Federal Court  Cour fédérale

Date: 20180711

Docket: T-486-18

Citation: 2018 FC 719

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 11, 2018

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

ROBERT MÉNARD

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for leave and for judicial review filed by Robert Ménard, the applicant, against a decision of the Parole Board of Canada (the Board) dated March 6, 2018, imposing two additional special conditions on his long-term supervision order (LTSO) issued in 2012.

II. Facts

[2] In the following paragraphs, I will reproduce excerpts from the description of facts the respondent provided in his memorandum.

[3] The applicant is 55 years old. His criminal record began in 1981. Since then, he has spent very little time in the community. He has received a series of sentences that have had no deterrent effect. Most of the release measures granted to the applicant have ended in breaches of conditions or reoffending.

[4] The applicant served a third federal sentence of 12 years after being convicted of 13 counts of sexual assault against women, two counts of uttering threats, overcoming resistance by suffocation, attempting to escape, and escaping from lawful custody.

[5] The applicant was deemed a long-term offender for a period of five years after his warrant expiry on May 24, 2012. Since then, he has been under an LTSO, which will expire on August 3, 2018.

[6] The applicant was charged with sexual offences in July 2017, of which he was acquitted on January 25, 2018, after a two-day trial before the Honourable Maurice Parent of the Court of Quebec (the trial). Justice Parent concluded that there was misidentification. During that period, the applicant was placed in preventive custody for over five months.

[7] On February 5, 2018, the applicant's Case Management Team from the Correctional Service of Canada (CMT) prepared an Assessment for Decision recommending that two special conditions be added, one being a residency condition at a community correctional centre. The CMT based this recommendation in part on reasonable grounds to believe that the applicant was guilty (of the offences with which he was charged) despite the acquittal from the court of justice. The CMT based this finding on the photographs published in the wanted poster issued by the police. Note that Alexandre Brousseau, the person who signed off on the CMT's recommendation and the applicant's parole officer, testified at the trial.

[8] On March 6, 2018, the Board approved the CMT's recommendation and imposed the two conditions on the applicant that are at the centre of this dispute. The Board considered the applicant's criminal record.

[9] On May 1, 2018, the applicant filed his memorandum of fact and law. On June 5, 2018, he filed a motion for leave to add a supplementary affidavit to the record to submit into evidence the transcript of Parent J.'s reasons for decision in the files on the charges against him.

III. Decision

[10] The Board explained that, to render its decision, it had to evaluate whether the special conditions recommended by the CMT were reasonable and necessary to protect the victims and promote the applicant's reintegration.

[11] The Board summarized the applicant's criminal record and the submissions of the applicant and the CMT.

[12] The Board based its reasoning on the applicant's most recent psychological assessment, performed in 2009, which determined the risk of sexual recidivism to be high. The Board noted that the applicant's behaviour had improved between 2015 and 2017, and that, as a result, his special residency condition had not been extended, allowing him to live with his spouse. The Board even acknowledged that the most recent report on the applicant's last meeting with his psychologist in June 2017 was positive.

[13] However, the Board agreed with the CMT's recommendation on the basis of the following observations:

1. [TRANSLATION] «The extent of your criminal behaviour, its persistence over the past 35 years, the severity of the offences committed and the considerable number of victims, all of whom suffered serious harm»;
2. The applicant's limited motivation and accountability, as well as the high risk of recidivism with sexual and/or violent offences, which still requires a high level of intervention;
3. The applicant's serious difficulties following the supervision rules and special conditions, and his propensity not to be completely transparent about his activities (even though the applicant was acquitted of the charges against him from July 2017, the CMT's assessment noted that his statements about his movements on the day in question lacked transparency, and it was ascertained that he had not been where he had claimed to be).

[14] The Board noted that the applicant had to [TRANSLATION] «rebuild his credibility and his CMT's trust».

[15] The Board ordered that the following two additional special conditions be added until the expiry of his LTSO:

1. [TRANSLATION] «Inform your supervision officer of all of your movements, in accordance with the terms and conditions he or she has established in advance»; and
2. [TRANSLATION] «Reside in a community correctional centre or a community-based residential facility, or another residential establishment (such as a placement at a private home) approved by the Correctional Service of Canada, until the legal expiration of the long-term supervision order, for a maximum period of 180 days, and participate in a program there».

