

CANADA / JUDGMENT

Tshitenge v. Mission Institution (Warden)

2023 BCSC 1237

COURT

Supreme Court of British Columbia

DECIDED

19 July 2023

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2023 BCSC 1237 Tshitenge v. Mission Institution (Warden)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tshitenge v. Mission Institution (Warden),

2023 BCSC 1237

Date: 20230719

Docket: 72857

Registry: Chilliwack

In the Matter of an Application for Habeas Corpus

Between:

Patrick Tshitenge

Applicant

And

The Warden of Mission Institution

Respondent

Corrected Judgment: The text of the judgment was corrected on the front page and through the entirety of the judgement on July 21, 2023.

Before: The Honourable Justice Duncan

Reasons for Judgment

The Applicant, Patrick Tshitenge

appearing on his own behalf:

P. Tshitenge

Counsel for the Respondent:

M. East

S. Flader

Place and Date of Trial/Hearing:

Chilliwack, B.C.

June 5 and 28, 2023

Place and Date of Judgment:

Chilliwack, B.C.

July 19, 2023

Introduction

- [1] Patrick Tshitenge is serving a sentence in the federal correctional system. He applies to this Court for habeas corpus in relation to the decision of the Warden of Mission Institution (the "Warden") to reclassify him from medium to maximum security. Mr. Tshitenge also challenges the decision of the Correctional Service of Canada ("CSC") to involuntarily transfer him from Mission, a medium security institution, to Kent, a maximum security institution. He raises issues with procedural fairness as well as racial profiling of Black inmates within the institutional system.
- [2] Mr. East, counsel for the Attorney General of Canada, maintains that both the transfer and the security reclassification were justified and reasonable at that time they were made. Mr. East also notes that since Mr. Tshitenge's transfer to Kent Institution ("Kent"), he has engaged in violent, threatening and disrespectful behaviour and as a result he was transferred into the Structured Intervention Unit ("SIU"), which further demonstrates the reasonableness of the decision to reclassify him to maximum security and transfer him to Kent.

Background Circumstances

- [3] Mr. Tshitenge is serving a life sentence for second-degree murder and other offences. Between August 20, 2022 and February 2, 2023, while an inmate at Mission, he was charged with several institutional offences. The offences included distributing and importing drugs, extorting and threatening other offenders and accessing and using drugs.

- [4] On February 2, 2023, correctional officers found a significant quantity of fentanyl in Mr. Tshitenge's cell during a search. This discovery, coupled with his other institutional behavioural difficulties, led to the decision to transfer Mr. Tshitenge to Kent on an emergency involuntary basis. The transfer was authorized by s. 13 of the Corrections and Conditional Release Act, S.C. 1992, c. 20 [CCRA] and the Commissioner's Directive (CD) 710-2-3.
- [5] Angela Tober, an Institutional Parole Officer ("IPO"), provided Mr. Tshitenge with a memorandum advising of the transfer and informing him of the right to retain and instruct counsel. IPO Tober also noted that Mr. Tshitenge would be provided with the movement or transfer documentation within two days.
- [6] One of several steps in the involuntary movement or transfer process is the completion of a Security Reclassification Scale ("SRS") by an offender's Case Management Team ("CMT"). At the hearing of this application, Mr. Tshitenge maintained that he had not been provided with the SRS.
- [7] Since the issue with service of the SRS was not readily apparent in Mr. Tshitenge's written materials, I permitted Mr. East to file further material. He provided the affidavit of IPO Hillary Kozak.
- [8] IPO Kozak deposed that she recalled sharing the SRS with Mr. Tshitenge on February 6, 2023. He refused to sign acknowledgement of receipt of the required documentation, including the SRS. I am satisfied on the basis of IPO Kozak's affidavit that the SRS was given to Mr. Tshitenge as required.
- [9] Mr. Tshitenge sought to rebut the transfer recommendation. He was given two extensions to do so and had the assistance of legal counsel in preparing the rebuttal.
- [10] The rebuttal materials addressed the February 2, 2023 seizure of fentanyl from Mr. Tshitenge's cell. Mr. Tshitenge vehemently denies responsibility for having fentanyl in his cell; however, the charge relating to the seizure was withdrawn because of a failure to properly document the exhibits.
- [11] On March 3, 2023, a Warden's Board review was held to address the CMT's recommendation to classify Mr. Tshitenge as a maximum security inmate and the validity of the emergency transfer. While those are two discrete issues, the Warden issued one decision.
- [12] The Warden noted that since June 2022, Mr. Tshitenge had engaged in undesirable behaviours. He was involved in a fight with another offender, which did not result in an institutional charge. In November 2022, he tested positive for THC in his system. He has tested positive for THC on several occasions since 2014. Mr. Tshitenge admitted to smoking marijuana because he was stressed. He was charged and found guilty on December 12, 2022. The Warden noted this to be a clear indication of his participation in drug subculture in the institution.

