Federal Court  Cour fédérale

Date: 20201113

Docket: T-1202-19

Citation: 2020 FC 1056

Ottawa, Ontario, November 13, 2020

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

ASHOT TUNIAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review by the Applicant of a decision dated June 24, 2019, by the Parole Board of Canada [Parole Board]. The Applicant alleges that the Parole Board erred in including his unpaid restitution orders as part of his sentence for the purpose of calculating when he was eligible for a Record Suspension (formerly known as a "pardon").

II. Background

[2] On October 21, 1999, the Applicant pled guilty to one count of fraud over $5000 contrary to section 380(1) of the *Criminal Code*, RSC, 1985, c C-46, and was sentenced to:

a. Six months imprisonment;
b. Nine months probation; and
c. Four restitution orders under section 738 of the *Criminal Code*.

[3] The four stand alone restitution orders [SAROs] were to:

a) Costco for the amount of $751;
b) The Nanaimo Credit Union for the amount of $22,250;
c) (person's name redacted for privacy) for the amount of $5000; and
d) (person's name redacted for privacy) for the amount of $3800.

[4] On April 11, 2002, the Applicant payed the credit union and on April 23, 2002, he paid the amount due to Costco.

[5] In November 2017, the Applicant applied for a record suspension under section 3 of the *Criminal Records Act*, RSC, 1985, c C-47, the provision that allows for a record suspension. On November 27, 2017 the returned application, informed the Applicant that there was a lack of supporting documentation.

[6] The Applicant engaged counsel and paid the restitution to the remaining two parties, as ordered, in 2018. On June 6, 2018, (name redacted for privacy) released the Applicant upon payment, and on June 13, 2018, (name redacted for privacy) did the same.

[7] The Applicant resubmitted his application dated June 27, 2018 for a record suspension. On July 4, 2018, the application and fee were returned with a letter noting that proof of payment for three of the restitution orders was still required. On July 18, 2018, the Applicant provided the proof requested of the paid restitution orders. The Applicant again provided the proof of paid restitution orders in a letter dated April 16, 2019. The Parole Board and the Applicant's counsel spoke on the telephone, where they informed him that the Applicant was not yet eligible for his record suspension.

[8] A follow up from this phone call is the decision by an individual at the Clemency and Record Suspension Division of the Parole Board of Canada and is the decision under review. The decision is a result of a returned application and ongoing discussion around eligibility. In a letter to the Applicant's counsel dated June 24, 2019, it outlined the statutory requirements including section 4(1) of the *Criminal Records Act*. The letter notes that a person is ineligible to apply for a record suspension until after the expiration of any sentence, and that "[t]his includes standalone restitution orders that are to be paid directly to the victim as well as those to be paid to the court". It contains a quote from the Record Suspension Application Guide:

> You must get Court Information for each of your convictions. This MUST include proof of payment for any fines, victim surcharges, restitution, and compensation (including date of final payment). If you were ordered to pay restitution to an individual or entity, courts may not be able to confirm payment (if this is the case, call the PBC at 1-800-874-2652).

III. Issue

[9] The issue is whether the officer's determination that a sentence is only fully satisfied when standalone restitution orders are paid was a reasonable one.

A. *Preliminary Issue*

[10] The Applicant did not file an affidavit. Instead, a legal assistant swore to an affidavit on direct knowledge. It would appear, though, that this was impossible as some of the evidence she swore to was before retaining legal counsel. As well, other evidence she swore to do not appear that she would have personal knowledge of contrary to rule 81 of the *Federal Courts Rules*, SOR/98-106. The affidavit contained evidence that was not put before the decision maker. Because of the non-compliance with Rule 81, the Respondent asks that little weight should be given to the affidavit or at least to portions of it.

[11] As well, the written arguments contain evidence that is not found in the Certified Tribunal Record [CTR]. The Respondent asks that I disregard this evidence at paragraphs 1, 2 and 4 of the Applicant's record.

[12] The Applicant did not respond to this argument.

[13] I agree that this affidavit does not comply with Rule 81. The affidavit contains new evidence and information the legal assistant would not have personally known though it may be on belief, nor is there any explanation of why the new evidence was not provided to the decision maker before as it existed before the application was submitted (*Elliot v The Queen*, 2017 FCA 145 at para 8).

