
CANADA / JUDGMENT

R. v. Keiros-Meyer

2017 BCSC 58

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 58 R. v. Keiros-Meyer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Keiros-Meyer,

2017 BCSC 58

Date: 20170113

Docket: 64575

Registry: Chilliwack

Regina

v.

Albert Keiros-Meyer

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Crown:

M. East

Accused appearing in person:

A. Keiros-Meyer

Place and Date of Hearing:

New Westminster, B.C.

February 4, 2016

Place and Date of Judgment:

Chilliwack, B.C.

January 13, 2017

Background

- [1] Mr. Keiros-Meyer is a 48 year old federal offender who received a life sentence for second-degree murder in 1993 with no eligibility for parole for 18 years.
- [2] In November 2015, the applicant, who had been in custody for approximately 23 years, was incarcerated in Mission Institution, a minimum security penitentiary in Mission, BC. He was expecting to qualify for parole sometime in the near future.
- [3] Starting in October 2015, staff had become concerned that the applicant's behaviour could not be adequately managed in an open perimeter minimum security institution.
- [4] The applicant has a medical condition described as "Genital Gigantism" resulting in his having enlarged genitalia. This physical condition, coupled with a number of incidents in which he is alleged to have exhibited "inappropriate and highly sexualized behaviour", was the basis for the decision to reclassify Mr. Keiros-Meyer.
- [5] On November 19 or 20, 2015, Mr. Keiros-Meyer was transferred involuntarily from the minimum security Mission Institution to the medium security Mountain Institution on an emergency basis. The respondent alleges that after the decision was made to transfer the applicant to Mountain Institution, he was observed to exhibit other inappropriate behaviours.
- [6] The applicant was given a copy of the notice of involuntary transfer recommendation on November 23, 2015 and the documentation pertaining to the involuntary transfer.
- [7] He submitted a 29 page rebuttal submission on November 24, 2015 and made an oral presentation via video to the Warden's Review Board hearing, which convened on November 27, 2015 to address the CMT recommendations and the respondent's submissions concerning the decision to reclassify the applicant as a medium security inmate.
- [8] After the Warden's Review Board hearing, the reclassification decision was confirmed the same day (the "Transfer Decision").
- [9] On December 7, 2015, Mr. Keiros-Meyer filed an application for habeas corpus challenging the transfer decision. The applicant contended that his continued detention in Mountain Institution was unlawful due to a failure by the prison authorities to comply with the principles of procedural fairness and statutory requirements of their jurisdiction regarding involuntary transfers. He complains that the administrators at Mission Institution failed to provide adequate disclosure of the evidence it considered when assessing the applicant's reclassification and involuntary transfer as required by s. 27 of the Corrections and

Conditional Release Act, S.C. 1992, c. 20 ["the Act"]. Mr. Keiros-Meyer also applied for other orders, including an order correcting or expunging information in his correctional file.

- [10] On October 27, 2016 a new assessment was completed to address the recommendation by Mr. Keiros-Meyer's Case Management Team ("CMT") that he be voluntarily transferred to another minimum security institution, William Head Institution, on Vancouver Island. The assessment for decision also recommended that the applicant's security classification be reduced to "minimum" and that he be voluntarily transferred to William Head Institution.
- [11] On November 2, 2016, after a Warden's Review Board Hearing, the warden of Mountain Institution confirmed the recommendation of Mr. Keiros-Meyer's CMT and ordered that he be transferred to William Head Institution. Mr. Keiros-Meyer's physical transfer to William Head Institution was scheduled for November 10, 2016.
- [12] There have been three days of argument on Mr. Keiros-Meyer's habeas corpus application. In addition, he has also made applications to subpoena the warden of Mission Institution for cross-examination and at least two other correctional officers whose affidavits have been filed. Mr. Keiros-Meyer has submitted very extensive materials and argument in support of his application and, if the hearing continues will likely require one to two additional days.

