Federal Court  Cour fédérale

Date: 20160829

Docket: T-1954-15

Citation: 2016 FC 980

Toronto, Ontario, August 29, 2016

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

CARL LEONE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Carl Leone seeks judicial review of a decision of the Appeal Division of the Parole Board of Canada. The Appeal Division confirmed the Parole Board's decision to grant some, but not all of the unescorted temporary absences sought by Mr. Leone, who is serving a lengthy sentence for multiple counts of aggravated sexual assault. Mr. Leone's convictions relate to his having engaged in unprotected sex with a number of women without first advising them that he was HIV-positive.

[2] Mr. Leone says that both decisions were unreasonable, as they misapprehended the evidence relating to the steps that his family members had taken to educate themselves about HIV. Mr. Leone further submits that the Board erred in its consideration of the statutory criteria that must be satisfied in order for the Board to allow an offender to have unescorted temporary absences.

[3] For the reasons that follow, I am satisfied that the decisions of both the Parole Board and the Appeal Division were reasonable. Consequently, Mr. Leone's application for judicial review will be dismissed.

I. Background

[4] In 1997, Mr. Leone was advised that he had tested positive for the presence of the HIV virus. At that time, he was counselled to advise prospective sexual partners of his condition, and to refrain from having unprotected sex.

[5] Part way through his trial in 2007, Mr. Leone pleaded guilty to 15 counts of aggravated sexual assault for having unprotected sex with 15 different women without disclosing that he was HIV-positive. Mr. Leone's actions took place over a seven-year period, and resulted in several women becoming infected with HIV. Mr. Leone subsequently received an 18 year sentence for his offences.

[6] Several years into his sentence, Mr. Leone asked the Parole Board of Canada to grant him three unescorted temporary absences (or "UTAs") to allow him to visit his family in London, Ontario. He also sought three additional UTAs so that he could visit a Community Residential Facility in London where he expects to reside when he is eventually released on parole.

[7] The Parole Board granted Mr. Leone's request, in part. He was granted one UTA to visit his family, and two UTAs to visit the Community Residential Facility. The Board specified that each of the UTAs was to be taken over the next year.

[8] The Parole Board also imposed a number of conditions on Mr. Leone's UTAs in light of the nature of his past criminal activity and the factors that contributed to it. Amongst other things, he was ordered to report all contact with female associates or women that he attempted to associate with, and to refrain from being in the company of sex trade workers.

[9] Mr. Leone appealed the Board's decision to the Appeal Division of the Parole Board, alleging that the Board had treated him unfairly by imposing conditions on his UTAs without first giving him an opportunity to address the proposed conditions. He further alleged that the Parole Board erred in only approving one UTA to visit his family without considering how this would affect his family visits within the institution. Mr. Leone also contended that the Parole Board misapprehended or overlooked evidence regarding the steps that members of his family had taken to educate themselves about HIV. Finally, Mr. Leone submitted that the Parole Board had erred in its application of the statutory criteria governing the granting of UTAs.

[10] The Appeal Division stated that its role was to ensure that Parole Board decisions were made in accordance with the applicable law and policies, to ensure that decisions were made in accordance with the rules of fundamental justice, and that decisions were based on relevant, reliable and persuasive evidence. It further noted that it could re-assess an offender's risk of reoffending, but that it could only substitute its own decision where the Board's decision was unsupported by the evidence.

[11] After reviewing the record in Mr. Leone's case, including his submissions, the Appeal Division held that Mr. Leone had failed to raise any ground of appeal that warranted its intervention.

[12] The Appeal Division was not satisfied that the structure of Mr. Leone's proposed UTAs and the desirability of such releases warranted granting the full number of UTAs sought. Insofar as Mr. Leone's proposed family visits were concerned, the Appeal Division found that the Board was aware that some members of Mr. Leone's family had taken steps to educate themselves about HIV, but that it was reasonable for the Board to have concerns about the level of family support that they could provide to him.

[13] The Appeal Division also noted that Mr. Leone's Case Management Team had indicated that he needed to improve his level of insight into his offences, and that his Correctional Plan recommended a very gradual release plan. Consequently, the Appeal Division held that it was "not unreasonable for the [Parole] Board to adopt a slow methodical approach and to only grant 1 of the 3 requested UTAs for family contact".

[14] The Appeal Division also rejected Mr. Leone's argument that the Board erred in granting only two of his three requested UTAs for "personal development" to permit him to visit the Community Residential Facility in London by failing to properly explain its conclusion that he did not require the full amount of time requested to familiarize himself with the Facility.

[15] The Appeal Division noted that Mr. Leone had already enjoyed escorted temporary absences which allowed him to visit the Facility in issue, and found that it was not unreasonable for the Parole Board to find that two UTAs would be sufficient to allow him to learn the rules of

the Facility, familiarize himself with its staff, and establish goals and objectives for a possible day parole release.

[16] As a consequence, the Appeal Division upheld the Board's decision, including the conditions that were imposed on Mr. Leone during any UTAs. It further noted that it was open to Mr. Leone to apply for further UTAs in the future.

II. Analysis

[17] While Mr. Leone's application for judicial review technically relates to the decision of the Appeal Division of the Parole Board of Canada, where, as here, the Appeal Division has affirmed the Parole Board's decision, the duty of this Court is to ensure that the Board's decision is lawful: see *Cartier v. Canada (Attorney General)*, 2002 FCA 384 at para 10, [2003] 2 F.C. 384.

[18] I further agree with the parties that decisions of the Parole Board are generally to be reviewed against the reasonableness standard: *Ngo v. Canada (Attorney General)*, 2005 FC 49 at para. 8, 268 F.T.R. 64.

III. Did the Board Err in its Application of the Statutory Criteria?

[19] Mr. Leone submits that the Parole Board erred in its application of the criteria set out in subsection 116(1) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (*CCRA*). This provides that the Board may authorize the unescorted temporary absence of an offender where, in the opinion of the Board, the offender will not present an undue risk to society, and it is desirable for the offender to be absent from the penitentiary for reasons that include family contact and personal development for rehabilitative purposes. In deciding whether to authorize a

UTA, the Board must also consider the offender's behaviour while serving his or her sentence, and whether there is a structured plan in place for the absence.

[20] Mr. Leone says that the Appeal Division erred by conflating the question of whether there was a structured plan in place for his absence and whether it was desirable for him to be absent from the penitentiary with risk-related concerns such as his alleged lack of insight. This, he says, is an error of law which requires judicial intervention.

[21] Mr. Leone asserts that there was sufficient evidence before the Appeal Division establishing that the proposed UTAs were sufficiently structured, as he had demonstrated that he had family support and appropriate parole officer supervision. He further submits that he had provided sufficient evidence to establish that his absence from the penitentiary was desirable - both to facilitate family contact and to assist in his rehabilitation and reintegration into society.

[22] Mr. Leone contends that both the Appeal Division and the Parole Board failed to provide a rational explanation, rooted in evidence, as to why he should only be granted one of the three UTAs to visit his family on the basis that it was not desirable to do grant additional UTAs. They further failed to explain its finding that his proposed absences lacked sufficient structure, given that the Board had previously found he did not pose an undue risk to the community and his behaviour while incarcerated did not preclude granting him the UTAs he requested.

[23] I do not accept these submissions. While Mr. Leone's Case Management Team was of the view that the risk posed by Mr. Leone was manageable, the Board was quite reasonably concerned about his apparent lack of insight into his offences. It was this concern that had led to the recommendation in his correctional plan that his release plan should be gradual. Also of

concern were the report of Mr. Leone's Team regarding his attitude and sense of entitlement, and the psychiatric reports indicating that he suffers from a personality disorder with narcissistic traits.

[24] Moreover, as counsel for Mr. Leone acknowledged at the hearing, the criteria set out in subsection 116(1) of the *CCRA* do not fit into discrete, watertight compartments, and there is significant overlap between the various criteria.

[25] For example, the availability of family support and the development of a structured plan can both serve to mitigate risk. Moreover, it is clear from the wording of the French version of subsection 116(1) that insofar as the question of "desirability" is concerned, the question is not whether the offender desires to have a UTA, but whether, in the Board's view, it is desirable to allow UTAs, given that the protection of society is the paramount consideration for the Board: section 101.1, *CCRA*.

[26] In light of this, the approach taken by both the Appeal Division and the Parole Board in assessing Mr. Leone's application for UTAs was entirely reasonable.

IV. Did the Appeal Division Err in Relation to the Issue of Family Support?

[27] Mr. Leone also says that the Appeal Division and the Parole Board both erred in assessing the strength of the support that was available to him from his family. According to Mr. Leone, the Board stated that it had no evidence to establish that his family members had actually educated themselves about HIV, even though there were letters from his family members before the Board stating that they had done so.