[14] As a result, I will give no weight to the matters that were not in her direct knowledge or was not evidence before the decision maker I will disregard the evidence not before the decision maker and first seen in the Applicant's argument.

[15] It appears, though, that all of the information that was before the decision maker is already contained in the CTR (with the exception of the new evidence). There was no discernable change in what was presented in argument and what could have been argued without or with the affidavit.

IV. Standard of Review

[16] This case is largely dependant on the decision maker's interpretation of their home statute. When interpreting a home statute, the law has long been clear that the standard of review is one of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25 [*Vavilov*]).

[17] A reasonable decision must be based on reasoning that is rational and logical, and be based on internally coherent reasoning (*Vavilov*, above, at paras 85 and 102). The decision must bear the hallmarks of reasonableness—justification, transparency and intelligibility (*Vavilov* at 99). The party alleging the unreasonableness of the decision bears the onus of demonstrating it is unreasonable (*Vavilov* at 100).

V. Analysis

[18] Attached in Annex A are the pertinent sections of the law.

[19] The Applicant, since he filed the Notice of Application has conceded that SAROs do form part of the sentence. This is settled law and unpaid SAROs are included in the totality of the sentence (*R v Kelly*, 2018 NSCA 24 [*Kelly*] at para 52; *Criminal Records Act* subsection 2(1); *Criminal Code*, RSC, 1985, c C-64 ss 673, 738; *R v Yates*, 2002 BCCA 583 at para 7).

[20] The Parole Board has exclusive jurisdiction over records suspension under the *Criminal Records Act* and absolute discretion when ordering a record suspension. To be eligible to apply for a record suspension, a certain length of time must have passed after a sentence is complete under the *Criminal Records Act*. A sentence to be completed means the fulfillment of one's incarceration, probation, and payment of any fines. In this case, his conviction was for an offence committed before June 29, 2010, and so his ineligibility period is five years for indictable offences and three years for summary offences (*Criminal Records Act* s. 4 as it read in 1999).

[21] The Applicant's oral argument was that the decision is not reasonable given that there are all kinds of reasons that one may not be able to pay their restitution order and this should be taken into consideration when determining when a sentence is completed for eligibility purposes for a record suspension. The Applicant listed some reasons you may not be able to fulfil the restitution order such as: if the victim does not wish to have contact with you; if they are unable to be found; or if the company goes bankrupt so you have no entity to pay.

[22] The Applicant argued that another problem making the decision unreasonable would be if you cannot find a person, then how can you go back to the court that sentenced you once you complete your jail time and probation to have the restitution changed. He argued it is impossible to go back to the criminal sentencing court once you complete the other criminal parts of the sentence because these restitution orders are civil orders so the criminal court no longer has authority.

[23] The Applicant said that these factors must be considered given that *Vavilov* (at para 101) instructs me that the decision maker cannot make a decision that is "…untenable in light of the relevant factual and legal constraints that bear on it." Before *Vavilov*, a decision could be justifiable, with a spectrum of decisions being reasonable. Now, though, not only the outcome must be reasonable, but the reasoning process as well. The reasons must "reveal a rational chain of analysis….", and the failure to do so will render a decision unreasonable (*Vavilov* at para 103).

[24] The decision, according to the Applicant, is untenable. I cannot agree.

[25] The Applicant argued that because he tried to pay the restitution orders earlier, that this is something the decision maker should have taken into account. But, in this case, that evidence was not put before the decision maker. There was no evidence submitted of any attempts to find the people that he owed restitution too. The only evidence in the application is that: he was sentenced in 1999; paid restitution in 2002 for two of the orders; and paid the other two in 2018.

[26] The hypothetical scenarios presented by the Applicant did not happen in this case. There was no evidence about attempts to pay the orders over the 19 years since the sentence was rendered and when he finished paying all the restitution orders other than when the orders were each paid. The Applicant is asking me to speculate what it would take to make this decision unreasonable. The decision cannot be found to be unreasonable based on evidence that was not before the decision maker.

[27] I would add that in making the restitution orders, a sentencing judge would take a number of factors into consideration that would include the applicant's ability to pay, and the situation of the victim(s). However, no evidence was filed such as the sentencing transcript, so we are in a vacuum and certainly cannot speculate on why the Applicant did not pay the orders sooner so the appropriate time-period could start when he would be eligible for a record suspension.