The Attorney General's Position

- [13] The Attorney General contends that the issue raised in the applicant's habeas corpus application is moot and that the Court should dismiss the application.
- [14] The respondent argues that Mr. Keiros-Meyer's application is moot because he has recently been reclassified to a minimum security institution and there are no grounds warranting the court's exercise of its discretion to decide the issue. Although the argument in this application occurred before the applicant's transfer to the minimum security institution, I accept that his change in status occurred as contemplated at the time of argument.
- [15] The respondent contends the court's discretion to consider an application that is moot is informed by the two step test articulated in *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342 [Borowski].
- [16] This first step described in *Borowski* involves determining whether the requisite tangible and concrete dispute between the parties has disappeared rendering the issues academic. If that is the case, the application will be moot.
- [17] The second step described in *Borowski* is whether the court should exercise its discretion to hear the claim, despite the absence of a live controversy. Courts are to be guided in the exercise of their discretion by considering the underlying rationale of the mootness doctrine, including whether the court is competent to resolve legal disputes outside of a full adversarial context, whether hearing the case is a good use of scarce judicial resources and whether the court's proper lawmaking function should be engaged; see *Borowski* at paras 31, 34 and 40 and *Skulsh v. Katz*, 2012 BCSC 350 at para. 83 [Skulsh].

Mootness

- [18] The respondent argues that the purpose of the habeas corpus writ is to allow the timely examination of the legality of imprisonment and that this claim is now inappropriate because the issue is moot. It claims that the only remedy available to him is a writ of release and that, in this case, this remedy, which would involve returning the applicant to a minimum security institution, is unavailable because he has already been returned to a minimum security setting.

Discretion

- [19] Since the applicant has already achieved the primary relief he seeks in the notice of application the respondent states that there is no reason to decide the underlying issues, especially since two of the underlying rationales for the exercise of discretion in light of the issue's mootness are not met.
- (a) Lack of adversarial context
- [20] First, the respondent says that there is no adversarial context in which the court can make its decision. The Attorney General claims that the subject matter of the dispute has become academic and, in the absence of an adversarial context, the decision would not have any concrete collateral consequences to either any other party, intervenor or the applicant. The circumstances of this particular applicant are not apposite to any other inmate and the public interest would not be served by hearing and determining whether the transfer decision was reasonable or that the applicant received procedural fairness or proper disclosure. The question of what information constitutes adequate or sufficient disclosure to enable an inmate to defend against a warden's decision varies, based on the unique circumstances of the inmate; as such, deciding the issue in this case will not affect future decisions.
- [21] The respondent further submits that speculating on the potential of future correctional decisions concerning the applicant is meaningless and should not be the basis for exercising the court's discretion to continue with the hearing.
- (b) Judicial economy will not be achieved
- [22] Additionally, the respondent argues that judicial economy will not be achieved by the continuation of this application. While habeas corpus is intended to be a summary procedure that provides swift relief from unlawful detention, Mr. Keiros-Meyer's materials filed on this application and his submissions are prolix and have already resulted in three days of hearing. With respect to the order Mr. Keiros-Meyer seeks to have a subpoena issued to the Warden of Mission Intuition and other correctional officers for cross-examination, even if the motion to cross-examine is refused, there is no prospect of an early or summary resolution of Mr. Keiros-Meyer's application.

- [23] The respondent relies heavily on *R. v. Antonius*, 2016 BCSC 997 [Antonius] on this and other points in its argument. In particular, the respondent contends that the application will have no practical effect on the applicant. The issue raised is not a matter of short duration that will inevitably become moot in every case; see *Antonius* at para. 44. This application has become moot because of the applicant's particular circumstances.
- [24] Finally, the respondent argues that the public interest would not be served by hearing and determining this application. The law on the nature and scope of substantive reasonableness review on habeas corpus was settled in *Khela v. Mission Institution (Warden)*, 2014 SCC 24 [Khela] and there would be no benefit to continuing with this fact specific application.
- [25] The respondent asserts that the applicant's remedy to correct any alleged inaccurate allegations or faulty records of allegations cannot be considered under the habeas corpus writ but can be dealt with under the Act, which governs records. This procedure includes the right of judicial review.
- (c) Proper role of the courts
- [26] The respondent did not raise an argument with respect to this Court having the institutional competence to determine the claims described in Mr. Keiros-Meyer's application.

The applicant's argument

Mootness

- [27] The applicant accepts that the question of his return to minimum security is, because of the intervening events, moot. Nonetheless, he argues that there are issues connected to his habeas corpus application that should be decided notwithstanding his transfer back to minimum security and that this Court should exercise its discretion to decide this issue.

