Federal Court  Cour fédérale

Date: 20150603

Docket: T-2390-14

Citation: 2015 FC 702

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, June 3, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

GREGG HERBERT PREVOST

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The applicant seeks judicial review of a decision dated October 6, 2014, by the National Parole Board Appeal Division [Appeal Division] affirming a decision of the National Parole Board [Board] dated January 22, 2014, denying him day parole and full parole pursuant to the *Corrections and Conditional Release Act*, SC 1992, c 20 [Act].

II. Facts

[2] Since October 4, 1985, the applicant has been serving a life sentence, with eligibility for full parole after 25 years, for the first-degree murder of a police officer committed in the fall of 1984 in the community of Iroquois Falls, Ontario.

[3] For the past 12 years, the applicant has been serving his sentence in a minimum security prison.

[4] On June 17, 2009, the Board granted the applicant day parole at the Maison Saint-Léonard Community Residential Centre [St-Léonard CRC].

[5] On December 19, 2009, the police intercepted the applicant, who smelled of alcohol and had a drill in his possession. A subsequent search revealed that the applicant was also in possession of Dilaudid pills and syringes.

[6] Accordingly, the applicant's day parole was revoked on March 18, 2010.

[7] On September 18, 2013, the applicant submitted a new application for day parole and full parole to the Board.

[8] On November 29, 2013, the applicant's Case Management Team [CMT] recommended that the applicant no longer be granted the escorted temporary absences he had been receiving

over the course of the preceding year. On December 6, 2013, the CMT decided not to recommend to the Board full parole for the applicant.

[9] On January 22, 2014, the Board held a hearing in the presence of the applicant. That same day, the Board denied the applicant's applications for day parole and full parole.

[10] On October 6, 2014, the Appeal Division affirmed the Board's decision.

III. Impugned decisions

A. *Decision of the Board dated January 22, 2014*

[11] In its decision dated January 22, 2014, the Board reviewed the evidence in the applicant's record, including his oral testimony at the hearing.

[12] The Board began by reviewing the applicant's recent psychological assessment, which reveals that his risk of reoffending was weak to moderate, which, the Board noted, constitutes an acceptable level of risk when considering day parole. The Board observed that the applicant has been incarcerated in a minimum security setting for the past 11 years.

[13] The psychological assessment also indicates that the applicant suffers from alcohol and drug dependency and has antisocial personality traits.

[14] The Board emphasized that while the applicant has expressed genuine remorse for his actions, he nevertheless tends to complain about the system and has difficulty interacting with authority figures when he feels he has been treated unfairly. The Board also noted that the applicant secretly consumed Dilaudid between 2006 and 2009.

[15] The Board recognized that the applicant had completed various substance abuse rehabilitation programs, that he participated in Alcoholics Anonymous [AA] meetings and that he was in regular contact with an Aboriginal Liaison Officer. The Board noted that the applicant had been participating in escorted temporary absence groups since March 2011.

[16] The Board then took into account the applicant's release plan. It recognized that the applicant had been accepted into the St-Léonard CRC, that he benefitted from the support of his family and community members, that he planned to find employment as a machinist or in a related field and that he planned to attend AA meetings.

[17] However, the Board observed that the day parole the applicant had been granted in June 2009 had been revoked in April 2010 following a relapse into drug and alcohol use and that, in January 2011, he received a concurrent sentence of two months for possession of substances.

[18] The applicant's record also shows that his wife had informed the CMT that he had been consuming alcohol since the beginning of his day parole and that he had been violent with her, having sexually assaulted her until she lost consciousness. The Board noted that the applicant had always denied these allegations. The evidence also shows that the applicant had had sexual

relations with both a prostitute and a volunteer from a non-profit Christian organization during this same period.

[19] Moreover, the Board pointed out that in October 2013, the psychological counseling that the applicant had been receiving since June 2013 had been suspended because he was constantly criticizing the Correctional Services of Canada [CSC].

