Federal Court  Cour fédérale

Date: 20180628

Docket: T-1774-17

Citation: 2018 FC 673

Ottawa, Ontario, June 28, 2018

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

SIMON JAMES ELLIOTT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is a judicial review application of a decision [the Decision] of the Appeal Division of the Parole Board of Canada [Appeal Division], which dismissed an appeal of a decision [the Board Decision] of the Parole Board of Canada [the Board], which revoked the Applicant's statutory release.

[2] For the reasons that follow, the application is dismissed with costs.

II. BACKGROUND FACTS

[3] The Applicant, Simon James Elliott, is currently serving a sentence of eight years and four months for a series of offences. His sentence commenced on March 1, 2011. His warrant expiry date is June 30, 2019. His original statutory release date was September 19, 2016. On September 8, 2016 the Board issued a decision with respect to the conditions to be imposed on the Applicant's statutory release. These included a residency condition requiring nightly returns to a residence, prohibitions on the use and possession of alcohol and non-medication drugs, compliance with a treatment plan, and the avoidance of certain persons. The Applicant was released to the Edmonton Remand Centre on September 15, 2016. He was released to the community in Edmonton on October 24, 2016.

[4] On November 8, 2016, a warrant was issued for the Applicant's arrest. The Correctional Service Canada [CSC] suspended the Applicant's statutory release for failing to provide a urinalysis sample as directed and for attempting to use a concealed sample for the test. CSC recommended that the Applicant's statutory release be revoked as it concluded that he was no longer manageable in the community. In making that recommendation, CSC noted that during the period of statutory release:

a. The Applicant presented as demanding, arrogant, and entitled;

b. The Applicant lied to an Alberta Supports officer in an attempt to obtain funding to which he was not entitled;

c. The Applicant displayed behaviours indicating methamphetamine use;

d. The Applicant asserted that any positive drug test would be indicative of institutional drug use;

e. When he arrived at the Edmonton Parole Office for a urinalysis test, he attempted to hide a bottle of urine he had concealed in his jacket which he produced only when confronted;

f. The Applicant sought to have the urine in the bottle accepted for analysis;

g. The Applicant did not provide a fresh urine sample even when he was provided with water to drink;

h. The Applicant denied having to provide a urinalysis sample previously even though records indicated otherwise; and

i. The Applicant insisted that bringing a bottle of urine to a urinalysis were logical.

[5] The Applicant submitted a written argument in response, by letter dated November 8, 2016, in which he disputed the information provided in the Assessment for Decision dated May 19, 2017 relating to his transfer to another institution.

[6] A hearing before the Board took place on February 9, 2017. By reasons issued the same day, the Applicant's statutory release was revoked. The Applicant appealed that decision. By reasons issued April 14, 2017, the Appeal Division allowed the appeal and ordered a new hearing before the Board.

[7] On July 27, 2017, a new hearing took place before the Board. By reasons issued that day, the Board revoked the Applicant's statutory release, finding that he posed an undue risk. In doing so, the Board noted, in part:

a. Psychological reports indicated that the Applicant represented a high risk of general reoffending;

b. The Applicant's denial that the victim of his index offence was traumatized was of concern as it indicated a lack of victim empathy and understanding of the impact of his criminal behaviour;

c. The Applicant's explanation as to why he brought a bottle of urine to the urinalysis while on statutory release was concerning and difficult to accept, particularly given his provision of urine samples previously;

d. The Applicant's history of negative behaviour within institutions, including seven instances of negative behaviour since the suspension of his statutory release, and his behaviour at the Board hearing;

e. The Applicant had demonstrated a capacity for deceitful behaviour;

f. The Applicant did not appear to have the will or ability to use risk management skills in the community; and

g. The Applicant understood the conditions of his release.

[8] On August 10, 2017, the Appeal Division received the Applicant's appeal of the Board Decision. It received additional letters from the Applicant dated October 11, 2017 and October 26, 2017.

