IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Mr. Justice William J. Burnett
Madam Justice Karen I. Simonsen

B E T W E E N :

MICHAEL KALO	)	
	)	***V. F. Y. Li***
(Applicant) Respondent	)	*for the Appellant*
	)	
- and -	)	***M. Kalo***
	)	*on his own behalf*
THE CITY OF WINNIPEG	)	
	)	***B. S. Newman***
(Respondent) Appellant	)	*for the Intervener*
	)	
- and -	)	*Appeal heard:*
	)	***February 8, 2019***
CRIMINAL DEFENCE LAWYERS ASSOCIATION OF MANITOBA	)	
	)	*Judgment delivered:*
	)	***April 29, 2019***
Intervener	)	

On appeal from *Kalo v Winnipeg (City of) on behalf of Winnipeg Police Service*, 2018 MBQB 68

STEEL JA

[1] The respondent the City of Winnipeg (the City) appeals the decision of the application judge which granted judicial review of a decision of the Winnipeg Police Service (the WPS). It seeks to have the application judge's decision set aside and the application dismissed with costs.

[2] This matter proceeded through the courts in such a confusing manner that it was difficult for this Court to determine what the record was in front of the application judge and on what basis his determination was made. This is reflected in the number of motions for the filing of further evidence that were brought preliminarily to the hearing of this appeal.

[3] Given the importance of the issue raised on the application, not only to the applicant Michael Kalo (Kalo), but also to the public interest, it would be wrong to decide this issue on the ambiguous record in front of this Court.

[4] Consequently, the appeal is allowed to the extent that the application be referred back to the Court of Queen's Bench for a fresh hearing before a different judge, on a proper record.

[5] There is no doubt that the application judge committed certain errors in law and procedure; yet, the City consented to the procedure but did not file an appropriate record. The necessity for a fresh hearing delays any decision for Kalo who is self-represented and presently on social assistance. I would award costs in favour of Kalo and against the City in the amount of $5,000, to be paid forthwith.

FACTS

[6] In January 2017, Kalo's prospective employer required him to obtain an up-to-date police information check and police vulnerable sector check (collectively, the criminal record check) for employment purposes. He had had previous criminal record checks for work in vulnerable sectors, which had come back clear.

[7] The first page was similar to the previous criminal record check and indicated that there was no criminal record. However, this time, a second page was attached. That second page included a section headed "NON CONVICTIONS" and indicated that Kalo had been charged with two offences that had been stayed. A third section headed "JUDICIAL ORDERS" identified a restraining order. It is the inclusion of the non-convictions and judicial order which are the subject of this appeal.

[8] The WPS is the administrator of this process for the City. The criminal record check was done in accordance with the Winnipeg Police Service, *Standard Operating Guidelines: Police Record Checks* (January 2017) (the SOG). The change was a result of a new process for criminal record checks implemented by the WPS in August 2016. In January 2017, this new process was followed by the creation of an amended version of the SOG which was posted online on the WPS website.

[9] Because Kalo had indicated that he was applying for a position that involved working with vulnerable persons, an exceptional disclosure assessment was conducted in accordance with the SOG. The purpose of the exceptional disclosure assessment is to consider non-conviction information and determine whether it should be disclosed in the criminal record check.

[10] The SOG indicate, that in exceptional circumstances, the police vulnerable sector check may include non-conviction information such as stayed charges. In this case, the criminal record check included the following non-conviction information:

1. a sexual assault charge against a child from 2009 which was stayed subsequent to Kalo entering into a peace bond; and

2. a sexual interference charge, arising from the same incident and the same child, also from 2009 which was stayed subsequent to Kalo entering into a peace bond (the stayed charges).

[11] The criminal record check also included reference to a judicial order granted in 2007.

[12] The City filed an affidavit before the application judge indicating that, in determining whether to include the stayed charges set out in the non-convictions section of the criminal record check's supplementary information, the WPS reviewed relevant excerpts of the SOG, the narrative report of the investigating officer and a letter from a Crown attorney. Based on that information, the WPS determined that the criteria was met for disclosure of the non-conviction sexual offences against a child as part of the criminal record check.

