Federal Court  Cour fédérale

Date: 20171013

Docket: T-1977-16

Citation: 2017 FC 914

Toronto, Ontario, October 13, 2017

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

INTHUNATHAN NADESU

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] By reasons dated October 10, 2016 the Parole Board of Canada (Board) denied the Applicant's request for a pardon in relation to convictions he received between 1997 and 2004. The issue for determination is whether the decision was made in error of law.

[2] It is agreed that the provision of the *Criminal Records Act*, R.S.C. 1985, c. C-47 (*CRA*) that the Board was required to apply at the time the decision was rendered reads as follows:

> Pardon
> 4.1 (1) The Board may grant a pardon for an offence if the Board is satisfied that
> (a) the applicant, during the applicable period referred to in section 4, has been of good conduct and has not been convicted of an offence under an Act of Parliament; and
> (b) in the case of an offence referred to in paragraph 4(a) granting the pardon at that time would provide a measurable benefit to the applicant, would sustain his or her rehabilitation in society as a law-abiding citizen and would not bring the administration of justice into disrepute.
>
> Onus on applicant
> (2) In the case of an offence referred to in paragraph 4(a), the applicant has the onus of satisfying the Board that the pardon would provide a measurable benefit to the applicant and would sustain his or her rehabilitation in society as a law-abiding citizen.

[3] For clarification, the mention in s. 4.1(1)(b) of "paragraph 4(a)" refers to time limits which must pass for a particular offence before an application for a pardon can be commenced. In the present case, it is agreed that the Applicant's application for a pardon conformed to the provision.

[4] It is also agreed that a sequential approach is required in the application of s. 4.1(1):

> With respect to the two-part conjunctive test in the *CRA*, the Applicant must first meet the initial criterion set out in paragraph 4.1(1)(a) which is that they be of "good conduct" before proceeding to [the] next set of criteria included in paragraph 4.1(1)(b).
>
> (Respondent's Memorandum of Fact and Law, para. 85)

[5] Therefore, s. 4.1 requires that the Board make five positive findings in the following order before a pardon can be granted: good conduct since the time of the convictions under consideration for pardon; no convictions since the time of the convictions under consideration

for pardon; measurable benefit to the Applicant; sustaining rehabilitation for the Applicant, and by granting the pardon does not bring the administration of justice into disrepute. Thus, on this interpretation, if the evidence before the Board results in a sustainable finding that an Applicant has not been of good conduct, the analysis stops there. This was the case in the decision under review.

[6] On initial consideration of the Applicant's request for a pardon, the Board came to the following preliminary conclusion:

> In March 2016 the Board proposed to deny your request for a pardon. The Board considered information suggesting that you may not meet the criterion of good conduct. The Board considered that an immigration removal order was issued against you in December, 2004. You had twice failed to appear for a pre-removal order interview. In May 2005 you were arrested and investigated for attempted murder but charged with assault with a weapon. At that time you were considered to have been a fugitive hiding from police since July, 2004. On June 17, 2015 charges of possess / use credit card obtained by offence, unauthorized use of credit card data, and fraud under $5000 were withdrawn. The charges related to an incident in 2014.
>
> The Board also considered that your criminal history spans over seven years, and includes many convictions and withdrawn charges of a serious and violent nature that included the use of weapons, intimidation, threats and violence. Based on that information, including your conduct since 2004, the Board was of the view that granting a pardon in your case may bring the. administration of justice into disrepute.
>
> [Emphasis added]
>
> (Decision, paras. 3 and 4)

[7] The Board provided the Applicant with an opportunity to respond before reaching a final decision, and made the following findings with respect to the Applicant's submission:

> In response, you provided lengthy submissions and documents. These include descriptions of the background factors that contributed to your criminality, evidence of a positive, productive lifestyle and a recent psycho-social assessment expressing the opinion that you are a reformed and changed man. In a sworn affidavit you explained that the 2014 charges were withdrawn in 2015 because store employees confirmed it was not you who had used a fraudulent card to purchase items. Your explanation was not consistent with police information, or the Board's investigation. According to the relevant police report, the card you provided did not match the information on your invoice and the card was fraudulent. Crown Counsel advised an investigating officer for the Board that the charges were withdrawn because you and your brother made significant donations to two charitable organizations. You maintained you are innocent of all charges since your last conviction.
>
> (Decision, para. 6)