[9] On November 20, 2017, the Appeal Division issued its Decision denying the appeal and affirming the Board Decision. The Appeal Division considered the grounds of the Applicant's appeal: whether the Board Decision was reasonable; and whether it was based on erroneous or incomplete information. It concluded that the Board Decision was based on relevant, reliable and persuasive information, and was reasonable.

[10] The Applicant now seeks judicial review of that Decision.

III. ISSUES

[11] The following matters are at issue in this application:

a. What is the appropriate standard of review applicable to the matters raised in this application?

b. Were the members of the Board or the Appeal Division biased against the Applicant?

c. Was the Applicant afforded the appropriate level of procedural fairness?

d. Was the Appeal Division's Decision reasonable?

e. Were the Applicant's rights under sections 7, 9, or 12 of the *Canadian Charter of Rights and Freedoms* breached?

A. *Standard of Review*

[12] Arguments concerning procedural fairness are assessed against a standard of correctness (*Abraham v. Canada (Attorney General)*, 2016 FC 390 at para 12).

[13] Decisions of the Appeal Division are reviewed on the standard of reasonableness. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

[14] However, because the Appeal Division possesses an expertise in matters decided by the Board, the Court must show deference to the decision of the Appeal Division. For this reason, "reasonable" means that even if the reasons given do not seem wholly adequate to support the decision, the Court must first seek to supplement them by presuming that the decision-maker has considered factors raised by a party, even if not specifically mentioned in the reasons (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, at para 12).

[15] When the Court is reviewing a decision of the Appeal Division affirming the Board's decision, it must be satisfied that the Board's decision is itself lawful (*Cartier v. Canada (Attorney General)*, 2002 FCA 384 at para 10). Moreover, the Federal Court has recognized the expertise of the Board and the Appeal Division in matters related to conditional-release related decisions, such that their determinations should be shown considerable deference (*Fernandez v. Canada (Attorney General)*, 2011 FC 275, at para 20; *Boucher v. Canada (Attorney General)*, 2006 FC 1342, at para 11).

B. *The Members of the Board or the Appeal Division Were Not Biased Against the Applicant*

[16] The Applicant has provided neither evidence nor any reasonable argument to claim bias against him by the Board or Appeal Division.

[17] The Applicant's principal argument was that the Board member had a reasonable apprehension of bias towards him by "essentially concluding that the applicant's risk is currently undue, and revoked his statutory release". For example, he contends that when he claimed that his parole officer and halfway house caseworkers "set him up" by ordering a urinalysis test to be completed, the Member was not receptive to this submission. He described her response as she "simply spoke about the applicant's background and criminal record and being in the system and dealings with the police and continuously cut off the applicant and would be very manipulative, even when the applicant noted that he does not have a history of Methamphetamine …"

[18] He similarly submitted that the Board member attempted to entrap him and pointed to her statement to him at page 8 of the decision that "[s]pecifically, you challenge the information in your file that the victim of the index offence was not traumatized" concluding that "there are

outstanding needs to be met in the area of victim empathy and understanding the full impact of your criminal behavior".

[19] The Applicant did not provide the Court with any excerpts from the recording of the Board hearing. Rather he requested that the Court listen to the recording of the Board hearing. Having done so to the extent necessary, the Court finds no evidence to support the Applicant's submissions. Rather, it finds that the Applicant interjected often in the proceedings and refused to follow the Board's directions as she attempted to maintain an orderly procedure of the hearing.

[20] Moreover, it would appear that the Applicant fails to understand that the Parole Board acts in neither a judicial nor a quasi-judicial manner, but rather in accordance with an inquisitorial procedure that confers a broad inclusionary mandate. It is required to take into account "all available information that is relevant to a case". Moreover, the "evidence" is not presented under oath, and the panel presiding over the hearing may have no legal training: *Mooring v. Canada (National Parole Board)*, [1996] 1 SCR 75, 132 DLR (4th) 56 at paras 25 and 29; *Mitchell v. The Queen*, [1976] 2 SCR 570, 61 DLR (3d) 77, at p. 593.