[28] It is, however, clear from the Board's reasons that it was aware that Mr. Leone had been receiving support from his family during his incarceration and that certain members of his family had stated that they had educated themselves about HIV. The Board was, however, concerned that Mr. Leone's family had not been able to manage his behaviour, including his abuse of drugs and alcohol, during the years leading up to his convictions. The Board also noted that there was no independent information in the file corroborating whether Mr. Leone's family had in fact educated themselves about Mr. Leone's condition.

[29] As the Appeal Division noted, the Board explicitly considered the letters from Mr. Leone's family regarding their attempts to educate themselves about HIV, but reasonably concluded that there remained concerns regarding the ability of the family members to properly support Mr. Leone during his proposed UTAs.

[30] Indeed, it is apparent from a review of the Board's reasons that its real concern was not the level of Mr. Leone's family members' knowledge regarding HIV, but rather their inability to positively direct him during the period prior to his arrest, including their inability to intervene in relation to his drug abuse.

[31] These concerns regarding Mr. Leone's family members' past inability to positively influence him were found by the Board to weigh in favour of a slow and methodical reintegration into his family. This was not an unreasonable conclusion, especially considering that such an approach had been recommended in Mr. Leone's Correctional Plan.

[32] In light of this, the Parole Board's decision to only authorize one UTA for a family visit was entirely reasonable.

[33] I note that there is jurisprudence holding that if the Court concludes that a Parole Board's decision is lawful, there is no need to review the Appeal Division's decision: see, for example, *Ye v. Canada (Attorney General)*, 2016 FC 35 at para. 8, [2016] F.C.J. No. 31, *Aney v. Canada (Attorney General)*, 2005 FC 182 at para. 29, 270 F.T.R. 262. Having concluded that the Parole Board's decision in this case was both lawful and reasonable, it follows that Mr. Leone's application for judicial review should be dismissed.

V. The New Evidence

[34] There is, however, one final matter that bears comment. Although not mentioned by Mr. Leone's counsel, there are documents from three organizations in the Certified Tribunal Record that post-date the Parole Board's decision. These documents provide independent confirmation that some members of Mr. Leone's family had indeed endeavoured to educate themselves about HIV. There is, however, no mention of these documents by the Appeal Division in its reasons.

[35] Because this issue was not raised by Mr. Leone, there is no evidence before the Court as to whether these documents were in fact before the Appeal Division when it made its decision. This is a particular concern given that the documents were not accompanied by an application to admit new evidence, and Mr. Leone did not refer to them in his submissions to the Appeal Division.

[36] It also raises a question as to whether it was in fact open to the Appeal Division to consider new evidence on an appeal from a decision of the Parole Board, given that its mandate is to consider, amongst other things, whether decisions of the Parole Board are supported by the evidence that was before the Board when the decision was made.

[37] I note that there is jurisprudence that suggests that it is not open to the Appeal Division to consider evidence that was not before the Board: *Lively v. Canada (Attorney General)*, 2012 FC 637, 412 F.T.R. 79. I do not, however, have to resolve this question in this case, nor do I have to determine whether the Appeal Division erred in failing to consider the letters, as I am satisfied that this additional evidence would not have materially affected the outcome of Mr. Leone's appeal.

[38] As noted earlier, both the Parole Board and the Appeal Division were aware of the fact that members of Mr. Leone's family had sought to educate themselves regarding HIV. However, the adjudicators' concern was not so much with Mr. Leone's family's current level of HIV awareness, but rather their past inability to manage his behaviour. The Parole Board quite reasonably determined that the family's recent efforts to educate themselves did not outweigh their past failure to exert a controlling influence over Mr. Leone's behaviour. The Appeal Division's decision to uphold that finding was also reasonable.

[39] As a consequence, I am not persuaded that any failure on the part of the Appeal Division to consider the evidence corroborating the claims of Mr. Leone's family could have affected the outcome of the appeal.

VI. Conclusion

[40] The decision to authorize a UTA is a discretionary one, and it remains open to the Parole Board to refuse to authorize a UTA, even if all of the statutory conditions established in subsection 116(1) of the *CCRA* have been met.

[41] Both the Parole Board and the Appeal Division weighed the relevant considerations and provided lucid reasons for denying part of Mr. Leone's request. The outcome of his application for UTAs is, moreover, one that is well within the range of possible acceptable outcomes that are defensible in light of the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190.

[42] Consequently, Mr. Leone's application for judicial review is dismissed. In the exercise of my discretion I make no order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Anne L. Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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