[20] The Board also observed that in November 2013, the applicant's CMT received reliable information from employees, fellow inmates and the Security Intelligence that he was a negative leader, that he had led a smear campaign against a fellow inmate, that he intimidated others and that he participated in tobacco smuggling activities within the penitentiary.

[21] The Board emphasized that the applicant had denied these allegations and maintained this position at the hearing before it.

[22] The Board noted that, based on the evidence in the record, the applicant's attitude and conduct had deteriorated over the course of the preceding months. Among other things, the applicant's credibility is tainted by the fact that he continues to show signs of rigidity, hostility and frustration toward the justice system, the CSC and various authorities. According to the Board, in light of the recent events that brought the applicant's psychological counseling to a halt and led to the cancellation of the escorted temporary absence program, the applicant's situation is precarious and disappointing.

[23] The Board noted the CMT's position that the applicant presents an undue risk to society. The Board observed that although the applicant had made efforts to improve his conduct, the objectives described in his correctional plan were not achieved.

[24] With this in mind, the Board declared that the applicant would have to demonstrate a willingness and ability to cooperate with his CMT to establish a relationship of trust.

[25] In short, the Board concluded that the applicant's release plan was premature and that his release would not contribute to the protection of society.

B. *Decision of the Appeal Division dated October 6, 2014*

[26] In a letter dated October 10, 2014, the Appeal Division rejected the applicant's appeal and affirmed the decision of the Board.

[27] The Appeal Division began by summarizing the applicant's comments and identifying three grounds for appeal. The applicant criticized the Board for having (1) provided inadequate reasons; (2) relied on incomplete and inaccurate evidence; and (3) rendered an unreasonable decision.

[28] The Appeal Division then observed that, contrary to the applicant's claims, the Board had reviewed all of the evidence in the applicant's record, identifying and weighing both the positive and negative elements contained in his file. This global assessment led the Board to conclude

that the risk to society presented by the applicant did not justify granting day parole or full parole.

[29] The Appeal Division found that, contrary to the applicant's claim, the Board had relied on reliable, relevant and convincing information contained in the applicant's file.

[30] The Appeal Division also noted that the audio recording of the hearing before the Board revealed that the Board had given the applicant the opportunity to make comments and respond to the allegations against him.

[31] Moreover, the audio recording demonstrates that the applicant is hostile to authority figures. The Appeal Division held that it was reasonable for the Board to weigh this factor in light of his offence of first-degree murder of a police officer in its evaluation of the applicant's risk of reoffending.

[32] Finally, the Appeal Division confirmed that the principles of fairness had been followed in the applicant's case and that the Board's reasons in support of its decision were transparent and based on the evidence in the record.

IV. Issues

[33] This application sets out the following two issues:

(1) Is the Appeal Division's decision reasonable?

(2) Did the Appeal Division respect the principles of procedural fairness in the applicant's case?

V. Standard of review

[34] Given the Board's and the Appeal Division's expertise in making decisions about whether to grant parole, it is settled law that the applicable standard of review is that of reasonableness. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47).

[35] In this view, the Court must take a deferential approach to the Board's decision. The Court may not substitute its own reasons for those of the Appeal Division, but may, if it finds it necessary, look to the record for the purpose of assessing the reasonableness of the outcome (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 15).

[36] As Justice George J. Locke held in the Federal Court decision in *Korn v Canada (Attorney General)*, 2014 FC 590 at para 14 [*Korn*], judicial deference is called for with respect to the decisions of the Board and the Appeal Division:

> [14] I understand that, in light of the expertise of the PBC and the Appeal Division, I owe them a degree of deference (*Sychuk v Canada (Attorney General)*, 2009 FC 105 at para 45). In a case

> where parole is involved, the PBC's "decision must not be interfered with by this Court failing clear and unequivocal evidence that the decision is quite unfair and works a serious injustice on the inmate. …" (*Desjardins v Canada (National Parole Board)*, [1989] FCJ No. 910 (QL), 29 FCR 38 (FCTD), cited in *Aney*, above at para 31).

[37] As for the determination of whether the Board's decision respects the principles of procedural fairness, the applicable standard is that of correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

VI. Analysis

A. *Statutory and jurisprudential framework*

[38] The provisions relating to parole are set out in Part II of the Act.

[39] The main purpose of parole is contained in section 100 of the Act:

Purpose of conditional release	**Objet**
100. The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.	**100**. La mise en liberté sous condition vise à contribuer au maintien d'une société juste, paisible et sûre en favorisant, par la prise de décisions appropriées quant au moment et aux conditions de leur mise en liberté, la réadaptation et la réinsertion sociale des délinquants en tant que citoyens respectueux des lois.

[40] The Board's decision-making authority is set out in section 102 and paragraph 107(1)(*a*) of the Act:

Criteria for granting parole	**Critères**
102. The Board or a provincial parole board may grant parole to an offender if, in its opinion,	**102**. La Commission et les commissions provinciales peuvent autoriser la libération conditionnelle si elles sont d'avis qu'une récidive du délinquant avant l'expiration légale de la peine qu'il purge ne présentera pas un risque inacceptable pour la société et que cette libération contribuera à la protection de celle-ci en favorisant sa réinsertion sociale en tant que citoyen respectueux des lois.
(*a*) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and	
(*b*) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.	
Jurisdiction of Board	**Compétence**
107. (1) Subject to this Act, the Prisons and Reformatories Act, the International Transfer of Offenders Act, the National Defence Act, the Crimes Against Humanity and War Crimes Act and the Criminal Code, the Board has exclusive jurisdiction and absolute discretion	**107**. (1) Sous réserve de la présente loi, de la Loi sur les prisons et les maisons de correction, de la Loi sur le transfèrement international des délinquants, de la Loi sur la défense nationale, de la Loi sur les crimes contre l'humanité et les crimes de guerre et du Code criminel, la Commission a toute compétence et latitude pour :
(*a*) to grant parole to an offender;	*a*) accorder une libération conditionnelle;

[41] The powers of the Appeal Division are set out in subsections 147(4) and (5) of the Act as follows:

Decision on appeal	**Décision**
147. (4) The Appeal Division,	**147**. (4) Au terme de la

on the completion of a review of a decision appealed from, may	révision, la Section d'appel peut rendre l'une des décisions suivantes :
(*a*) affirm the decision;	*a*) confirmer la décision visée par l'appel;
(*b*) affirm the decision but order a further review of the case by the Board on a date earlier than the date otherwise provided for the next review;	*b*) confirmer la décision visée par l'appel, mais ordonner un réexamen du cas avant la date normalement prévue pour le prochain examen;
(*c*) order a new review of the case by the Board and order the continuation of the decision pending the review; or	*c*) ordonner un réexamen du cas et ordonner que la décision reste en vigueur malgré la tenue du nouvel examen;
(*d*) reverse, cancel or vary the decision.	*d*) infirmer ou modifier la décision visée par l'appel.
Conditions of immediate release	**Mise en liberté immédiate**
(5) The Appeal Division shall not render a decision under subsection (4) that results in the immediate release of an offender from imprisonment unless it is satisfied that	(5) Si sa décision entraîne la libération immédiate du délinquant, la Section d'appel doit être convaincue, à la fois, que :
(*a*) the decision appealed from cannot reasonably be supported in law, under the applicable policies of the Board, or on the basis of the information available to the Board in its review of the case; and	*a*) la décision visée par l'appel ne pouvait raisonnablement être fondée en droit, en vertu d'une politique de la Commission ou sur les renseignements dont celle-ci disposait au moment de l'examen du cas;
(*b*) a delay in releasing the offender from imprisonment would be unfair.	*b*) le retard apporté à la libération du délinquant serait inéquitable.