[21] What the Applicant describes as bias appears to be the Board member carrying out her duty to inquire fully into the situation, including posing questions intended to assist her understand the evidence being tendered, that extends from time to time to challenging statements by the offender that raise questions as to their soundness.

C. *The Applicant Was Afforded the Appropriate Level of Procedural Fairness*

[22] The Applicant's submission, apart from that of bias, is not the traditional complaint about an absence of an appropriate notice to know the case to be met, or to be provided a proper opportunity to respond. Rather he submits that he was denied procedural fairness because the Appeal Division did not render its decision on his appeal as quickly as he considers should be the case for an offender whose statutory release time is being shortened by the delay in the challenge to its revocation. Given that the Court concludes that the revocation order should not be set aside, this submission is only of hypothetical value.

[23] While justice delayed, may be justice denied, the Court is of the view that timelines for making a decision are not matters of procedural fairness as grounds for setting aside a decision. Rather they relate to issues concerning the better administration of the Appeal Division's procedures. Normally, the remedy is that of *mandamus* in the face of unacceptable delay in the decision-making process.

[24] In any event, the Appeal Division responded to a query from the Applicant about the status of his appeal as to when it would be heard. It indicated that it was unable to provide a precise date when his case would be completed inasmuch, with certain exceptions, cases are processed in order of the date on which the grounds for appeal are received. How this policy should be administered is left to the Appeal Division, unless some obvious breach of the interests of justice is evident. This is not the case here.

[25] As an example, the Québec Court of Appeal in the matter of *Perron v. Tremblay*, 2017 QCCA 1407 at para 19 concluded that the Board and Appeal Division are authorized to conduct

a complete, comprehensive and expert review of these matters, such that the superior courts should decline *habeas corpus* jurisdiction over Board matters, despite the period of four and a half months for the Appeal Division to issue a decision.

[26] Accordingly, the Court rejects the Applicant's claim that he was denied procedural fairness by the Appeal Division.

D. *The Suspension and Revocation of the Applicant's Statutory Release Was Reasonable*

(1) Statutory Release

[27] The protection of society is the paramount consideration in all matters before the Board (*Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*] s. 100.1).

[28] Subject to other provisions not relevant in this case, at two-thirds of his sentence an offender is entitled to be released from a penitentiary and remain at large until the expiration of his sentence. This statutory release is subject to conditions (*CCRA*, ss. 127, 133).

[29] The following principles apply to statutory release:

(a) Statutory release may be suspended when an offender breaches a condition of release or where suspension is necessary to prevent a breach of any condition or to protect society (*CCRA*, s. 135 (1)).

(b) Such suspension must be referred to the Board for review (*CCRA*, ss. 135 (3)(b) and 107(l)(c) of the *CCRA*.

(c) On review, the Board may revoke the statutory release if satisfied that the offender will, by reoffending before the expiration of their sentence according to law, present an undue risk to society (*CCRA*, s. 135 (5)).

(d) This is a matter within the Board's exclusive jurisdiction and absolute discretion (*CCRA*, s. 107(1)(c)).

[30] The Appeal Division has the jurisdiction to consider an appeal of any Board decision on the basis that the Board, in making its decision:

(a) failed to observe a principle of fundamental justice;

(b) made an error of law;

(c) breached or failed to apply a policy adopted pursuant to s. 151 of the *CCRA*;

(d) based its decision on erroneous or incomplete information; or

(e) acted without jurisdiction or beyond its jurisdiction, or failed to exercise its jurisdiction (*CCRA*, s. 147(1))

(2) Analysis

[31] The Appeal Division correctly stated that its mandate to intervene was limited to situations where the Board Decision is clearly unreasonable and unfounded. In such circumstances, it may substitute its discretion for that of the Board member. But it is the Board member who has the initial responsibility to assess the risk of reoffending and render a decision with respect to the manageability of the Applicant's risk in the community. The review by the Appeal Division generally relates to decisions of the Board that misapprehend the facts or misapplied the law, and would extend to situations where there is a significant failure to provide reasonable explanations for its decision. The Court finds no ground for the Appeal Division to intervene in this matter.

