence, I conclude that the disclosure of the material that was relied on in the Transfer Decision was in accordance with the scope and timeframes required by common law, the Guidelines and s. 27 of the CCRA.
- [51] In the alternative, if there was a breach of the statute through the late disclosure of the video itself, I find that this was merely a technical breach, and as the reviewing judge, I have discretion to determine whether such a breach is sufficient to have resulted in procedural unfairness: *Khela* at para. 90. I find that in this case, any technicality did not render the decision procedurally unfair. The summary was accurate, and there is little Mr. Moazami could have done to undercut any inferences arising therefrom, even had he been put in possession of a copy of the video itself at an earlier date.
- [52] In the further alternative, even if there has been a breach of procedural fairness, this does not mean that habeas corpus must be granted. In *Boone v. Ontario (Community Safety and Correctional Services)*, 2014 ONCA 515, leave to appeal to SCC ref'd, 36103 (29 January 2015), the Ontario Court of Appeal held as follows:

- [41] In my view, the appellant's blanket assertion that, once a breach of procedural fairness is found to have occurred, habeas corpus must be granted to return him to Pod C with a cellmate, is too broad. The application judge held that there were aspects of the transfer process that did not fully comply with the principles of procedural fairness, but he found that the detention itself was not procedurally unfair. Instead, he concluded that, on all of the evidence, and in spite of the procedural missteps, the detention was not unlawful and declined to issue the writ. This decision was reasonable and based on an ample evidentiary foundation. I would not interfere with it.
- [53] Similarly, I find that in this case, even if there had been a breach of procedural fairness, the breach was technical and the transfer itself was not rendered unlawful. As such, I would not have found that any failing required a reversal of the decision in any event.

D. Mr. Moazami's right to counsel was not violated

- [54] I find that Mr. Moazami's right to counsel was not violated.
- [55] First, Mr. Moazami was advised of his right to counsel before the emergency transfer. He was simply not put in a position to exercise that right until after the emergency transfer.
- [56] I accept the respondents' submission that Mr. Moazami was provided with access to legal counsel as soon as reasonably possible, consistent with section 97 of the CCRR. By definition, an emergency transfer is one done in exigent circumstances. I find that the authorities here were acting in good faith in assessing that there was an emergency, given that staff safety was at issue.
- [57] Mr. Moazami relies on the decision in *British Columbia Civil Liberties Association v. Canada Attorney General*, 2019 BCCA 228 [British Columbia Civil Liberties Association], in which the Court of Appeal held that procedural fairness required that an inmate who wishes to be represented by counsel should be entitled to such representation in respect of decisions to place an inmate in administrative segregation.
- [58] I agree with the respondents' submissions that British Columbia Civil Liberties Association is distinguishable. Administrative segregation was an extraordinary tool, and prolonged use of administrative segregation has been found to constitute cruel and unusual treatment: *British Columbia Civil Liberties Association* at para. 206. Such treatment therefore required maximum procedural protection before its imposition.
- [59] Mr. Moazami's situation on the other hand relates to a transfer on an emergency basis from one level of security to another, not a near total deprivation of personal autonomy and dignity. He was informed of his right to counsel and was given access to same shortly after the transfer. He had every ability to have counsel assistance in advance of the Warden's Board. This is not comparable situation to an individual placed in administrative segregation, and does not require the same heightened level of procedural protection.

- [60] I find that in the case at bar, there was no right to access counsel prior to the emergency transfer. Rather, consistent with the Guidelines, this right should be provided within a reasonable time. Paragraph 34(b) of the Guidelines provides that not more than two working days after the transfer, the Institutional Head of the receiving institution or designate will ensure that the inmate is advised of their right to counsel. This standard has been met.
- [61] Further, the court in *Keiros-Meyer v. Canada (Attorney General)*, 2020 BCSC 1273, a decision that issued after that in *British Columbia Civil Liberties Association*, considered the right to counsel in the context of a transfer between institutions, and held that it was not prejudicial to defer access to counsel until after a transfer or a Notice of Involuntary Transfer was received.
- [62] Here, Mr. Moazami did have the ability to secure counsel's assistance to draft "effective representations in response" prior to the Warden's Board: *Keiros-Meyer* at para. 114. There was no evidence of the respondent engaging in further evidence gathering between Mr. Moazami being advised of his right to counsel and the Warden's Board: *Keiros-Meyer* at paras. 119-120. In the cases relied upon by Mr. Moazami on this point, there is no indication that there was a hearing held before the emergency transfer in cases, let alone a hearing at which a right to counsel was provided: *Thilson v. Mountain Institution*, 2011 BCSC 874; *Bromby v. Warden of William Head Institution*, 2020 BCSC 1119.
- [63] As such, I find that there was no breach of procedural fairness on any ground.