[42] Finally, the principles guiding the Board in carrying out its mandate are set out in section 101 of the Act:

Principles guiding parole boards

101. The principles that guide the Board and the provincial parole boards in achieving the purpose of conditional release are as follows:

(*a*) parole boards take into consideration all relevant available information, including the stated reasons and recommendations of the sentencing judge, the nature and gravity of the offence, the degree of responsibility of the offender, information from the trial or sentencing process and information obtained from victims, offenders and other components of the criminal justice system, including assessments provided by correctional authorities;

(*b*) parole boards enhance their effectiveness and openness through the timely exchange of relevant information with victims, offenders and other components of the criminal justice system and through communication about their policies and programs to victims, offenders and the general public;

(*c*) parole boards make decisions that are consistent with the protection of society and that are limited to only what is necessary and proportionate to the purpose of conditional release;

Principes

101. La Commission et les commissions provinciales sont guidées dans l'exécution de leur mandat par les principes suivants:

a) elles doivent tenir compte de toute l'information pertinente dont elles disposent, notamment les motifs et les recommandations du juge qui a infligé la peine, la nature et la gravité de l'infraction, le degré de responsabilité du délinquant, les renseignements obtenus au cours du procès ou de la détermination de la peine et ceux qui ont été obtenus des victimes, des délinquants ou d'autres éléments du système de justice pénale, y compris les évaluations fournies par les autorités correctionnelles;

b) elles accroissent leur efficacité et leur transparence par l'échange, au moment opportun, de renseignements utiles avec les victimes, les délinquants et les autres éléments du système de justice pénale et par la communication de leurs directives d'orientation générale et programmes tant aux victimes et aux délinquants qu'au grand public;

c) elles prennent les décisions qui, compte tenu de la protection de la société, ne vont pas au-delà de ce qui est nécessaire et proportionnel aux objectifs de la mise en liberté sous condition;

(*d*) parole boards adopt and are guided by appropriate policies and their members are provided with the training necessary to implement those policies; and	*d*) elles s'inspirent des directives d'orientation générale qui leur sont remises et leurs membres doivent recevoir la formation nécessaire à la mise en œuvre de ces directives;
(*e*) offenders are provided with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release process.	*e*) de manière à assurer l'équité et la clarté du processus, les autorités doivent donner aux délinquants les motifs des décisions, ainsi que tous autres renseignements pertinents, et la possibilité de les faire réviser.

[43] It is clear from the statutory and jurisprudential context set out above that public safety and protection are paramount considerations in the assessment of an application for parole (*Campbell v Canada (Attorney General)*, 2013 FC 803 at para 35; *Fernandez v Canada (Attorney General)*, 2011 FC 275 at para 22 [*Fernandez*]).

[44] As stated by the Federal Court of Appeal in *Ouellette v Canada (Attorney General)*, 2013 FCA 54 at paras 61 and 62 [*Ouellette*]:

> [61] In the case of an offender, the Act states quite clearly that "the protection of society [is] the paramount consideration in the determination of any case": para. 101(*a*) of the Act as it read at the time of the Board's decision and s. 100.1 of the Act as it reads now. This paramount consideration will always trump the principle of the least restrictive determination. In addition, if the Board concludes that it cannot grant the offender parole, in contrast to a review board, it cannot establish conditions for continued incarceration.
>
> [62] Since the Board concluded that paroling the appellant posed an unacceptable risk to society, it did not have to question this conclusion in light of the principle of the least restrictive determination. In fact, in the offender's case, the paramount consideration under the Act, in all circumstances, remains the protection of society, and the principle of the least restrictive

> determination is contingent upon this paramount consideration and cannot under any circumstances replace it.
>
> [Emphasis added.]

[45] This principle, among others, is apparent in section 101 of the Act, which states that "[t]he purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society" and section 102, which states that the Board may grant parole if, in its opinion, "the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving" and "the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen".

[46] The case law also establishes that parole is a privilege and not a right (*Korn*, above, at para 15).