[28] In the written materials, the Applicant submitted that the Respondent has fallen into error by either:

- Considering 1999 SAROs as though they were issued today; or
- Treating them more akin to a fine, which, if unpaid, would in fact extend the sentence.

[29] Though the Applicant cites *R v Kelly*, and agrees that there is no dispute that a SARO forms part of a sentence, he distinguishes, however, the present issuance of SAROs to when they issued in the Applicants case (in 1999).

[30] The Applicant argues that SAROs are very different now than they were in 1999; there are now processes to ensure that they are fair and appropriate. He claims that twenty years ago, SAROs were "blunt tools that, once issued, were no longer within the purview of the Courts or criminal justice system."

[31] He claims that the SAROs issued did not form part of the Applicant's probation, but were stand-alone orders that had to be paid immediately. They were, therefore, *de facto* judgments for the victims to enforce in civil proceedings, and not part of the sentence.

[32] Further, the Applicant argues that it makes no sense that 1999 SAROs would constitute part of the sentence. They were not part of his probation, the SAROs were not part of the criminal justice system at the time, and so non-payment of them in the case where there was a forgiveness would result in an absurd situation: a perpetual sentence.

[33] These arguments have no merit given that it is settled law that the all types of restitution orders are part of the sentence whether ordered in 1999 or 2020.

VI. Conclusion

[34] The law is that you are not eligible to apply for the discretionary relief under the *Criminal Records Act* for a record suspension until the statutory time has elapsed since the sentence is completed. This sentence includes probation, and in this case, the sentence was not completed until, the four stand-alone restitution orders were paid in full (or otherwise settled). As they were not paid until 2018, the sentence was not complete until 2018 and therefore the Applicant was

not eligible. His application and money was returned, as well he was given further explanation by telephone and writing as to why these restitution orders not being paid until 2018 made him ineligible for a record suspension due to his sentence not being completed until then. I find it a reasonable decision.

[35] The application is dismissed with no costs ordered, as the Respondent did not seek costs.

JUDGMENT IN T-1202-19

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed

2. No costs are awarded.

"Glennys L. McVeigh"
Judge

ANNEX A

Criminal Code, RSC, 1985, c C-64

Restitution to victims of offences

738 (1) Where an offender is convicted or discharged under section 730 of an offence, the court imposing sentence on or discharging the offender may, on application of the Attorney General or on its own motion, in addition to any other measure imposed on the offender, order that the offender make restitution to another person as follows:

(a) in the case of damage to, or the loss or destruction of, the property of any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying to the person an amount not exceeding the replacement value of the property as of the date the order is imposed, less the value of any part of the property that is returned to that person as of the date it is returned, where the amount is readily ascertainable;

(b) in the case of bodily or psychological harm to any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying to the person an amount not exceeding all pecuniary damages incurred as a result of the harm, including loss of income or support, if the amount is readily ascertainable;

(c) in the case of bodily harm or threat of bodily harm to the offender's intimate partner or child, or any other person, as a result of the commission of the offence or the arrest or attempted arrest of the offender, where the intimate partner, child or other person was a member of the offender's household at the relevant time, by paying to the person in question, independently of any amount ordered to be paid under paragraphs

Dédommagement

738 (1) Lorsque le délinquant est condamné ou absous sous le régime de l'article 730, le tribunal qui inflige la peine ou prononce l'absolution peut, en plus de toute autre mesure, à la demande du procureur général ou d'office, lui ordonner :

a) dans le cas où la perte ou la destruction des biens d'une personne — ou le dommage qui leur a été causé — est imputable à la perpétration de l'infraction ou à l'arrestation ou à la tentative d'arrestation du délinquant, de verser à cette personne des dommages-intérêts non supérieurs à la valeur de remplacement des biens à la date de l'ordonnance moins la valeur — à la date de la restitution — de la partie des biens qui a été restituée à celle-ci, si cette valeur peut être facilement déterminée;

b) dans le cas où les blessures corporelles ou les dommages psychologiques infligés à une personne sont imputables à la perpétration de l'infraction ou à l'arrestation ou à la tentative d'arrestation du délinquant, de verser à cette personne des dommages-intérêts non supérieurs à la valeur des dommages pécuniaires — notamment la perte de revenu — imputables aux blessures corporelles ou aux dommages psychologiques, si le montant peut en être facilement déterminé;

c) dans le cas où les blessures corporelles ou la menace de blessures corporelles infligées par le délinquant à une personne demeurant avec lui, notamment un de ses enfants ou son partenaire intime, sont imputables à la perpétration de

