Federal Court  Cour fédérale

Date: 20201030

Docket: T-1767-18

Citation: 2020 FC 1020

Ottawa, Ontario, October 30, 2020

PRESENT: The Honourable Madam Justice Fuhrer

BETWEEN:

JAMES RUSTON

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, James Ruston, has been a federal inmate since 1992 serving a life sentence for first degree murder committed in 1989 when he was 17. His challenges with substance abuse, including his inability to abstain from alcohol use, have resulted in the revocation of Mr. Ruston's day parole several times since it first was granted in 2007. He also

incurred a conviction for driving under the influence [DUI] in 2011 while on parole, having engaged in drinking and driving about six times in as many months before the DUI conviction.

[2] Mr. Ruston's most recent parole revocation, and the subject of this judicial review, stems from events in 2017 summarized as follows:

- another attempted suicide while incarcerated; Mr. Ruston declined the subsequent offer of a psychiatric assessment;
- parole suspension for breach of the special condition to abstain from alcohol use; the suspension later was cancelled based on (i) Mr. Ruston's return to a substance abuse treatment program at the community residential facility to which he was re-released, and (ii) the addition of the drug Antabuse;
- parole suspension for not taking medical marijuana as prescribed, taking only half of the four pills dispensed and pocketing the rest; his release was maintained, however, when the pharmacy solved the matter by dispensing instead, and Mr. Ruston consumed, two pills in the morning and two in the evening;
- signing out of the community residential facility to participate in a charity run and then to go to a local beach, and instead, or in addition, taking a bus to another part of town to have lunch alone, without informing the facility of the change in plans;
- consuming alcohol illicitly in public and private spaces, including restaurants, buses, and under a canal;
- providing an incomplete or substituted urinalysis sample;
- possessing a mostly empty bottle of vodka, found in Mr. Ruston's backpack during a room search when he was two hours late for providing the urinalysis sample; the Correctional Service of Canada consequently issued a suspension warrant that same day;

- erratic behaviour during the post-suspension interview with his parole officer and his psychologist, including laughing and making faces at the psychologist when the parole officer spoke.

[3] Noting the community residential facility would not support Mr. Ruston any further, the parole officer recommended the revocation of Mr. Ruston's day parole. A psychological risk assessment and a detailed report were completed in early 2018. The psychologist concluded that the probability of re-offending was in the low-moderate range. Following a hearing, however, the Parole Board of Canada [Board] concluded Mr. Ruston's risk had heightened to undue and revoked his day parole in April 2018. The Parole Board of Canada Appeal Division [Appeal Division] affirmed the Board's decision. Mr. Ruston now seeks judicial review of the Appeal Division's decision.

[4] At the hearing of this matter before me, the Respondent's counsel advised that Mr. Ruston had been released subsequent to the Appeal Division's decision. I note that neither party informed the Court of this development in advance of the hearing; equally, if not more troubling, the Applicant's counsel did not inform me of this development when making his initial submissions. I am unaware of the circumstances applicable to either party resulting in this omission. I am prepared nonetheless to "give them the benefit of the doubt." I remind counsel, however, of their duty to the Court as its officers pursuant to subsection 11(3) of the *Federal Courts Act*, RSC 1985, c F-7, as underscored by the decision in *Logeswaren v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1374, particularly paragraphs 15 and 18.

[5] The circumstance of Mr. Ruston's release raises a preliminary issue of whether this judicial review application is moot and if yes, the appropriate remedy. If not, then the only other issue for determination is whether the Appeal Division's decision and the underlying decision of the Board are unreasonable: *May v Canada (Attorney General)*, 2020 FC 292 at para 12, citing *Maldonado v Canada (Attorney General)*, 2019 FC 1393 at para 18; *Cartier v Canada (Attorney General)*, 2002 FCA 384 at para 10.

[6] The parties advocated different remedies because of Mr. Ruston's release. The Applicant requested quashing the Appeal Division's decision but not sending it back for redetermination, while the Respondent submitted the only appropriate remedy is removal of the revocation from the record. Subsequent to the hearing, I invited the parties to make further submissions regarding the appropriate remedy in the circumstances.

[7] The Applicant did not respond. The Respondent confirmed Mr. Ruston's subsequent release on day parole in October 2019 pursuant to "a new and separate application for day parole under subsection 122(1) of the *Corrections and Conditional Release Act (CCRA)*..." In addition, after the decision to (re)release Mr. Ruston on day parole, the Board continued Mr. Ruston's day parole for two additional periods of 6 months each, the most recent decision dated October 13, 2020. The Respondent provided copies of all three decisions with the response. The Respondent maintains its position that the Board's April 2018 decision was reasonable and should not be set aside. In the alternative, if the Court finds the decision unreasonable, it should be quashed but remain part of Mr. Ruston's offender file to ensure that there are no chronological or informational gaps in his offender history. The Respondent's response is silent regarding the

issue of potential mootness. Indeed, in my view it is implicit in both the Respondent's positions that the Court proceed with a determination of the judicial review application on the merits.

[8] I find, however, that (a) there no longer is a live controversy and (b) the circumstances of this matter do not warrant exercise of the Court's discretion to determine it. I therefore dismiss the judicial review application for mootness, for the reasons that follow.