[13] As a result of the inclusion of the supplementary information, Kalo sought declaratory relief by way of a notice of application to be heard on April 25, 2017. The application, filed against the Attorney General of Canada on behalf of the Royal Canadian Mounted Police and the City on behalf of the WPS, asked for a declaration that Kalo was entitled to receive a clear criminal record check. Kalo submitted that including non-conviction charges in the supplementary information attached to the criminal record check was in violation of the *Canadian Charter of Rights and Freedoms* (the *Charter*). The application was abandoned against the Attorney General of Canada on behalf of the Royal Canadian Mounted Police.

[14] The application was heard in the Court of Queen's Bench on October 2, 2017. It was adjourned on the understanding that Kalo would

request a reconsideration. Under the SOG, an applicant could request, in writing, a reconsideration of the results of his or her criminal record check which would be reviewed by a panel of three members of the WPS. Judicial orders were not eligible for reconsideration.

[15] Prior to his reconsideration hearing, Kalo provided a written submission in support of his position. The WPS conducted a reconsideration hearing on October 27, 2017, and reasons for the decision were provided to Kalo on October 31, 2017. The panel denied the reconsideration.

[16] On November 8, 2017, Kalo received an email from the City's solicitor advising that "the WPS has recently changed its policy regarding the release of Family Court Orders in relation to Criminal Background Checks." Kalo requested, but was not given a copy of the policy change.

THE APPLICATION JUDGE

[17] On January 8, 2018, the application judge resumed consideration of Kalo's application. Although Kalo had requested declaratory relief in his application, during the hearing the application morphed into a request for judicial review. The application judge determined that he could not "overturn the decisions of the WPS on declaratory relief", but that what Kalo sought was "akin to judicial review" (at para 47). As the City did not object to this turn of events or ask for an adjournment or file any additional material, the case proceeded on that basis.

[18] The application judge did not determine the standard of review or whether the decision was reasonable or correct. Instead, he dealt only with the issue of procedural fairness. The application judge applied the factors

from *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, and found that the WPS procedure was unfair. As a remedy, he ordered that the WPS conduct an in-person hearing within 30 days. He also ordered that Kalo had a right to request reconsideration of the decision and make a presentation to the reconsideration panel in person.

[19] Ultimately, Kalo attended an in-person hearing and the WPS decided that the reference to the Court of Queen's Bench order should be deleted, but the other non-conviction information (relating to the stayed charges) should remain on the criminal record check. Kalo has not had an opportunity to request reconsideration of that decision because the proceedings have been stayed pending appeal.

[20] On appeal, the City argues that the application judge erred by making findings of fact that were not based on the evidence; by using these findings to conclude that the WPS breached the rules of procedural fairness; and by purporting to conduct a judicial review of the decision of the WPS without determining the applicable standard of review.

[21] While the City acknowledges that it did not object to the application judge's suggestion that he conduct a judicial review, it submits that the decision of the application judge uses tests and referred to cases that were never referenced by Kalo. The City argues that it could not have anticipated the basis for the decision of the application judge.

[22] Prior to the appeal hearing, the Criminal Defence Lawyers Association of Manitoba (the Association) was granted intervener status. The Association makes no specific submissions regarding the facts of this particular case. However, it argues that the WPS procedure does not meet the

requirements of procedural fairness and that the reconsideration process conducted by members of the WPS raises a concern regarding the appearance of bias.

ANALYSIS

[23] As I indicated earlier, there were a number of motions made for the admission of further evidence before this Court. The parties consented to some of them. Of course, their consent does not necessarily indicate that the Court agrees to the admission of this evidence.

[24] Kalo seeks to have the appeal struck as moot (because the WPS is following the application judge's order) or, in the alternative, seeks to file fresh evidence consisting of "any decisions produced by a hearing officer and/or by a hearing panel (of the [WPS]) regarding [Kalo's] Criminal Record Check Certificate". As mentioned earlier, Kalo did have an in-person hearing on August 15, 2018, pursuant to the order of the application judge and he seeks to introduce that decision as further evidence. That decision was based on a different and updated SOG and occurred subsequent to the hearing that is under appeal.

[25] The City, unsuccessfully, moved to have the hearing of the appeal adjourned pending the Supreme Court of Canada's decisions on *Bell Canada v Canada (Attorney General)*, 2017 FCA 249, leaves to appeal to SCC granted, 37896 (10 May 2018) and 37897 (10 May 2018); and *Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132, leave to appeal to SCC granted, 37748 (10 May 2018) or, in the alternative, reservation of the decision in this matter pending the Supreme Court of Canada's release of these judgments.