(a) and (b), an amount not exceeding actual and reasonable expenses incurred by that person, as a result of moving out of the offender's household, for temporary housing, food, child care and transportation, where the amount is readily ascertainable;

(d) in the case of an offence under section 402.2 or 403, by paying to a person who, as a result of the offence, incurs expenses to re-establish their identity, including expenses to replace their identity documents and to correct their credit history and credit rating, an amount that is not more than the amount of those expenses, to the extent that they are reasonable, if the amount is readily ascertainable; and

(e) in the case of an offence under subsection 162.1(1), by paying to a person who, as a result of the offence, incurs expenses to remove the intimate image from the Internet or other digital network, an amount that is not more than the amount of those expenses, to the extent that they are reasonable, if the amount is readily ascertainable.

Regulations

(2) The lieutenant governor in council of a province may make regulations precluding the inclusion of provisions on enforcement of restitution orders as an optional condition of a probation order or of a conditional sentence order.

l'infraction ou à l'arrestation ou à la tentative d'arrestation du délinquant, de verser, indépendamment des versements prévus aux alinéas a) ou b), des dommages-intérêts non supérieurs aux frais d'hébergement, d'alimentation, de transport et de garde d'enfant qu'une telle personne a réellement engagés pour demeurer ailleurs provisoirement, si ces dommages peuvent être facilement déterminés;

d) dans le cas de la perpétration d'une infraction prévue aux articles 402.2 ou 403, de verser à la personne qui, du fait de l'infraction, a engagé des dépenses raisonnables liées au rétablissement de son identité — notamment pour corriger son dossier et sa cote de crédit et remplacer ses pièces d'identité — des dommages-intérêts non supérieurs à ces dépenses si ces dommages peuvent être facilement déterminés;

e) dans le cas de la perpétration d'une infraction prévue au paragraphe 162.1(1), de verser à la personne qui, du fait de l'infraction, a engagé des dépenses raisonnables liées au retrait d'images intimes de l'Internet ou de tout autre réseau numérique des dommages-intérêts non supérieurs à ces dépenses si ces dommages peuvent être facilement déterminés.

Règlements du lieutenant-gouverneur

(2) Le lieutenant-gouverneur en conseil d'une province peut, par règlement, interdire l'insertion, dans une ordonnance de probation ou une ordonnance de sursis, d'une condition facultative prévoyant l'exécution forcée d'une ordonnance de dédommagement.

Restitution to persons acting in good faith

739 Where an offender is convicted or discharged under section 730 of an offence and

(a) any property obtained as a result of the commission of the offence has been conveyed or transferred for valuable consideration to a person acting in good faith and without notice, or

(b) the offender has borrowed money on the security of that property from a person acting in good faith and without notice,

the court may, where that property has been returned to the lawful owner or the person who had lawful possession of that property at the time the offence was committed, order the offender to pay as restitution to the person referred to in paragraph (a) or (b) an amount not exceeding the amount of consideration for that property or the total amount outstanding in respect of the loan, as the case may be.

Dédommagement des parties de bonne foi

739 Lorsque le délinquant est condamné ou absous sous le régime de l'article 730 et qu'il a transféré ou remis moyennant contrepartie des biens obtenus criminellement à un tiers agissant de bonne foi et ignorant l'origine criminelle des biens ou qu'il a emprunté en donnant ces biens en garantie auprès d'un créancier agissant de bonne foi et ignorant l'origine criminelle des biens, le tribunal peut, si ceux-ci ont été restitués à leur propriétaire légitime ou à la personne qui avait droit à leur possession légitime au moment de la perpétration, ordonner au délinquant de verser au tiers ou au créancier des dommages-intérêts non supérieurs à la contrepartie versée par le tiers pour le bien ou au solde du prêt.