II. Analysis

[9] The leading case on mootness is *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*]. The decision sets out a two-part framework, the first element of which involves determining whether there is a "live controversy" affecting the rights of the parties; absent live controversy, "the case is said to be moot": *Borowski* above at page 353. The Court nonetheless retains discretion to determine the matter before it where the circumstances warrant. This second element of the framework requires consideration of the following principles:

1) the presence of an adversarial relationship;
2) the need to promote judicial economy; and
3) the need for the Court to show a measure of awareness of its proper role as the adjudicative branch of government.

[10] The Federal Court of Appeal elaborated on these principles in *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195 [*Democracy Watch*] at para 14. Will the parties with an interest in the outcome argue the matter fully, despite the absence of a live controversy? Does the case involve a recurring issue of short duration or otherwise evasive of court review? By determining the matter, will the Court resolve a real dispute? The Federal Court of Appeal

previously cautioned that "[a]bsent a real dispute, the judicial pronouncement of legal principles can smack of gratuitous law-making, something that is reserved exclusively to the legislative branch of government[; hence,] the discretion to do so must be exercised prudently and cautiously": *Canada (National Revenue) v McNally*, 2015 FCA 248 at para 5.

a) *No Live Controversy*

[11] With above principles in mind, I find that there no longer is a "live controversy" by reason of Mr. Ruston's further release on day parole in October 2019 for a period of six months and two subsequent 6-month extensions of day parole, the second of which issued just weeks ago. I have considered this issue from the standpoint of whether quashing the Appeal Division's decision could assist Mr. Ruston if he were successful on the merits (which is not meant to imply that it is a given in this case). I conclude that it would not.

[12] The reason for the revocation of his day parole was the Board's conclusion that Mr. Ruston's risk had heightened to undue based on the circumstances then at play, as summarized in paragraph 2 above. Quashing the decision would mean only that the circumstances would be reconsidered (were the matter sent back for redetermination), not necessarily that a different result would ensue.

[13] Further, the risk level did not prevent the Board from considering subsequent circumstances (from April 2018 until October 2019) that favoured granting Mr. Ruston day parole again. In other words, if the purpose for seeking to quash the decision, without sending the matter back for redetermination, were to remove the potential impediment to (re)release

posed by the finding of heightened risk, it seems it was not a sufficient impediment to prevent the Board granting Mr. Ruston day parole anew.

[14] In addition, I note from the October 2019 decision that the Board appears to have reconsidered circumstances at play in its 2018 decision to revoke day parole, including among other things the psychological risk assessment completed in 2018 (mentioned in paragraph 3 above) and that his correctional plan assessed his levels of intervention for static and dynamic factors as high. Even were the decision to confirm revocation of day parole quashed, without being sent back for redetermination, there still would be a subsequent, unchallenged decision of the Board that reconsidered some of the circumstances resulting in Mr. Ruston's day parole revocation in 2018, albeit without Court intervention or guidance. I further note that where the Board holds a hearing (as it did in connection with its 2019 decision) or renders a decision, it is required to keep a record of the proceedings or a copy of the decision and reasons, until the expiration of the offender's sentence: subsections 166(1) and (2) of the *Corrections and Conditional Release Regulations*, SOR/92-620.

[15] Thus, the judicial review application is moot.

b) *Circumstances Do Not Warrant Exercise of Discretion*

[16] I turn next to the issue of whether to exercise the Court's discretion to determine the matter absent a live controversy. I conclude that the circumstances do not warrant it.

[17] First, in my view the adversarial relationship had disappeared by the time of the hearing before this Court or strongly was trending in that direction, as confirmed by the recent, second 6-month extension. Although the parties with an interest in the outcome argued the matter fully, this occurred in part because neither party informed the Court of Mr. Ruston's status prior to the hearing. The fact of Mr. Ruston's (re)release came to light only after the Applicant's submissions on the merits of the judicial review application. By then, judicial resources had been expended to reach that point. That said, by the time of the hearing before this Court, the Board had granted Mr. Ruston day parole again in October 2019 and one 6-month extension.

[18] Second, the case involves an issue, parole revocation or suspension, that has recurred more than once in Mr. Ruston's institutional history. In my view, however, the April 2018 revocation was not of such short duration that it was evasive of court review. The Appeal Division rendered its decision in August 2018 and the Applicant filed his judicial review application in October of that year, one year before the Board granted Mr. Ruston day parole again. While delays in the progression of the matter resulted in a status review at one point, the Applicant filed a requisition for hearing in August 2019. (Eventually the matter was set down to be heard in March 2020 and then rescheduled to June 2020 because of the COVID-19 pandemic.) But for the various delays along the way, some of which were at the request of the parties, the matter could have been heard prior to October 2019.

[19] I find, however, that the principle of judicial economy weighs against considering the merits of this judicial review application, in part because the Board has reconsidered some of the circumstances at play in its April 2018 decision, in connection with its October 2019 decision.

Further, as alluded in the discussion above regarding no live controversy, in my view no practical purpose would be served in determining whether the Appeal Division's decision, including the Board's April 2018 decision, were unreasonable in light of Mr. Ruston's subsequent and continuing release. Finally, for this reason as well, I find that there no longer is any real dispute between the parties to be resolved; the Board's April 2018 decision did not impede Mr. Ruston's (re)release.

III. Conclusion

[20] I therefore conclude Mr. Ruston's judicial review application is moot, and I find no reason to exercise my discretion to decide its merits.

[21] Neither party seeks costs; thus, no costs are awarded.

JUDGMENT in T-1767-18

THIS COURT'S JUDGMENT is that this judicial review application is dismissed for mootness; no costs are awarded.

"Janet M. Fuhrer"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	T-1767-18
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