[8] In fairness, the Board asked for a further submission from the Applicant which was received:

> Through your lawyer you have responded that your prior explanation was an innocent error. In your most recent affidavit you explain that your lawyer at the time told you that the identifications of the store employees were weak and that the Crown was willing to drop the charges if you and your brother made significant charitable donations. You indicate you understand that your previous statement was not a full reflection of the events. You claim you misspoke in absolute good faith, that you failed to provide full and clear detail regarding the events and that you are sorry. You provided official documentation consistent with the Board's information including proof of the donation you made. You claim you had no intention to mislead the Board.
>
> (Decision, para. 8)

[9] In the result, the Board reached a final conclusion:

> Your written representations do not satisfy the Board that you meet the criteria for a pardon. The Board finds the information from police and crown to be reliable and persuasive. There is reliable

> and persuasive information that you have been involved in criminal activity as recently as 2014. Furthermore, you gave false and misleading information in a sworn affidavit with respect to the reason those charges were withdrawn. The Board concludes you do not meet the conduct criterion for a pardon. Furthermore, having considered your very serious criminal history that included weapons and violence, together with your conduct since your last conviction and willingness to provide false and misleading information in an attempt to obtain a pardon, the Board concludes that granting you a pardon at this time risks bringing the administration of justice into disrepute.
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> The Board denies your request for a pardon.
>
> [Emphasis added]
>
> (Decision, paras. 9 and 10)

[10] In challenging the Board's decision to deny the Applicant's request, Counsel for the Applicant does not contest the accuracy of the evidence upon which the Board decided. Counsel for the Applicant argues that the decision under review was made in reviewable error of law:

> The Applicant submits that the Member [who delivered the decision on behalf of the Board] erred in reaching the conclusion that [the Applicant] was not of good conduct by failing to consider the totality of the evidence. Moreover, the Member erred by not assessing relevant mitigating factors against the concern of bringing the administration of justice in disrepute. The Applicant submits that as a result of the aforementioned errors, the Member was unable to properly balance the factors required to assess whether the Applicant was deserving of a pardon. Thus, the decision is unreasonable.
>
> […]
>
> It is submitted that it was incumbent on the Member to properly consider and analyze the evidence regarding the good conduct and the repute of the administration of justice globally once she embarked on the substantive merits of the Applicant's application. Instead, it appears the Member made a finding based solely on negative or aggravating factors. In doing so, she wholly overlooked all other evidence tendered pertaining to the Applicant's rehabilitation and pro-social lifestyle. This, it is

> submitted, is precisely the type of scenario contemplated and addressed in *Cepeda-Gutierrez v Canada* (1998), 157 F.T.R. at para. 27.
>
> (Applicants Memorandum of Argument, paras. 14 and 32)

[11] In the decision, the Board acknowledged the Applicant's efforts to become a law-abiding person:

> In response, you provided lengthy submissions and documents. These include descriptions of the background factors that contributed to your criminality, evidence of a positive, productive lifestyle and a recent psycho-social assessment expressing the opinion that you are a reformed and changed man.
>
> (Decision, para. 6)

[12] Counsel for the Applicant argues that the positive evidence on the record was required to be taken into consideration in reaching the conduct finding. I cannot agree with this argument. It is clear that the Board's "good conduct" expectation was exclusively directed towards the Applicant and criminality, and, in this respect, the Applicant failed to meet the very important initial criterion set out in paragraph 4.1(1)(a). As a result, the Board's finding on conduct foreclosed the opportunity to consider the positive evidence as a feature of the "measurable benefit" and "sustaining rehabilitation" criteria of s. 4.1(1)(b).

[13] In conclusion, the Board found that, because the Applicant did not meet the conduct criterion for a pardon, the pardon could not be granted because, to do so, would bring the administration of justice into disrepute. I find that the Board was correct in its findings of law, and, as a result, I find that the decision under review is reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that:

a) The present Application is dismissed.

b) The issue of costs is reserved for determination upon receipt of argument from Counsel.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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