[26] In addition, the City moved to have two further affidavits filed, one by Gene Bowers, a member of the first reconsideration panel, dated December 21, 2018. The affidavit contains Kalo's request for reconsideration sent to the WPS on October 4, 2017, and the decision of the reconsideration panel dated October 31, 2017. The second is an affidavit of Alana Odokeychuk containing information as to the process followed by other police forces.

[27] All of these motions to introduce further evidence confirm my concern for the state of the record in these proceedings. I agree with the City that the application judge did not address the decision itself, including the applicable standard of review.

[28] However, I do not believe that the record in front of him was complete so as to allow for an analysis of the procedure adopted by the WPS. More importantly, based on the record in front of us, it is not possible to determine whether the application judge was correct in his conclusion or in the remedy he ordered. It is not possible to determine with certainty what the record was in front of the application judge.

[29] The record serves an important function in a judicial review proceeding, given that the function of judicial review is to ensure the legality, the reasonableness and the fairness of the administrative process below. While many jurisdictions have created a legislative definition of what constitutes the record, Manitoba has not. In Manitoba, the duty to provide a record of proceedings on judicial review and the content of that record is not mandated by any one statute or rule. Rather, the content of this duty is found in case law and the applicable (and varying) statutory provisions governing

decision-making bodies (see Anita Southall & Meghan Menzies, "The Record on Judicial Review: How It's Done in Manitoba" (2016) 29 Can J Admin L & Prac 27).

[30] A judicial review is not a hearing *de novo*, and there are strict limits on the type of additional evidence that may be admitted on judicial review. In modern judicial review, the record consists of all of the material that was before the original decision-maker (see Robert W MacAulay, James LH Sprague & Lorne Sossin, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomson Reuters, 2018) vol 3 (loose-leaf updated 2018, release 6), ch 28.19).

[31] It follows, therefore, that evidence that was not before the initial decision-maker will not be permitted on judicial review. There are exceptions to this rule, based primarily on fairness, natural justice and assistance to the court. The record can be expanded for further evidence to include relevant background information, to address procedural fairness concerns or jurisdictional errors, and to demonstrate that no evidence was available to the decision-maker on a given point. See, for example, *Ross v British Columbia (Human Rights Tribunal)*, 2009 BCSC 1969 at para 27; and *Economical Mutual Insurance Company v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 903 at paras 64-68.

[32] So, for example, affidavit evidence on judicial review to demonstrate bias or fraud on the part of the tribunal, its members or witnesses, is generally admissible (see Freya Kristjanson, "The Record on Judicial Review" (2013) 41:4 Adv Q 387 at 397 (Kristjanson, Judicial Review 2013)). With expanded jurisdiction over *Charter* and constitutional questions,

evidence to supplement the record with respect to these grounds may be admissible (see *Lockridge v Director, Ministry of the Environment*, 2012 ONSC 2316; and *Ismail v British Columbia (Human Rights Tribunal)*, 2013 BCSC 1079).

[33] In this case, for example, background information as to the situation in other jurisdictions may be permitted where it would provide assistance on the matter to the reviewing court (see Kristjanson, Judicial Review 2013 at pp 396-400; Freya Kristjanson & Margaret Leighton, "The Record on Judicial Review in Ontario" (2016) 29 Can J Admin L & Prac 51; Lauren J Wihak & Benjamin J Oliphant, "Evidentiary Rules in a Post-Dunsmuir World: Modernizing the Scope of Admissible Evidence on Judicial Review" (2015) 28 Can J Admin L & Prac 323 at 349; and *Chopra v Canada (Treasury Board)*, 1999 CarswellNat 1050 (FCTD)). Thus, in other circumstances, some of the further evidence submitted by the parties might have been admitted.

[34] On the other hand, evidence of events that occurred after the decision will be excluded (see *Hanna v Attorney General for Ontario*, 2010 ONSC 4058). Therefore, the evidence of the decisions of the WPS with respect to the in-person hearing that occurred after the decision of the application judge in this case would not be admissible on this appeal.

[35] It is important to understand that an incomplete record alone can be grounds, in some circumstances, to set aside a decision on judicial review. The Federal Court has confirmed this in a number of cases. See, for example, *Parveen v Canada (Minister of Citizenship & Immigration)*, 1999 CarswellNat 772 at para 8 (FCTD); *Construction and Specialized Workers'*

Union, Local 1611 v Canada (Citizenship and Immigration), 2013 FC 512 at para 57; *Lemieux v Canada (National Revenue)*, 2016 FC 798 at paras 9-10; *Togtokh v Canada (Citizenship and Immigration)*, 2018 FC 581 at paras 13-23; and *Patel v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 804 at para 34.

[36] In the case at bar, it is unclear what information the WPS were relying on in coming to their conclusion, especially with respect to the reconsideration. The City never disclosed what evidence the WPS considered at the reconsideration stage of this matter. Though their decision refers to a 2008 criminal investigation file, we do not know its contents. The reasons given by the reconsideration panel indicate that they reviewed "criminal investigation, Cr#R088874814" from December 2008. I have no idea, nor did the application judge I presume, know what is contained in that file.

[37] Moreover, there were issues referred to in Kalo's submission for reconsideration, but it is not clear whether the reconsideration panel considered them. For example, did the panel consider the transcript of the proceedings in front of Guy J in 2009 with respect to the peace bond entered into by Kalo, which was filed in this Court by the Association?

[38] With respect to the stayed charges, the Family Division of the Court of Queen's Bench canvassed the allegations in the context of the family case, and highlighted a number of inherent contradictions in the allegations. Kalo referred to that decision in his request for a reconsideration (see *Shore-Kalo v Kalo*, 2009 MBQB 209). The Court in that case heard oral evidence on the stayed charges, viewed the video statement of the child in question and heard the testimony of the detective who investigated this matter. The judge

concluded the "mother has not met the onus of convincing me that it was an incident of a sexual nature" (at para 48). Did the WPS review the decision in that case when it was referred to them by Kalo?

[39] As well, it appears that the application judge did not have a copy of Kalo's request for reconsideration before him.

[40] In addition, so far as I can tell, the record also includes three versions of Kalo's criminal record check that is in dispute (see: 1) Exhibit B of Kalo's April 20, 2017 affidavit; 2) Exhibit B of Shannon Hanlin's April 28, 2017 affidavit (which is more complete than the version filed by Kalo); and 3) Exhibit G of Ms Hanlin's April 28, 2017 affidavit (the revised version)). The parties are not in agreement as to which documents constituted the record in the Court below, and counsel for the City indicated that she was not sure which documents were before the original hearing officer, the reconsideration panel or the application judge.

[41] It is also unclear which version of the SOG was in evidence before the application judge. It would appear that the parties only relied upon the January 2017 version of the SOG and, certainly, this was the version referred to by the application judge. Yet, given the timing of the WPS reconsideration of this matter, the April 2017 version of the SOG could also have formed part of the record.

[42] In addition, this Court is at a loss to understand the parameters surrounding the inclusion of judicial orders in criminal record checks. What guidelines or policies govern the decision with respect to their inclusion? At one point during this process, counsel for the City sent an email to Kalo telling him that the policy with respect to the inclusion of judicial orders had changed

in case he wanted to submit another application. He was not told what the original policy was, how it had changed or given a copy of the change. It was not included in the record filed by the City. When questioned on this at the hearing of this appeal, counsel for the City was unable to provide the Court with a copy of the change in policy.

[43] Given the fact that we are sending this matter back for rehearing, it is unnecessary for us to decide the many other issues that arose on this appeal. However, it might be useful to highlight some of them.

[44] First, no decision was ever made as to the authority under which the exceptional disclosure assessment came into force or the extent of that authority.

[45] In his application, Kalo questioned the jurisdiction and/or authority of the WPS to implement the policy in question. He challenged the validity of the SOG itself, as well as its application in his case. As a matter of fact, at the first appearance before the application judge, Kalo made clear:

> This is not an application for judicial review of a decision of a tribunal. This goes beyond that. This is a direct attack on the authority of the [WPS] and I am saying they have acted with no authority. I am saying they have violated my *Charter* rights.

[46] There is no specific statutory scheme that outlines the criminal record check process and the exceptional disclosure of non-conviction information. The City argued that the WPS SOG were developed in accordance with the requirements outlined in sections 36(1)(b), 40(1) and 44(1)(b) of *The Freedom of Information and Protection of Privacy Act*, CCSM c F175; the City of Winnipeg, by-law No 86/2010, *Records*

Management By-Law (21 July 2010); and section 22(1)(b) of *The Police Services Act*, CCSM c P94.5, which gave the WPS authority to pass the SOG. Although addressed in the context of the application judge's analysis regarding procedural fairness, the issue of whether the SOG was *ultra vires* was never decided.

[47] Second, the original notice of application filed by Kalo asked for declaratory relief. The application judge indicated that he could not give Kalo declaratory relief and that, instead, he would continue the application in the form of judicial review. He does not indicate why a declaration would not be available in this case. Again, I make no comment as to whether Kalo would have been successful as to this request except to make clear that our failure to deal with this issue on appeal does not constitute an approval of those reasons.

[48] Third, the application judge dealt with the *Charter* challenge very briefly, adopting *Tadros v Peel Regional Police Service*, 2009 ONCA 442. That is not the subject of an appeal by Kalo and, therefore, not argued before us and I make no comment on the applicability of that case to these facts, or any of the *Charter* arguments.

Costs

[49] With respect to my comments on the actions of the City, I should point out that counsel on the appeal was not originally counsel of record. A different counsel had conduct of the file from its inception and was responsible for filing the first affidavit.

[50] Normally, the general rule is that costs follow success in litigation. But, that is not always the case. The fact that a party is successful in a case

does not prevent the court from awarding costs against the party in a proper case. The court has considerable discretion in the award of costs. So, for example, cost awards can be used to discourage steps that unduly prolong litigation (see Mark M Orkin & Robert G Schipper, *The Law of Costs*, 2nd ed (Toronto: Thomson Reuters, 2019) (loose-leaf updated March 2019, release 82), ch 2 at 2-7; and Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, rr 57.01(1)(d.1), 57.01(2)).

[51] In an application for judicial review, it is incumbent on the tribunal to file the record and to ensure that the record is complete (see Kristjanson, Judicial Review 2013 at p 391). This expedites the process and makes the record available in a timely manner. The City did not file a complete record, even after it consented to proceeding on that basis. This impacts significantly on Kalo who is self-represented and presently on social assistance. His application for employment as a bus driver required a clear criminal record check. He may never receive that clear check and he may not get the job even if he did, but that determination has been delayed significantly.

[52] Nor do I consider the fact that he is self-represented to be a deterrent to receiving costs in this case. As Beard J (as she then was) indicated in *Kuny v Beamish*, 2003 MBQB 47 (at para 18):

> After considering the current Manitoba legislation and the case law as it has been developing, I find that there has been a change in the common law of costs and that there is no longer a blanket prohibition against awarding costs, other than disbursements, to a self-represented litigant. I further find that, while one factor to be considered in setting the appropriate amount of costs is whether the self-represented litigant has suffered a lost opportunity to earn income, this [is] only one factor to be considered, and is not

> determinative of the issue of a self-represented litigant's entitlement to costs.

See also *232 Kennedy Street Ltd v King Insurance Brokers (2002) Ltd*, 2009 MBCA 22.

[53] I would award costs in favour of Kalo and against the City in the amount of $5,000 inclusive of disbursements, to be paid forthwith. These are inclusive of costs in the Court below and the Court of Appeal. There will be no costs awarded to or against the intervener.

CONCLUSION

[54] This case raises important systemic and public interest issues. What is the extent of the legislative authority of the WPS and did they exceed that authority in making the supplementary information part of the criminal record check? Is the inclusion of non-convictions and judicial orders on a criminal record check in exceptional circumstances in breach of the *Charter*? Was the decision reached reasonable or correct? Was the process followed fair? What is the impact, if any, of an applicant's consent to the disclosure of information on the application form?

[55] A large group of individuals may be affected by these decisions and, in particular, those who often face significant challenges in securing employment. On the other hand, the protection of vulnerable individuals is an equally important societal concern and part of the consideration. These decisions should not be made on the basis of the ambiguity in front of us on this appeal.

[56] The appeal is allowed to the extent that the matter is referred back to the Court of Queen's Bench for a fresh hearing before a different judge, on a proper record.

Steel JA

I agree: Burnett JA

I agree: Simonsen JA