[32] The Appeal Division initially described the submissions of the Applicant, and thereafter responded to them in a comprehensive and logical manner, in addition to noting other factors relating to the inappropriate conduct of the Applicant that supported the Board' Decision.

[33] The incident of the Applicant not providing a urine sample for a urinalysis test could reasonably be assessed as a refusal to comply with a condition of his release. The facts indicate that the Applicant tried in the first instance to conceal a bottle of urine in his pocket, and thereafter attempted to have it accepted for the purpose of the urinalysis test. The Applicant is aware that the reliability of a urine test depends upon assurances that the sample provided is that of the person taking the test. His actions and explanations were unreasonable and constituted evidence upon which the Board could reasonably conclude that he refused to provide a urinalysis sample because of concerns that the test would provide positive results.

[34] In somewhat the same vein, the Applicant argues that the Board and Appeal Division should have given consideration to some of the positive aspects of his behaviour, including that he had several negative urinalysis tests both before and after the incident of November 7, 2016. They were referenced in the decisions. It is not clear that the Applicant was not consuming drugs prior to his release, inasmuch as he stated at the hearing that the last time he consumed drugs, which he claimed could be mistaken for illicit drugs, was his last day in prison before his release.

[35] However, the relevant fact remains that one failure to take the test, particularly shortly after being released into the community under conditions of non-consumption of illicit drugs, is largely sufficient in and of itself to justify the suspension of his statutory release. It is also evidence in support of the Decision to revoke the suspension.

[36] During the Court hearing, the Applicant expended considerable effort to contradict what he concluded was an overstatement that his transfers were due to his violent character. As a result, the Applicant led the Court through his long history of incarceration and in particular

described the litany of his transfers between institutions across the country, most of which did not involve violence on his part, but were instead voluntary. He was the victim of assaults on three occasions, which he explained was because he was at risk when residing with the general population because members of his family are allegedly high-ranking members of the Hells Angels. As a result, many of his transfers were for the purpose of removing him from segregated solitary, only to find him requesting self-segregation wherever he was transferred to.

[37] In responding to this submission, the Court finds that the Applicant has misstated the summary of the Appeal Division's description of the Board's concern, which was with his "long and violent criminal history" and that the cause of his "multiple voluntary and involuntary transfers was due to [his] violent behaviors and to alleviate segregation status". These characterizations of his criminal history as a contributing factor to his voluntary and involuntary transfers is not inaccurate, when considered in light of the evidence in the record referred to by the Board; although it would appear that the most salient factor to his transfers was likely his incompatibility with other inmates.

[38] In terms of his violent character, the Applicant was serving his fourth federal sentence of eight years and four months. He had committed a number of serious crimes involving significant violence and recklessness. As the Board describes them, they included manslaughter, robbery, break and enter, assault, forcible entry, driving offences (impaired and disqualified), fraud, property and breach of trust offences. Ten of the previous convictions were for Schedule I offences in which he had used weapons, such as knives, guns and a piece of a doorframe. In addition he had threatened victims with violence to gain their compliance.

[39] The Board also made reference to a report of an unprovoked violent assault by the Applicant on an inmate in May 2016 during which he attacked and punched another inmate from behind. The Applicant then continued to punch him in the head and upper body approximately 41 times despite the victim being on the ground and not fighting back. He was convicted for the incident and received a one-day sentence. He claims that he was not guilty because the person involved in the assault had attacked him previously, which the Court does not find to be an acceptable argument of self-defence, particularly with respect to the degree of violence of his attack. He also claims that in the circumstances and considering the sentence, it was not worth contesting the charges. The Court was not directed to any corroborating evidence in the record supporting the Applicant's excuse for assaulting the inmate or the reasons for not contesting the charges.

[40] Moreover, the Applicant's claim that his transfers were voluntary in order to avoid inmate assaults because members of his family are high-ranking members of the Hells Angels seems questionable. The Respondent pointed out that the security intelligence officer investigated his situation in 2017, but could find no evidence to support a claim of his being at risk. In addition, the Assessment for Decision dated May 19, 2017 relating to a transfer, contains a passage stating that the Applicant's "interactions with inmates have sometimes been quite worrisome. He has on a number of times been assaulted by inmates, something he explains by saying it is '[b]ecause I speak up for myself'".

[41] The Applicant claims that his numerous institutional transfers prevented him from completing important programs which would have prepared him for introduction into the community. However, the Court concludes that it was principally his aversion to fraternize with

the general prison population, to whom these programs were mostly offered, that prevented him from participating in them.

[42] An explanation that suggests personal incompatibilities with others as being the cause for the numerous transfers is also consistent with the evidence of his having requested a separate room after a few days in a halfway house when released to the community in October 2016. The Board report notes that he criticized the conduct of other residents in the facility, claiming one was involved in drug crimes and the other was acting strangely, practicing magic and had "conjured up an entity". The manager of the halfway house refused the request and the CSC officer did not support his request.

[43] This is consistent with other evidence cited in the Board report concerning psychological problems related to his behaviour in the community and in the institutions. A CSC report notes that when in the community he presented as someone who was demanding, arrogant and entitled. When first released into the community, he told his caseworker that he did not have time to complete the CSC's paperwork because he had so many lawsuits pending against the CSC that it took up all of his free time. Similarly, he indicated to the CSC worker that he did not have to complete a resume because he would have no problems obtaining employment.

[44] The Applicant claimed at the hearing that the CSC workers, in particular his parole officer, were not truthful in describing these and other events. No evidence in support of this allegation was referenced, or a reasonable rationale provided as to why CSC workers would not be truthful in reporting on his conduct. There is no reason for the Board or Appeal Division not to have preferred the evidence of CSC workers over that of the Applicant concerning his

unsubstantiated allegations of bad faith against the CSC employees or the managers of halfway houses. This is a principle generally applied to all unsubstantiated claims of bad faith against persons.

[45] The Applicant also challenged the Appeal Division's upholding of the Board's finding that he had outstanding needs concerning victim empathy. He contested the deemed assertion that he had caused his victim serious psychological harm in the robbery incident, because there was no victim impact statement or other information on the record to support the conclusion. As the Appeal Division noted, this was not the issue raised by the Board. Rather, it was the lack of empathy and understanding of the consequences of his criminal behaviour, such that questioning the significance of psychological harm is an irrelevant consideration.

[46] There are also good reasons for victims of violent crimes to avoid providing impact statements, not the least would be a reasonable fear of retaliation from someone who had already demonstrated a penchant for criminally violent and reckless behaviour. The Board noted that the Applicant was incarcerated due to a series of events where he had entered a jewelry store carrying a silver pellet gun. He then jumped over the glass display case, grabbing a female employee. He ordered the female employee to open the display case, implicitly threatening her that otherwise he would hurt her. When she tried to run away, he chased after her and tackled her causing minor injuries.

[47] The incident continued after his leaving the store with a high speed police chase through the town. It ended by his stolen car running into the back of another automobile. This was followed by two attempted car jacks, one involving an attempt to pull a woman out of her car.

His reckless conduct only ended by his being subdued using force with a Taser. These are not circumstances where the Applicant can, or even should, consider arguing that his crimes were not serious, or would have no serious psychological impact on the random citizens who suffered the consequences of his violent conduct.