IV. Issues

[16] The applicant argues that the Board erred by failing to apply the principle of issue estoppel. The applicant also claims that the Board violated the principles of procedural fairness. These two arguments are related to the applicant's claim that the Board based its decision on a finding of fact that he likely committed the offences he was charged with in July 2017, a finding that is in conflict with that of Parent J.

[17] Moreover, in his motion, the applicant is requesting to file into evidence the transcript of Parent J.'s reasons for decision.

V. Analysis

[18] The correctness standard of review applies to issues of procedural fairness: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paragraph 43. In general, other issues, namely the adequacy of reasons and most questions of law, are reviewed on the standard of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*].

[19] The biggest weakness in the applicant's arguments is that the Board did not base its decision on a finding that he likely committed the offences he was charged with in July 2017. It is true that the CMT promoted that conclusion, and that the Board noted this in its decision, but its reasons for decision are not based on that conclusion. The Board's conclusion does not contradict that of Parent J. It follows that neither the principle of issue estoppel nor the principle of procedural fairness applies in this case.

[20] The applicant also argues that the Board erred by failing to acknowledge a conflict of interest involving Mr. Brousseau: the CMT's recommendation, which he wrote, refers to several [TRANSLATION] «credible» witnesses, who apparently recognized the applicant in photographs taken during the incident in July 2017, without acknowledging that Parent J. had rejected the testimonies of those «credible» witnesses and that Mr. Brousseau was one of them.

[21] I allow that Mr. Brousseau had a conflict of interest and should have acknowledged in his recommendation that he was one of the witnesses at the trial and that his testimony had been rejected. However, the Board was aware of the material facts at the time of its decision. The

applicant had made submissions to the Board describing this conflict situation. His submissions also referenced the argument that the Board should not have arrived at a finding of fact that contradicted those of Parent J.

[22] The Board clearly stated that it considered the applicant's submissions. In its decision, the Board noted the CMT's arguments that there were still serious suspicions about the applicant's involvement in the offences he was charged with, despite his acquittal. However, the Board did not comment on this.

[23] The real issues in this case are whether the Board erred by (i) failing to specify in its reasons that it did not accept the finding of fact that the applicant likely committed the offences he was charged with in July 2017, or by (ii) failing to make explicit reference in its reasons to the conflict of interest involving Mr. Brousseau.

[24] In my opinion, these are not issues of procedural fairness to which the correctness standard of review would apply, but rather issues of the adequacy of reasons, which are subject to the reasonableness standard.

[25] With regard to the argument about suspicions of the applicant's guilt in the July 2017 offences, I reject the position that the Board apparently based its decision on such a finding of fact. The Board's decision does not support that argument. Moreover, I do not accept that it was unreasonable for the Board not to address this argument.

[26] The Board based its decision primarily on the applicant's lack of transparency about his movements, including on the day of the incidents in July 2017. In his submissions to the Board, the applicant argued the following about this point:

1. He always maintained his innocence;
2. The police investigation did not reveal where he was at the time of the incident;
3. His spouse (who, according to the CMT, was called upon to make an alibi defence) was not called as an alibi witness at the trial.

[27] In my view, none of these submissions contradicts the finding that the applicant lacked transparency about his movements on the day of the incident.

[28] The applicant argues that the matter of lack of transparency is related to the matter of the identity of the person who committed the offences in question. I also reject that argument. The finding that the applicant had not been where he said he was does not lead to the conclusion that he was at the scene of the offences.

[29] As for the conflict of interest, there is no indication that the Board overlooked the applicant's argument.

[30] Was the Board unreasonable in failing to refer to the conflict of interest in its decision? In my opinion, the answer is no. It might have been preferable for the Board to indicate clearly that it had considered that question, but I do not consider this to be necessary. The Board's decision

is justified, transparent and intelligible and falls within «a range of possible, acceptable outcomes which are defensible in respect of the facts and law» (*Dunsmuir*, at paragraph 47).

[31] For the above reasons, I find that the Board did not err in its decision.

[32] With regard to the applicant's motion to file into evidence the transcript of Parent J.'s reasons for decision, I consider it unnecessary to make a decision on this since the addition of that transcript would not change my decision. I have arrived at this conclusion because I have already accepted the key elements of that evidence: that Parent J. found that the applicant had not committed the offences in question and that Mr. Brousseau was a witness at the trial.

JUDGMENT in file T-486-18

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

«George R. Locke»
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-486-18
STYLE OF CAUSE:	ROBERT MÉNARD v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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