Discretion

- (a) Presence of an adversarial context
- [28] Mr. Keiros-Meyer argues that this Court should determine whether his reclassification to a medium security institution was wrongful. He asserts that a decision in this application will affect future correctional decisions, particularly if the decision corrects inaccuracies in records he believes were improperly relied on in the reclassification decision.
- [29] He also believes the Transfer Decision may impact the outcome of his outstanding grievance and may affect future decisions made concerning his classification.
- [30] Briefly, the applicant's grievance sought the following corrective actions:
- a determination that he did nothing wrong and responded truthfully to corrections staff;
 - an apology for remarks made to him about his physical condition;

- c. a determination of staff or breaches of his privacy and violations against him;
 - d. clear recommendations to improve how staff ask for information about medical conditions in the institution;
 - e. a determination of the roles of psychologist and others involved in the incident he complains of involving his own words reports or actions;
 - f. a clear direction to the Mission Institution head and staff to cease and desist from adverse treatment, actions and/or reporting related to his medical condition;
 - g. clear directions for correction of all of his file information; and
 - h. protection from reprisal and/or retaliation and/or instigation by specific staff that should not be tolerated.
- [31] The applicant submits that the warden rushed to a perfunctory judgment in his November 27, 2015 decision and in the process:
- a) demonstrated an apprehension of bias;
 - b) acted without procedural fairness;
 - c) interfered with a meaningful review;
 - d) failed to provide meaningful disclosure of the evidence relied on in making the warden's decision; and
 - e) impeded his freedom of speech and incorrectly considered comments made to staff about his physical condition.
- [32] In his challenge to the warden's decision, the applicant also alleges that his ss. 7 and 8 Charter rights were breached.
- [33] Mr. Keiros-Meyer relies on *Mission Institution v. Khela*, 2014 SCC 24 [Khela 2014] at para. 82-83 for the proposition that he was entitled to full disclosure of the basis on which the warden made her decision but was denied access to all of the information and access to counsel before the hearing took place.
- [34] He contends that notwithstanding mootness of the issue it will be important to clarify the institution's legal obligations in conducting Warden's Board Review hearings in future cases with particular emphasis on an inmate's entitlement to disclosure. He relied on Khela 2014 at para. 14 for the principles that despite being moot, the Court should make a determination on whether he was denied full disclosure of information, whether some information was improperly considered by the warden and whether he was denied due process. He also claims he was denied the right to counsel and was thus impaired in his ability to respond to the allegations against him.

[35] Although his initial application included requests for orders that his file be corrected and expunged of impugned information forming part of the basis to his reclassification, he abandoned all claims except for his application for habeas corpus and his request that the warden's decision be overturned. He contends that the breach of his s. 7 Charter rights also warrants the order requested and this remedy has implications beyond his transfer. He argues that the court should consider the merits of his application to determine that the transfer was bad in law.

(b) Judicial economy will be achieved

[36] Mr. Keiros-Meyer claims a decision rendered on the issues in the habeas corpus application may materially affect the outcome of his unresolved grievance filed on November 2, 2015, some weeks before the applicant's involuntary transfer and the Warden's Board Review hearing. He argues that notwithstanding his reclassification to minimum security, correction staff might continue to insist that his behaviours outlined in the warden's decision were well founded and these beliefs may affect any subsequent transfers or considerations. He believes that if the court declares his earlier transfer unlawful, he will not have to repeat the claims that form the basis of his application.

[37] Thus, he contends the balance on the question of judicial economy tips in favour of a continuation of his hearing.

(c) Proper role of the courts

[38] Mr. Keiros-Meyer claims that this Court should determine his judicial review application and that the effect of making a determination in this case will be two-fold: to establish that his rights were infringed through the process and to advance his grievance.

Analysis and Conclusion

Mootness

[39] In this case, the dispute between the parties has disappeared because the objective of the habeas corpus application has also disappeared. In *Lising v. Kent Institution*, 2008 BCCA 10 at para. 17, Tysoe J.A., writing for the court, described habeas corpus as "a prerogative writ at common law, the purpose of which is to allow the timely examination of the legality of imprisonment". When Mr. Keiros-Meyer was transferred to William Head Institution, a minimum security facility, the first part of the Borowski test was satisfied. The matter is now moot.