[47] Furthermore, the Act requires respect for the principle of proportionality, as expressed in paragraph 101(*c*) of the Act, which sets out that the Board and the Appeal Division must make decisions that "are consistent with the protection of society and that are limited to only what is necessary and proportionate to the purpose of conditional release".

[48] Finally, it goes without saying that the Board and the Appeal Division must act fairly and respect the principles of fundamental justice in their decision-making process (*Ouellette*, above, at para 67).

B. *Reasonableness of the Appeal Division's decision*

[49] First, the Court cannot accept the applicant's argument that the Board's decision, as affirmed by the Appeal Division, is unreasonable because it is based on contradictory findings with respect to the applicant. More specifically, the applicant criticizes the Board and the Appeal Division for having failed to consider the principle of the [TRANSLATION] "decision that is limited to only what is necessary and proportionate to the purpose of conditional release".

[50] The Act requires that the Board attempt to balance the so-called positive and negative factors in the applicant's record, in order to weigh the applicant's rights and interests against the public interest and public safety.

[51] The Court is of the view that the principles of proportionality and striking a balance between the interests of the applicant and the protection of the public were duly respected by the Board and the Appeal Division, according to the requirements of the Act and their mandates.

[52] As their reasons indicate, the analysis conducted by the Board and the Appeal Division of the factors militating in favour of the applicant's parole (such as his progress in rehabilitation and his sense of remorse with respect to his actions) and the factors demonstrating a risk of reoffending (such as the allegations against him of violence and hostility, the persistence of his negative attitude and the recent deterioration of his conduct) shows that a thorough review of his file was conducted.

[53] With respect to the risk to society of the applicant reoffending, which the Board held to be unacceptable in a finding affirmed by the Appeal Division, the decision to refuse to grant day parole or full parole to the applicant is reasonable and justifiable.

C. *Respect for the principles of procedural fairness with respect to the applicant*

[54] The applicant alleges that the Board breached the principles of procedural fairness by failing to provide adequate reasons for its decision. The applicant also criticizes the Board for considering unreliable evidence and ignoring other pieces of evidence.

[55] The Court cannot agree with these arguments.

[56] For the purposes of calculating the risk of reoffending, the Board may take into account all available and relevant information, provided that it has not been obtained improperly, including information about criminal charges that have not resulted in convictions (*Fernandez*, above, at paras 24 and 26).

[57] Furthermore, the case law establishes that confronting the applicant at the hearing with the allegations made in his regard, and enabling him to comment on them, is also a significant method of verification (*Fernandez*, above, at para 25).

[58] In this case, the Board disclosed to the applicant the information provided by the CSC relevant to its decision. At the hearing, the applicant was given the opportunity to make oral and

written submissions to rebut the allegations against him, in accordance with the *audi alteram partem* rule.

[59] The Court is of the view that the reasons of the Board and the Appeal Division are transparent, intelligible and based on a review of all the evidence in the file, including the applicant's oral and written submissions, the prison record, the psychological reports, the CMT's recommendation, the letters of support submitted by the applicant, the release plan and the evidence of the applicant's participation in various rehabilitation programs.

[60] The Court finds that the Board and the Appeal Division respected the principles of procedural fairness and natural justice with respect to the applicant.

VII. Conclusion

[61] In light of the above, the applicant's application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT IS that the application for judicial review is dismissed. No costs are awarded.

OBITER

The Court recommends the documentary film *Doing Time, Doing Vipassana* as a source of inspiration to be watched and studied in depth along with related books and studies, about Vipassana meditation, in the context of an inmate in this type of case.

According to the results, the practice of Vipassana meditation, as such, contributed to a very impressive reduction in the risk of reoffending, making its use a remarkable success.

This is a recommendation for our prison system that could also result in an exceptional reduction (based on first-hand experience described in studies conducted with inmates) in the risk of reoffending in our detention centres, and therefore lower the risk that inmates will commit crimes out in society.

"Michel M.J. Shore"

Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2390-14
STYLE OF CAUSE:	GREGG HERBERT PREVOST v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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