E. The decision was reasonable

- [64] In terms of the substantive decision, while there were differing accounts as to why Mr. Moazami approached the Nurse, and whether it was in a threatening manner or not, on balance, I find that the decision was reasonable.
- [65] I have reviewed the CCTV footage, and find that given Mr. Moazami's aggressive approach toward the Nurse, it was reasonable for the Warden to have interpreted it as he did.
- [66] Further, the Incident cannot be viewed in isolation. Mr. Moazami had already demonstrated a pattern of concerning behaviour. Even if the CCTV is treated as ambiguous in isolation, when combined with Mr. Moazami's conduct during the interviews thereafter, and his pattern of behaviour leading up to the Incident, the decision was reasonable. The Warden "followed a rational, logical and coherent path to his conclusion [and there] are no identifiable gaps or inconsistencies in his reasoning": *Keiros-Meyer* at para. 158; *R. v. Elliott*, 2022 BCSC 1946 at para. 117. The "outcome appears to flow naturally from the preceding processes, including the consideration and weighing of matters that could have led to a different one" and the Warden "appeared to consider the relevant factors dictated by its overall regulatory regime and to relate those to the actual evidence that was presented. To the extent that it reflects an exercise of his discretion, that exercise is consistent with the purpose for which it was granted by the regulatory regime": *Keiros-Meyer* at para. 158; *Elliott* at para. 117.

[67] The question for the court is not whether a different decision-maker might have come to different conclusion on any of the factors underlying the analysis. The question is whether there was a rational basis for the conclusions that were reached. In my view, there was a rational basis for the Warden's decision here: Elliott at para. 118.

F. Mr. Moazami cannot seek relief regarding his SRS score

[68] I agree with the respondents that Mr. Moazami is not in a position to seek relief regarding the change to his SRS score.

[69] Habeas corpus is used to challenge the legality of confinement and concerns whether additional restraint on an offender has been lawfully imposed. It is not a "sort of legal Swiss Army knife that can be used to engage any grievance" the applicant has: R v. Latham, 2018 ABCA 308 at para. 7. Mr. Moazami is effectively asking the Court to make a declaratory order as to his proper SRS score, which falls outside the scope of an application for habeas corpus. He may challenge his continued detention generally, but the writ should not be used to isolate and individually challenge each factor that went into the ultimate decision as to the appropriateness of the transfer.

[70] According to the respondent's evidence, which I accept, the SRS is an automated tool that generates a score recommending a certain level of security. The SRS is a research-based tool employed by CSC to assist in determining the most appropriate level of security at key points throughout an offender's sentence. Importantly, the SRS score is not the sole determining factor for the purposes of reclassifying an inmate's overarching security level, or for transferring an inmate. Rather, it is simply one tool to assist the CSC in making determinations. An inmate's security classification is "not determined solely based on the score generated by the SRS": Brown v. Warden of Dorchester Institution, 2018 NBQB 179 at para. 21. A more subjective review is undertaken by the inmate's Case Management Team to determine the final classification and assignment.

[71] Habeas corpus does not provide a stand-alone remedy for reviewing an SRS score, but of course, any procedural unfairness or unreasonableness flowing from an adjustment can be reviewed, as can any unfair or unreasonable reliance on facts that purport to support the score. As noted above, I see no such unfairness here.

V. CONCLUSION

[72] For the reasons discussed above, I find that Mr. Moazami is not entitled to relief in the nature of habeas corpus. I conclude that the decision confirming his transfer and security level was procedurally fair and reasonable. His application must therefore be dismissed.

"The Honourable Mr. Justice Branch"

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