Criminal Records Act, RSC, 1985, c C-47

Restrictions on application for record suspension

4 (1) Subject to subsections (3.1) and (3.11), a person is ineligible to apply for a record suspension until the following period has elapsed after the expiration according to law of any sentence, including a sentence of imprisonment, a period of probation and the payment of any fine, imposed for an offence:

(a) 10 years, in the case of an offence that is prosecuted by indictment or is a service offence for which the offender was punished by a fine of more than five thousand dollars, detention for more than six months, dismissal from Her Majesty's

Restrictions relatives aux demandes de suspension du casier

4 (1) Sous réserve des paragraphes (3.1) et (3.11), nul n'est admissible à présenter une demande de suspension du casier avant que la période consécutive à l'expiration légale de la peine, notamment une peine d'emprisonnement, une période de probation ou le paiement d'une amende, énoncée ci-après ne soit écoulée :

a) dix ans pour l'infraction qui a fait l'objet d'une poursuite par voie de mise en accusation ou qui est une infraction d'ordre militaire en cas de condamnation à une amende de plus de cinq mille dollars, à une peine de détention de plus de six mois, à la

service, imprisonment for more than six months or a punishment that is greater than imprisonment for less than two years in the scale of punishments set out in subsection 139(1) of the National Defence Act; or

(b) five years, in the case of an offence that is punishable on summary conviction or is a service offence other than a service offence referred to in paragraph (a).

destitution du service de Sa Majesté, à l'emprisonnement de plus de six mois ou à une peine plus lourde que l'emprisonnement pour moins de deux ans selon l'échelle des peines établie au paragraphe 139(1) de la Loi sur la défense nationale;

b) cinq ans pour l'infraction qui est punissable sur déclaration de culpabilité par procédure sommaire ou qui est une infraction d'ordre militaire autre que celle visée à l'alinéa a).

Criminal Records Act s 4 as it read in 1999

4 Before an application for a pardon may be considered, the following period must have elapsed after the expiration according to law of any sentence, including a sentence of imprisonment, a period of probation and the payment of any fine, imposed for an offence, namely,

(a) five years, in the case of
(i) an offence prosecuted by indictment, or
(ii) a service offence within the meaning of the National Defence Act for which the offender was punished by a fine of more than two thousand dollars, detention for more than six months, dismissal from Her Majesty's service, imprisonment for more than six months or a punishment that is greater than imprisonment for less than two years in the scale of punishments set out in subsection 139(1) of that Act; or

(b) three years, in the case of (i) an offence punishable on summary conviction, or (ii) a service offence within the meaning of the National Defence Act, other than a service offence referred to in subparagraph (a)(ii).

4 La période consécutive à l'expiration légale de la peine, notamment une peine d'emprisonnement ou une période de probation, et du paiement de l'amende, - ou de la dernière peine purgée si plusieurs peines ont été infligées - pendant laquelle la demande de réhabilitation ne peut être examinée est de:

a) cinq ans pour les infractions punissables par voie de mise en accusation et pour les infractions d'ordre militaire au sens de la Loi sur la défense nationale en cas de condamnation à une amende de plus de deux mille dollars, à une peine de détention de plus de six mois, à la destitution du service de Sa Majesté, à l'emprisonnement de plus de six mois ou à une peine plus lourde que l'emprisonnement pour moins de deux ans selon l'échelle des peines établie au paragraphe 139(1) de cette loi;

b) trois ans pour les infractions punissables sur déclaration de culpabilité par procédure sommaire et pour les infractions d'ordre militaire au sens de la Loi sur la défense nationale autres que celles visées à l'alinéa a).

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1202-19
STYLE OF CAUSE:	ASHOT TUNIAN v ATTORNEY GENERAL OF CANADA

HEARING HELD BY VIDEOCONFERENCE ON NOVEMBER 9, 2020 FROM VANCOUVER, BRITISH COLUMBIA (COURT AND PARTIES) AND ABBOTSFORD, BRITISH COLUMBIA (PARTIES)

DATE OF HEARING:	NOVEMBER 9, 2020
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	NOVEMBER 13, 2020

APPEARANCES:

Christopher Terepocki	FOR THE APPLICANT
Maia McEachern	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Grace, Snowdon & Terepocki LLP Abbotsford, British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT