Federal Court  Cour fédérale

Date: 20160614

Docket: T-2174-15

Citation: 2016 FC 663

Ottawa, Ontario, June 14, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

JAMES WILLIAM ROBERTSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review of a Parole Board of Canada [the Board] decision denying the Applicant's request to be permanently relieved of the international travel restriction imposed by paragraph 161(1)(b) of the *Corrections and Conditional Release Regulations*, SOR /92-620 [*CCRR*], and denying his fifth request for travel to the United Stated in 2015.

I. Background

[2] On November 7, 2003, the Applicant, Mr. James Robertson, was convicted of several sexual offences against children, which took place over the span of two decades (between 1965 and 1976, and 1983 and 1988). He was sentenced to 16 years, and served a further five years imprisonment beyond the 11 years he spent in pre-trial custody. The Applicant has always maintained his innocence.

[3] The sentencing judge imposed a 10-year Long-Term Supervision Order [LTSO] on the Applicant pursuant to section 753.1 of the *Criminal Code*, RSC 1985, c C-46, which expires on October 9, 2022. The Applicant is also subject to special conditions, including avoiding any male or female children under the age of 18 unless accompanied by an adult who knows his criminal history, and reporting all intimate sexual and non-sexual relationships with females who have parental responsibility for children under age 18.

[4] On March 31, 2010, a few months following his release from incarceration, the Applicant fled to his home in California, USA, in violation of his LTSO. He remained Unlawfully at Large [UAL] until December 2012, when he was arrested and extradited back to Canada.

[5] In August 2013, the Applicant applied to the Board for permission to return to the United States. Upon the recommendation of his Correctional Service of Canada [CSC] Case Management Team [CMT], the Board refused his request on September 30, 2013, citing the Applicant's apparent lack of appreciation for the seriousness of his decision to be UAL.

[6] The Board granted the Applicant's six subsequent requests for travel to the United States in 2014 and 2015, all of which were supported by his CMT and occurred without incident.

[7] On August 17, 2015, the Applicant applied to the Board for permanent relief from the international travel restriction prescribed by subsection 161(1)(b) of the *CCRR*, and alternatively, for temporary relief to return to the United States from December 19, 2015 to January 3, 2016.

[8] The Applicant's CMT released an Assessment for Decision [CMT Assessment] on October 8, 2015, supporting his request for relief from compliance with the statutory condition of his LTSO requiring him to remain at all times in Canada. The CMT also recommended that the Applicant be allowed to travel to the United States for the dates requested. The CMT Assessment concludes:

> Taking into consideration the circumstance of the subject's offending, absence of offending since 1988, compliance with his LTSO (since March 2013), and his motivation to build credibility to demonstrate he has safely reintegrated into the community and no longer requires an LTSO, this writer assesses Mr. Robertson's risk as manageable with the removal of the general condition to remain at all times in Canada as well as on another trip to his residence in the U.S.A. Based on Mr. Robertson's positive attitude towards supervision and his performance to date, this writer is of the opinion that the community will not be put at undue risk should the noted general condition be removed or the requested travel be approved.

[9] Two psychological reports provided to CSC are relevant to the CMT Assessment and the Board's subsequent decision:

a. The report of Dr. Heather Scott, provided to CSC on April 2, 2014, indicated the Applicant's risk, previously assessed as moderate for violent and sexual reoffending, had

not changed significantly from the previous psychological assessment. Dr. Scott noted the Applicant continues to lack insight into the offences and the impact of his crimes. Though Dr. Scott amended this Psychological Report on July 16, 2014, this recommendation remained unchanged.

b. The report of Dr. Donald Salmon, the Applicant's treating psychologist who saw him nine times over the span of two years, dated June 26, 2015, notes "Mr. Robertson's reintegration into the community has gone well and there are no current concerns in this area. His offences are historical and his current dynamic risk is low". Dr. Salmon also discussed that while the Applicant denies his offences, he is cognizant of the public perception of his behavior, and "is very careful about the type of situations he places himself in".