- [40] Moreover, on this application for habeas corpus, the question was whether the decision to involuntarily transfer the applicant to another institution was lawful. If it was unlawful, this Court could have directed Mr. Keiros-Meyer to be returned to his previous minimum security status. This decision would involve an assessment of the lawfulness of the decision which may include a consideration of the reasonableness of a warden's decision and procedural fairness in the process: see *Khela*, 2014 SCC 24 at paras. 52 and 81-90.
- [41] It is not open to the court to quash the decision to involuntarily transfer a prisoner; see *Antonius* at para. 35 and *Mapara v. Sandhu*, 2014 BCCA 49 at paras. 19 and 22. Because Mr. Keiros-Meyer is now in a minimum security facility, no order can be made. On the claim for habeas corpus, a "live controversy" no longer exists and that the court must move on to consider the *Borowski* steps to determine whether it should exercise its discretion to decide the merits of the case.

Discretion

- [42] In *Skulsh*, C. L. Smith J. summarized the principles underlying the mootness doctrine which courts are guided by when considering whether to use their discretion to decide habeas corpus applications when the substantive claim is moot. She described them as follows:

i. Adversarial Context

84 In *Borowski*, Sopinka J. explained that the requirement of an adversarial context is fundamental to ensuring that issues are well and fully argued by parties with a stake in the outcome. In *Khela [v. Mission Institution (Warden)]*, 2011 BCCA 450], the Court of Appeal for British Columbia found this to be a persuasive factor that weighed towards hearing the application in that case even though the appeal had become moot (at para. 31). This requirement may be satisfied if the adversarial relationships will prevail even though the live controversy has ceased. Mr. Justice Sopinka gives the example of a litigant who may face collateral consequences that preserve the adversarial context even though he or she no longer has a direct interest in the outcome (*Borowski*, at p. 358-359).

ii. Judicial Economy

88 Turning to the concern for judicial economy, in *Borowski*, Mr. Justice Sopinka pointed out the unfortunate reality that courts must ration scarce judicial resources among claimants. He said that the concern is answered "if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it" (p. 360). Specifically, he explained that it is worthwhile to decide a moot issue if the decision will have a practical effect on the parties' rights even though it will not determine the live controversy that gave rise to the action. Further, expenditure of judicial resources may be warranted when cases that have become moot are of a recurring nature, but brief duration (p. 360-361). Finally, he said that the "economics of judicial involvement are weighed against the social cost of continued uncertainty in the law" in cases that raise an issue of public importance, such that it may be worthwhile to expend judicial resources in pursuit of a resolution (p. 361).

iii. Institutional Competence

92 The third rationale for the mootness doctrine is the court's proper law-making function. In *Borowski*, Sopinka J. said that courts must be sensitive to their role as adjudicators. He opined that pronouncing judgments when there is no dispute affecting the rights of the parties could be seen as an intrusion into the role of legislators (p. 362).

[43] The thrust of the applicant and respondent's arguments pertained to judicial economy. The petitioner's circumstances in this case are substantially indistinguishable from those in *Antonius*.

[44] In *Antonius*, an inmate was involuntarily transferred to a maximum security institution; he applied for a habeas corpus writ and requested that he be returned to a medium security institution. In preparation for the hearing, the prisoner took steps to obtain evidence from correction staff by issuing a subpoena. Before the habeas corpus application was heard, the inmate was returned to medium security. The respondent opposed the application for the subpoena because the inmate had already achieved his return to medium security and the issue was moot. The Attorney General also opposed the issuance of subpoenas and sought costs.

[45] At this point, although the inmate had been returned to a medium security institution he requested a further order directing his transfer to a minimum security institution and pursued his habeas corpus application.

[46] The court decided:

- a) it had no jurisdiction to consider a request to transfer him to a minimum security institution;
- b) the only order available to it was to return him to the medium security institution;
- c) the only question before the court was the legality of the involuntary transfer from the medium security to maximum security institution; and
- d) the inmate had been returned to medium security institution and the question raised on his habeas corpus application was moot.

[47] The only significant dissimilarity between this case and *Antonius* is that Mr. Keiros-Meyer contends that his outstanding grievance is a controversy that could be influenced by findings made of this Court on his habeas corpus application.

[48] I have reviewed the substance of his grievance and, in my view, the outstanding grievance does not raise the same issues alive in the application for habeas corpus. The legal and factual issues that must be decided as part of the habeas corpus application will not significantly address the issues in the applicant's grievance. For example, the grounds advanced on this application are that Mr. Keiros-Meyer was denied natural justice, his Charter rights were breached, he did not receive adequate disclosure of the information

relied upon in the decision to make the involuntary transfer, and he did not have the opportunity to obtain legal advice. He contends the warden was biased and took into account information or opinions not shared with him.