- [13] A week after the positive urinalysis, Mr. Tshitenge closed the door of a cell where corrections officers believed an altercation was taking place. When questioned, Mr. Tshitenge raised his voice and called the staff member who was inquiring about the incident inappropriate names. No charge was submitted.
- [14] In early December 2022, Mr. Tshitenge was noted to be bullying other inmates on the unit and calling them inappropriate names. He argued with staff. No charge was submitted but Mr. Tshitenge was warned and counselled about his behaviour.
- [15] The Warden also reviewed information from the Security Intelligence Department, commonly referred to as the "Gist", which reflected Mr. Tshitenge's involvement in the distribution and importation of drugs, extortion and threatening and access to drugs. The Warden noted the information in the Gist indicated that Mr. Tshitenge required a higher level of structure in his environment to be safely managed.
- [16] Mr. Tshitenge denied playing any role in the institutional drug subculture, but could not explain his positive urinalysis test results or how he obtained the substance he had ingested. He denied putting fentanyl in his cell in February 2022. He was argumentative and cautioned several times during the hearing; however, I feel it is only fair to point out that Mr. Tshitenge was polite and respectful in court during the habeas corpus hearing.
- [17] On March 10, the Warden increased Mr. Tshitenge's security classification from medium to maximum and approved his involuntary transfer to Kent. The Warden agreed with the IPO's analysis of behaviours that led to the involuntary transfer, primarily his role in the distribution of narcotics in Mission Institution which was substantiated by information from the SID in the Gist.
- [18] The Warden observed that Mr. Tshitenge required the structure and supervision of a maximum security environment and agreed with the reclassification to maximum security.
- [19] Mr. Tshitenge's time in Kent following the emergency transfer and reclassification decision has not been uneventful.
- [20] On April 5, 2023, Mr. Tshitenge and a second individual assaulted a fellow inmate. That inmate was stabbed in the face, neck and upper chest. As a result, Mr. Tshitenge was transferred to the SIU, where he continued to serve his sentence at the time of this application. There had been plans to transfer Mr. Tshitenge to another maximum security institution in another province, but Mr. East advised at the hearing of the application that this was no longer the case.

The Legal Basis for Habeas Corpus

- [21] In order to obtain a remedy under the doctrine of habeas corpus, an individual must demonstrate that they have been deprived of liberty. Once that has been shown, the onus shifts to the responding party that the deprivation was lawful: *Mission Institution v. Khela*, 2014 SCC 24 at para. 30 [Khela].
- [22] In determining whether the deprivation was lawful, a reviewing court considers whether the decision-maker lacked jurisdiction; whether there was a breach of procedural fairness; and whether the decision was reasonable: *Khela* at para. 52.
- [23] The standard of review that applies when procedural fairness is challenged is correctness: *Moazami v. Kent Institution (Warden)*, 2023 BCSC 61. This is a non-deferential standard.
- [24] The standard of review that applies to the transfer decision is reasonableness. This is a deferential standard. Unless a decision does not fall within the range of possible, acceptable outcomes which are defensible on the facts or the law, it is reasonable. Perfection is not required and the reviewing court does not reweigh the evidence, absent exceptional circumstances: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.
- [25] Mr. East acknowledges that Mr. Tshitenge's involuntary transfer from medium to maximum security constitutes a deprivation of his residual liberty, but maintains that the transfer was lawful, proper and necessary. Counsel also maintains that Mr. Tshitenge's behaviour since the transfer confirm that the decision to reclassify him to maximum security was reasonable.

Mr. Tshitenge's Submissions

1. The Fentanyl Seizure

- [26] Mr. Tshitenge vehemently denies that he was responsible for the fentanyl in his cell. He notes that the drugs were not properly catalogued as an exhibit and the CCTV footage from outside his cell door, which could show who else accessed it, was lost or not available to him. He sought to provide affidavit evidence from the individual he maintains was responsible for placing the fentanyl in his cell, but was unable to do so.
- [27] The CCTV footage from outside Mr. Tshitenge's cell is included in a confidential affidavit that was filed with the court; however, the Warden did not consider the footage when he made the transfer decision.
- [28] The failure of CSC staff to properly document the seizure of a drug that often proves deadly to users is troubling. The result was that Mr. Tshitenge was not charged with the infraction, but it did not erase his prior pattern of behaviour related to the illicit use of drugs in the institution. The Warden considered all of Mr. Tshitenge's conduct in the institution in arriving at his decision, including the SID information which substantiated Mr. Tshitenge's involvement with the drug subculture and his positive drug tests.

[29] Overall, I find no breach of procedural fairness in the Warden's failure to review the CCTV video footage.

2. The SRS Scoring

[30] Mr. Tshitenge maintains that the SRS scoring has not been validated in respect of Black inmates. I infer from his submission that the scoring does not take into account the background of Black inmates and how that may contribute to their adjustment to and behaviour in a federal institution.

[31] Given Mr. Tshitenge's behaviour at Mission Institution and his subsequent behaviour at Kent, the alleged shortcomings in the SRS do not lead to a conclusion that the emergency transfer or the reclassification decisions were unreasonable or the result of procedural unfairness.

3. Post-transfer Behaviour

[32] Mr. Tshitenge freely admits to acting out violently in Kent after the emergency transfer. He blames his behaviour on PTSD caused by a previous stay at Kent, during which he was violently assaulted. Nevertheless, he maintains that he should be transferred back to medium security at Mission Institution from SIU at Kent.

[33] There is a procedural difficulty with Mr. Tshitenge's approach: the movement of an inmate into SIU is itself a transfer under the CCRA. Unless Mr. Tshitenge successfully challenged the lawfulness of his transfer to the SIU on the basis of his actions at Kent, any remedy directed at his earlier transfer from Mission Institution to Kent would be moot because of the subsequent transfer into SIU. Mr. Tshitenge would simply be reclassified based on his most recent serious, and freely admitted, conduct at Kent.

[34] There is no application before me relating to the decision to transfer Mr. Tshitenge into SIU.

Conclusion

[35] Mr. Tshitenge's application for habeas corpus in relation to the decision approving the emergency transfer from Mission Institution to Kent and the reclassification to maximum security is dismissed.

[36] Mr. East may reclaim the unopened exhibit containing the Gist which was filed and sealed at this hearing.

"Duncan J."

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