[10] On December 2, 2015, the Board denied the Applicant's request to vary or permanently relieve him of the international travel restriction in paragraph 161(1)(b) of the *CCRR* [the Decision].

[11] The Board noted it had reviewed the Applicant's file, the recommendation in the CMT Assessment and the Applicant's own submissions, and concluded it would be taking no action on the request. The decision states:

> It is clear that when you are out of the country you cannot benefit from the normal monitoring that is provided by the parole supervision process. In your case as an LTSO it is particularly important that you be subjected to such monitoring. In fact the Judge who convicted you of your crimes indicated that the reason for imposing a long-term offender designation on you was that the threat that you continued to present to the community could only be reduced to an acceptable level as long as you were supervised…

> [O]ne of the reasons that she did not find you to be a Dangerous Offender and sentence you to indeterminate period of imprisonment was the level of supervision inherent in a long-term supervision order. This level of supervision requires the Board review the circumstances of each one of your proposed absences.

[12] The Board also took no action on the Applicant's request to visit the United States for the specific dates requested on the basis that:

> [a]lthough when considered one by one, your risk on each of the trips this year did not present individually as undue, when the cumulative absences are considered, your risk has become undue. A request by an offender to leave Canada is an exception to the general rule that he or she must remain in Canada. It is even more so in the case of an individual subject to an LTSO. At some point the exceptions begin to overtake the rule itself and in the Board's view this has happened in your case.

[13] The Board determined there would be undue risk in granting the Applicant a fifth trip to the United States in 2015 given the Applicant's history on release, which involved his fleeing to the United States; his moderate risk of reoffending; his adamant denial of having committed any crimes; and his lack of insight into the harm he has caused.

II. Issues

[14] The issues are:

A. Did the Board fetter its discretion?

B. Is the Board's Decision reasonable?

III. Standard of Review

[15] Whether the Board fettered its discretion, although "sitting uncomfortably" with the standard of review analysis set out in *Dunsmuir v New Brunswick*, 2008 SCC 9, is reviewed on the standard of reasonableness. As held by the Federal Court of Appeal in *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paras 22-25, a decision that is the product of a fettered discretion is *per se* an unreasonable decision.

[16] Substantive review of the Board's decision is also reviewed on the reasonableness standard: the issue concerns the exercise of the Board's discretion in its highly specialized field of expertise, to which the Court should show deference (*Latimer v Canada (Attorney General)*, 2014 FC 886 at para 18 [*Latimer*]; *Hurdle v Canada (Attorney General)*, 2011 FC 599 at para 11).

IV. Analysis

[17] The relevant provisions of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*] and *CCRR* are attached as Annex A.

A. *Preliminary Issue*

[18] As a preliminary matter, I do not find the Respondent's behaviour warrants a finding that it acted contemptuously toward the judicial system. The Applicant's request that this application be granted solely on that basis cannot succeed.

[19] The Applicant alleges the Respondent showed contempt for the judicial system in not complying with the Applicant's Rule 317 request for the record of materials before the Board "relevant to the imposition of the maintenance of an international travel restriction". The Board filed five volumes, consisting of 1550 pages of material with no indexing, table of contents, or indication of the materials used in making the Decision to take no action.

[20] While it would have been preferable that the Respondent at the very least index and paginate the Record, the Applicant's request was sufficiently broad in scope to convey that the material before the Board in making its decision should be provided. A judicial review application, subject to limited exceptions, is to be conducted on the basis of the materials before the federal decision-maker whose decision is being reviewed. As well, the CMT Assessment recommended that it be read in conjunction with a variety of materials, contained within the Certified Tribunal Record [CTR]. There is no onus on the Board to selectively provide the most relevant or important documents.

B. *Did the Board fetter the discretion provided by subsection 134.1(4)(a) of the CCRA?*

[21] Subsection 134.1(1) of the *CCRA* provides that subject to subsection (4), every offender supervised by a LTSO is subject to the conditions prescribed by subsection 161(1) of the *CCRR*, with such modifications as the circumstances require. Subsection 134.1(4)(a) of the *CCRA* provides relief from these conditions, stating that:

> The Board may, in accordance with the regulations, at any time during the long-term supervision of an offender,
>
> > (a) in respect of conditions referred to in subsection (1), relieve the offender from compliance with any

> such condition or vary the application to the offender of any such condition.

[22] The Applicant submits this suggests Parliament clearly intended that the Board have broad discretion to relieve offenders of LTSO conditions in subsection 161(1) of the *CCRR*, as is apparent from:

a. the lack of any language qualifying that discretion, such as specified temporal limits in the legislation, that are present elsewhere in the *CCRA*;
b. the express discretion and authority granted by the provision to vary the conditions or relieve an offender from them entirely;
c. this Court's consistent reaffirmation of the Board's broad discretion under subsection 134.1(4)(a) of the *CCRA*.

[23] The Applicant also alleges that the Board relied on an outdated policy. The Policy in place provides that the Board is to consider "all risk relevant information" – the most recent risk assessment being that of Dr. Salmon, which states the Applicant is a "low risk" to reoffend. The Board, though aware of this assessment, did not refer to or consider this opinion in denying the Applicant's requests for international travel.

[24] There is no dispute that the Board is granted broad discretion under subsection 134.1(4)(a) of the *CCRA* to relieve offenders of compliance with the conditions set out in subsection 161(1) of the *CCRR*. It is also well established that Policy manuals are not law and are not binding on the decision-maker. They are however useful tools for guiding consistent and principled decision-making, and a decision contrary to adopted policies is suggestive it may have

been an unreasonable exercise of delegated power (*Latimer*, above, at para 34 citing *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817 at para 72).

[25] I disagree with the Applicant: there is nothing in the Board's Decision to indicate it improperly applied an outdated Policy, acted contrary to the current Policy, or only relied on the Policy document in rendering its decision, without appreciation for the discretion afforded it under subsection 134.1(4)(a) of the *CCRA*.

[26] Whether or not the three phrases from the Decision that the Applicant alleges stem from a previous Policy are indeed so, the impugned phrases simply set out the applicable principles and considerations at play. There is nothing improper in the Board outlining the condition that an offender remain in Canada, or that an offender may request a temporary exemption. As well, though the Decision states that "Board members will take into account any factor that is relevant in determining whether the travel might result in an increase in the offender's risk to society", without specifically referencing "including the Parole Officer's overall assessment and recommendation", as stated in paragraph 12 of Chapter 7.1 of the current Policy, it is evident that the Board considered the CMT Assessment and recommendation in making its determination.

[27] As well, there is no support for the Applicant's assertion that the Board did not consider his request in light of the particular facts of his case. The Board discussed the nature of the Applicant's criminal history, his progress on previous travel, his reintegration, purpose and details of the travel, and the consistency of the travel with the Applicant's correctional plan – factors set out in paragraph 17 of Chapter 7.1 of the current Policy. There is nothing to suggest

the Board concluded it was bound by policy in denying the Applicant's request for permanent relief. The Board also considered other factors, including those the sentencing judge took into account in imposing a LTSO.

C. *Is the Board's Decision reasonable?*

[28] The Applicant argues there is no evidence or new information supporting the Board's finding that permanently lifting or varying the Applicant's international travel restriction will result in an increased or undue risk to society. He claims the evidence, including the CMT Assessment, suggested the opposite. CSC and the Board approved the Applicant's travel on six prior occasions upon considering his personal circumstances; the historical nature of the convictions; the limited class of persons claiming abuse; lack of any other allegations or criminal activity; his openness in providing details of the date, mode, time and purpose of each travel; and the active involvement of his supervisor. Each of these visits was without incident.