- [49] I am not satisfied that continuation of the applicant's hearing concerning the issues raised in his habeas corpus claim will address his grievance or have any impact on other grievances. It is my view that the collateral issues extant in the grievance will not be resolved by a determination of the issue in the habeas corpus application, that is whether the applicant was denied counsel, denied procedural fairness, denied disclosure of information, treated with bias, or any of the other issues he raises in the habeas corpus application. In my view, these are questions cannot been resolved by the court and whether he did or did not receive full disclosure does not engage considerations of legal principles or a need to settle the law in this area; these are fact specific concerns.
- [50] The applicant also contends that the court must consider the issues he raises so that the warden clearly understands her disclosure obligations for future classifications. He referred to the BC Court of Appeal decision *Khela v. Mission Institution (Warden)*, 2012 BCCA 335 [Mission Institution] in which the court said:
- [2] As no live controversy remained between the parties, these appeals were moot. We acceded to the parties' request that we hear them in order to clarify the scope of a warden's obligations to obtain and disclose information to prisoners under s. 27 of the Corrections and Conditional Release Act, S.C. 1992, c. 20, to assist prisoners to make representations concerning decisions about their reclassification and transfer and to clarify the standard of review of the reclassification decisions on habeas corpus applications.

See also *Khela v. Mission Institution (Warden)*, 2011 BCCA 450 at para 37.

- [51] In my view, the warden's obligations and the applicant's legal protections are well settled in the authorities and it would not be a good use of judicial resources to continue this application simply to refine or establish other duties or obligations of the participants in a warden's hearing.
- [52] There is a concern that the classification of an inmate is "of a recurring nature but brief duration" and that because of the transitory nature of inmates, live controversies will often be resolved before hearings. Nevertheless, I find that a decision on Mr. Keiros-Meyer's application will not address any public policy concerns or have general application that warrants use of the judicial resources required to address the factual issues Mr. Keiros-Meyer wants to explore.

[53] Because the nature of habeas corpus is fact specific, when, as in this case, the ultimate issue is moot, it is undesirable to embark on an analysis of "novel and difficult points of law" based on fact specific circumstances because the result will not have a practical effect on the rights of other parties. Where deciding the application is likely to have no practical effect and there are novel or difficult points raised, the court should be cautious in expending judicial resources in deciding a case that is moved.

[54] The applicant would like the court to comment on the propriety of the administrative procedures which preceded confirmation of his transfer to medium security.

[55] Smith J. addressed this question in *Skulsh* at para. 94:

Superior courts have habeas corpus jurisdiction to order release of prisoners from detention, and in that context to look at the circumstances of detention. As Mr. Justice Chiasson explained in *Khela* at para. 93, those charged with the administration of penal institutions are entitled to considerable deference. To decide this moot case would raise a serious concern about intrusion into their legislated role. [Emphasis added.]

[56] Dealing with the question of the courts' proper law-making function, it will not be helpful to embark on an inquiry into the administrative procedures that led to Mr. Keiros-Meyer's reclassification to medium security.

[57] The proper approach to this question was articulated by Schultes J. in *Hamer v. Vancouver Island Regional Correctional Centre (Warden)*, 2016 BCSC 2380 where he declined to engage in a retrospective inquiry into those correctional practices:

[13] As Smith J. expressed it in *Skulsh* (at para. 94):

Superior courts have habeas corpus jurisdiction to order release of prisoners from detention, and in that context to look at the circumstances of detention. As Mr. Justice Chiasson explained in *Khela* at para. 93, those charged with the administration of penal institutions are entitled to considerable deference. To decide this moot case would raise a serious concern about intrusion into their legislated role. [Emphasis added.]

[14] I accept that, as set out at para. 37 of *Khela*, the appellate situation may be different, and that those courts have regularly taken on habeas corpus appeals that have become moot since the original hearings. That seems appropriate given the role of those courts, especially the Supreme Court of Canada, in developing the law and addressing policy questions that may potentially overlap with the legislative function. It is a far cry from deciding such issues in the first instance, without an applicant whose liberty continues to be unlawfully restricted.

[58] In my view, it is not appropriate to embark further on an inquiry into the events that led to the applicant's reclassification, in part because this hearing at first instance will not address any of the issues more properly dealt with in the context of an inmate whose status is in issue.

[59] For these reasons the respondent's application is granted and the application for habeas corpus is dismissed.

"The Honourable Mr. Justice Armstrong"

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