[48] The Applicant also complained that the Board did not consider that there was a dissenting opinion referred to in a report dated April 13, 2017 that concluded he should receive the maximum security classification for assignment to an institution. However, the Court notes that the reasoning of the dissenting opinion was that it would be in the interest of public safety if the Applicant was sent to a medium security institution so as to provide him with the opportunity to complete risk management skills, obviously on the assumption that he was prepared to participate in the programming. The dissenting opinion may well have been rejected because the Applicant had demonstrated an unwillingness to reside with the general inmate population.

[49] Otherwise, the officer noted that the Applicant "will likely be released on statutory release on August 13, 2018 and that he poses a high risk to re-offend violently" [emphasis added]. These comments support the conclusion that revocation of his statutory release was justified.

[50] Apart from the specific points argued before the Court, which were often identical or similar to those argued before the Appeal Division, the Court notes that there were numerous other factors and evidence that could support the Board Decision that the level of risk of the Applicant reoffending had become undue. These include having amassed 78 institutional charges, 29 of which were serious, various psychological reports and assessments of personal

emotional and attitudinal deficits that required a need for improvement, areas of substance abuse and concerns about community functioning and education/employment challenges.

[51] The Court concludes that the Applicant is asking the Court to reweigh the evidence in this matter, which is not the Court's function on judicial review. There was more than sufficient information for the Board to conclude that the Applicant's risk could no longer be managed if he was released into the community. The Court also agrees with the Respondent that it was open to the Board and the Appeal Division to consider that the information found in the record should be preferred to the explanations provided by the Applicant challenging the good faith of CSC workers or others involved with corrections.

[52] Accordingly, the Court concludes that the Decisions of the Board and Appeal Division deciding that the interests of Society's protection required that the Applicant's statutory release be suspended and thereafter revoked fell within a reasonable range of possible, acceptable outcomes based on the facts and law and were justified by reasons that were transparent and intelligible.

E. *No violation of the Applicant's Charter rights*

(1) Section 7

[53] While the Applicant has been deprived of a portion of his liberty to which he would otherwise have been entitled, but for the revocation of his statutory release, there is nothing in the evidence indicating that such deprivation was contrary to principles of fundamental justice.

[54] The only allegation appears to be that the Board did not consider the accusations against him. This is not a ground for a Section 7 *Charter* pleading. The role of the Board is to assess an offender's conduct and determine whether, due to the risk to the community based upon factors described in statutory provisions, his statutory release should be suspended and revoked.

(2) Section 12

[55] There is no evidence or ground to indicate that the Applicant has been subject to any cruel and unusual punishment or treatment. He was convicted and imprisoned for multiple offences. The return of an offender to serve an indeterminate sentence within an institution following revocation of parole does not violate that offender's section 12 Charter rights (*Aney v. Canada (Attorney General)*, 2005 FC 182 at paras 65-69).

IV. CONCLUSION

[56] The application is dismissed with costs.

[57] At the hearing the Applicant requested a minimum cost award of $750, which he indicated related mostly to Court disbursements and the copying and preparation of his record. The Respondent submitted that his costs, calculated in accordance with Column III of the Tariff, would justify a cost award in the range of $3000. In the circumstances, the Court awards the Respondent $1000 in total costs, inclusive of disbursements and taxes.

JUDGMENT IN T-1774-17

THIS COURT'S JUDMGENT is that the application is dismissed with costs payable by the Applicant to the Respondent in the total amount of $1000, inclusive of disbursements and taxes.

Pursuant to Rule 303, the style of cause is amended to name the "Attorney General of Canada" as the Respondent.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1774-17
STYLE OF CAUSE:	SIMON JAMES ELLIOTT v. HMQ
PLACE OF HEARING:	OTTAWA, ONTARIO
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APPEARANCES:

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Robert Drummond	FOR THE RESPONDENT

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Attorney General of Canada	FOR THE RESPONDENT