[29] In denying the Applicant's request for temporary relief of the condition restricting international travel, the Applicant argues that the Board provided no justification for its conclusion that "when the cumulative absences are considered, [the Applicant's] risk has become undue."

[30] The Board is statutorily mandated by subsection 101(a) of the *CCRA* to consider evidence demonstrating degree of risk, yet the Applicant claims the Board ignored the most recent psychological assessment from Dr. Salmon, dated June 26, 2015, that assessed the Applicant's risk to reoffend as low or low to moderate.

[31] As well, under subsection 101(c) of the *CCRA*, the Board is required to maintain only such restrictions "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". Other conditions set out in subsections 161(1)(a) and 161(1)(g)(iv) of the *CCRR* still require the Applicant to advise his supervisor of all travel plans and whereabouts.

[32] In my view, the Board's decision not to permanently remove or vary the condition under subsection 161(1)(b) of the *CCRR*, notwithstanding its discretion to do so, is reasonable, and is justified and consistent with the law and Board policy.

[33] It is apparent that the Board was aware of the positive aspects of the Applicant's case, including the Applicant's previous successful trips outside of Canada, and the positive recommendation of the CMT Assessment. The Board is the expert body statutorily given the task of making such decisions, and it is not bound by the CMT Assessment recommending that the travel restrictions be lifted.

[34] Though the Applicant rightly points out that the Board is required under section 101(a) of the *CCRA* to consider evidence demonstrating his degree of risk, I also note that provision requires the Board to consider:

> 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.

[35] The Board did just that. The reasons and recommendations of the sentencing judge were discussed at length in the Decision and formed part of the Board's ultimate justification for its denial of the Applicant's request. The Board also considered the nature and gravity of the offences and the Applicant's lack of insight into his crimes. Such considerations are consistent with the Board's mandate under the *CCRA* and *CCRR*, and its duty to consider as paramount "the protection of society" in making such decisions (section 100.1 of the *CCRA*).

[36] I find no support for the Applicant's assertion that the Decision is based on no evidence. In denying the Applicant's temporary return to the United States, the Board's decision was based on the fact he had travelled to the United States already four times that year, and that the sentencing judge had determined the Applicant was an offender whose threat to society could be reduced to an acceptable level, so long as he was supervised in the community – something that cannot be done while he is outside Canada. The Board explained the cumulative absences of the Applicant make his risk undue, and that a request to leave Canada is an exception.

[37] As well, I am not satisfied that the Board failed to consider the June 26, 2015 psychological report of Dr. Salmon. The Board did mention Dr. Salmon's report when discussing in detail the Applicant's August 17, 2015 submission, which reviews Dr. Salmon's psychological notes. Moreover, the CMT Assessment directed that the Board consider a variety of documents, including the "Psychological Activity Notes dated 2015-06-26" (Dr. Salmon), as well as the amended "Psychological Risk Assessment dated 2014-07-16" (Dr. Scott).

[38] The reports appear to have been provided for different reasons. Dr. Scott's report was intended to provide a psychological opinion "in order to assist with the parole decision-making process". Though Dr. Salmon's Psychological Activity Notes are more recent they were provided to explain the discontinuance of their sessions – a special condition of the Applicant's release subsequently removed on the strength of this opinion in September 2015.

[39] While arguably the opinion of a psychologist who underwent nine sessions with the Applicant over the span of two years is of greater probative value than a more dated report completed in the course of a number of hours, the Court's role is not to reweigh evidence upon judicial review and the Board's expertise in these matters cannot be discounted. As well, I do not find that the Board's lack of specific reliance on and reference to Dr. Salmon's report renders the entire Decision sufficiently unreasonable to warrant granting this application. The psychological assessment was but one of many factors the Board considered in denying the Applicant's requests.

[40] The Board set out the rationale for its Decision in a transparent and intelligible manner, and the outcome is supported and falls within the range of possible, acceptable outcomes on the facts and the law.

[41] The Respondent requests lump sum costs in the amount of $2500.00. Based on the evidence and arguments made before me, I award costs in the amount of $1500.00.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. Costs to the Respondent in the amount of $1500.00.

"Michael D. Manson"
Judge

ANNEX A

Corrections and Conditional Release Regulations, SOR /92-620

Conditions of Release

161 (1) For the purposes of subsection 133(2) of the Act, every offender who is released on parole or statutory release is subject to the following conditions, namely, that the offender

(a) on release, travel directly to the offender's place of residence, as set out in the release certificate respecting the offender, and report to the offender's parole supervisor immediately and thereafter as instructed by the parole supervisor;

(b) remain at all times in Canada within the territorial boundaries fixed by the parole supervisor;

(c) obey the law and keep the peace;

(d) inform the parole supervisor immediately on arrest or on being questioned by the police;

(e) at all times carry the release certificate and the identity card provided by the releasing authority and produce them on request for identification to any peace officer or parole supervisor;

(f) report to the police if and as instructed by the parole supervisor;

(g) advise the parole supervisor of the offender's address of residence on release and thereafter report immediately

(i) any change in the offender's address of residence,

(ii) any change in the offender's normal occupation, including employment, vocational or educational training and volunteer work,

Conditions de mise en liberté

161 (1) Pour l'application du paragraphe 133(2) de la Loi, les conditions de mise en liberté qui sont réputées avoir été imposées au délinquant dans tous les cas de libération conditionnelle ou d'office sont les suivantes :

a) dès sa mise en liberté, le délinquant doit se rendre directement à sa résidence, dont l'adresse est indiquée sur son certificat de mise en liberté, se présenter immédiatement à son surveillant de liberté conditionnelle et se présenter ensuite à lui selon les directives de celui-ci;

b) il doit rester à tout moment au Canada, dans les limites territoriales spécifiées par son surveillant;

c) il doit respecter la loi et ne pas troubler l'ordre public;

d) il doit informer immédiatement son surveillant en cas d'arrestation ou d'interrogatoire par la police;

e) il doit porter sur lui à tout moment le certificat de mise en liberté et la carte d'identité que lui a remis l'autorité compétente et les présenter à tout agent de la paix ou surveillant de liberté conditionnelle qui lui en fait la demande à des fins d'identification;

f) le cas échéant, il doit se présenter à la police, à la demande de son surveillant et selon ses directives;

g) dès sa mise en liberté, il doit communiquer à son surveillant l'adresse de sa résidence, de même que l'informer sans délai de :

(iii) any change in the domestic or financial situation of the offender and, on request of the parole supervisor, any change that the offender has knowledge of in the family situation of the offender, and

(iv) any change that may reasonably be expected to affect the offender's ability to comply with the conditions of parole or statutory release;

(h) not own, possess or have the control of any weapon, as defined in section 2 of the Criminal Code, except as authorized by the parole supervisor; and

(i) in respect of an offender released on day parole, on completion of the day parole, return to the penitentiary from which the offender was released on the date and at the time provided for in the release certificate.

(i) tout changement de résidence,

(ii) tout changement d'occupation habituelle, notamment un changement d'emploi rémunéré ou bénévole ou un changement de cours de formation,

(iii) tout changement dans sa situation domestique ou financière et, sur demande de son surveillant, tout changement dont il est au courant concernant sa famille,

(iv) tout changement qui, selon ce qui peut être raisonnablement prévu, pourrait affecter sa capacité de respecter les conditions de sa libération conditionnelle ou d'office;

h) il ne doit pas être en possession d'arme, au sens de l'article 2 du Code criminel, ni en avoir le contrôle ou la propriété, sauf avec l'autorisation de son surveillant;

i) s'il est en semi-liberté, il doit, dès la fin de sa période de semi-liberté, réintégrer le pénitencier d'où il a été mis en liberté à l'heure et à la date inscrites à son certificat de mise en liberté.

(2) For the purposes of subsection 133(2) of the Act, every offender who is released on unescorted temporary absence is subject to the following conditions, namely, that the offender

(a) on release, travel directly to the destination set out in the absence permit respecting the offender, report to a parole supervisor as directed by the releasing authority and follow the release plan approved by the releasing authority;

(b) remain in Canada within the territorial boundaries fixed by the parole supervisor for the duration of the absence;

(c) obey the law and keep the peace;

(d) inform the parole supervisor immediately

(2) Pour l'application du paragraphe 133(2) de la Loi, les conditions de mise en liberté qui sont réputées avoir été imposées au délinquant dans tous les cas de permission de sortir sans surveillance sont les suivantes :

a) dès sa mise en liberté, le délinquant doit se rendre directement au lieu indiqué sur son permis de sortie, se présenter à son surveillant de liberté conditionnelle selon les directives de l'autorité compétente et suivre le plan de sortie approuvé par elle;

b) il doit rester au Canada, dans les limites territoriales spécifiées par son surveillant pendant toute la durée de la sortie;

c) il doit respecter la loi et ne pas troubler l'ordre public;

on arrest or on being questioned by the police;

(e) at all times carry the absence permit and the identity card provided by the releasing authority and produce them on request for identification to any peace officer or parole supervisor;

(f) report to the police if and as instructed by the releasing authority;

(g) return to the penitentiary from which the offender was released on the date and at the time provided for in the absence permit;

(h) not own, possess or have the control of any weapon, as defined in section 2 of the Criminal Code, except as authorized by the parole supervisor.

d) il doit informer immédiatement son surveillant en cas d'arrestation ou d'interrogatoire par la police;

e) il doit porter sur lui à tout moment le permis de sortie et la carte d'identité que lui a remis l'autorité compétente et les présenter à tout agent de la paix ou surveillant de liberté conditionnelle qui lui en fait la demande à des fins d'identification;

f) le cas échéant, il doit se présenter à la police, à la demande de l'autorité compétente et selon ses directives;

g) il doit réintégrer le pénitencier d'où il a été mis en liberté à l'heure et à la date inscrites à ce permis;

h) il ne doit pas être en possession d'arme, au sens de l'article 2 du Code criminel, ni en avoir le contrôle ou la propriété, sauf avec l'autorisation de son surveillant.

Corrections and Conditional Release Act (S.C. 1992, c. 20)

Paramount consideration

100.1 The protection of society is the paramount consideration for the Board and the provincial parole boards in the determination of all cases.

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

Critère prépondérant

100.1 Dans tous les cas, la protection de la société est le critère prépondérant appliqué par la Commission et les commissions provinciales.

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

assessments provided by correctional authorities;

(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;

ou d'autres éléments du système de justice pénale, y compris les évaluations fournies par les autorités correctionnelles;

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;

Conditions for Long-Term Supervision

Relief from conditions

134.1 (4) The Board may, in accordance with the regulations, at any time during the long-term supervision of an offender,

(a) in respect of conditions referred to in subsection (1), relieve the offender from compliance with any such condition or vary the application to the offender of any such condition; or

Conditions de la surveillance de longue durée

Dispense ou modification des conditions

134.1 (4) La Commission peut, conformément aux règlements, soustraire le délinquant, au cours de la période de surveillance, à l'application de l'une ou l'autre des conditions visées au paragraphe (1), ou modifier ou annuler l'une de celles visées aux paragraphes (2) ou (2.1).

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2174-15
STYLE OF CAUSE:	JAMES ROBERTSON v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 9, 2016
JUDGMENT AND REASONS:	MANSON J.
DATED:	JUNE 14, 2016

APPEARANCES:

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Timothy E. Fairgrieve	FOR THE RESPONDENT

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