Federal Court Cour fédérale

Date: 20210201

Docket: T-111-21

Citation: 2021 FC 107

Ottawa, Ontario, February 1, 2021

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

OLIVIER ST-CYR

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Introduction

[1] On January 14, 2021, the Applicant filed an application for judicial review wherein he seeks an order directing the Appeal Division of the Parole Board of Canada [Appeal Division] to render a decision forthwith on his appeal relating to the illegality of the residency condition imposed upon him during his statutory release. With the present motion, the Applicant is asking the Court to expedite the hearing of the application for judicial review.

II. Background

[2] The Applicant is currently serving a sentence for possession for the purpose of trafficking and possession of proceeds of crime. His sentence will end on April 15, 2021.

[3] In July 2019, the Parole Board of Canada released the Applicant on day parole for a term of three (3) months, to be followed by full parole. He was to reside at a community correctional centre for the duration of his day parole and then move to his parents' house, which had been pre-approved as his residence for full parole. He commenced full parole in October 2019.

[4] In January 2020, the Applicant was arrested for impaired driving and refusal to comply with demands. As a result, his full parole was suspended and he was incarcerated pending a post-suspension hearing before the Parole Board of Canada.

[5] His post-suspension hearing was held on April 23, 2020. At the conclusion of the hearing, the Parole Board of Canada decided to cancel the Applicant's suspension and to release him back on full parole with special conditions, including a residency condition to reside at a community correctional centre. The special conditions were to remain in effect until the expiry of the warrant issued against the Applicant.

[6] In September 2020, the Applicant attempted to challenge the legality of the residency condition by appealing the April 23, 2020 decision. On September 30, 2020, the Appeal Division

found that the appeal was time-barred under the provisions of the *Corrections and Conditional Release Regulations*, SOR/92-620 [CCRR].

[7] In addition to seeking judicial review of the Appeal Division's decision, the Applicant brought a motion for injunctive relief asking that he be released from the community correctional centre. On October 9, 2020, Justice Martine St-Louis dismissed the motion on the basis that the Applicant did not meet the irreparable harm and balance of convenience prongs of the tripartite test set out in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311. She nevertheless ordered that the underlying application be heard on an expedited timeline.

[8] On November 26, 2020, I heard the expedited application and reserved judgment. I dismissed the application for judicial review on December 1, 2020 on the basis that the Applicant had not demonstrated that the decision of the Appeal Division was unreasonable. The Applicant's appeal was indeed time-barred under the provisions of the CCRR. Moreover, the Applicant had not sought an extension of time nor had he provided a reasonable explanation for the delay, in addition to not having demonstrated a continued intention to pursue an appeal or the absence of prejudice to the other party.

[9] In the meantime, the Applicant submitted, on October 2, 2020, a new application before the Parole Board of Canada seeking the removal of the residency condition on the basis that he was on statutory release since July 16, 2020, and the continued residency condition was thus illegal. The Parole Board of Canada dismissed the application on November 25, 2020.

[10] On December 4, 2020, the Applicant filed an appeal to the Appeal Division seeking an urgent decision because of the illegality of the residency condition.

[11] The Applicant's counsel sent two (2) letters to the Appeal Division requesting an urgent decision. On January 8, 2021, the Vice-President of the Appeal Division wrote to the Applicant informing him that his file had been reviewed and was not considered a priority. He also informed the Applicant that files before the Appeal Division were treated in order of filing.

[12] On January 14, 2021, the Applicant filed an application for judicial review to obtain an order directing the Appeal Division to render a decision forthwith quashing the residency condition imposed on the Applicant.

[13] On January 22, 2021, the Applicant's counsel wrote to the Court requesting an urgent hearing on this motion to expedite the hearing of the application for judicial review. The Applicant later filed his motion materials with the Court and the matter was heard January 29, 2021.

[14] To date, the Appeal Division has not rendered a decision in the Applicant's file. The Applicant's warrant expires on April 15, 2021.

III. Analysis

[15] The sole issue to be decided is whether the Court ought to depart from the timelines prescribed in Part 5 of the *Federal Courts Rules*, SOR/98-106 [Rules] and expedite the hearing of the application for judicial review.

[16] Section 8 of the Rules authorizes the Court to "extend or abridge a period provided by these Rules or fixed by an order". In exercising its discretion to do so, the Court will consider a number of factors which have been summarized as follows:

a) Whether the proceeding is really urgent or does the moving party simply prefer the matter be expedited;
b) Whether prejudice will ensue to the responding party if the matter is expedited;
c) Whether the matter will be moot if it is not expedited; and
d) Whether expediting the matter will prejudice other litigants by jumping the queue (See *May v CBC/Radio Canada*, 2011 FCA 130 at paras 12-13; *Alani v Canada (Prime Minister)*, 2015 FC 859 at para 14 [*Alani*]; *Conacher v Canada (Prime Minister)*, 2008 FC 1119 at para 16 [*Conacher*]; *Canadian Wheat Board v Canada (Attorney General)*, 2007 FC 39 at para 13 [*CWB*]).

[17] After reviewing the cases in which reasons were provided on motions to expedite proceedings, the Honourable Mr. Justice Sébastien Grammond found in *McCulloch v Canada*, 2020 CF 565 [*McCulloch*] that the discretion to expedite the hearing of a case was exercised according to two (2) main sets of considerations: (1) whether an expedited hearing is necessary

to ensure the effectiveness of the remedy sought; and (2) whether it can be accomplished through a fair process (*McCulloch* at para 12).

[18] Notwithstanding how the relevant factors are framed, the burden lies with the party seeking to vary the timelines provided in the Rules (*Alani* at para 15; *CWB* at para 14; *Conacher* at para 18).

[19] The Applicant argues that there is urgency in having the application heard since his right to liberty under section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 is being breached by the requirement that he reside at a correctional community centre despite being on statutory release. He further argues that if the application is not expedited, his warrant will expire on April 15, 2021, and the issue of the validity of the residency condition will become moot. He adds that in the present case, counsel for the parties have already argued the merits of the issues in the prior application for judicial review.

[20] The Respondent opposes the motion on the basis that the Applicant has not demonstrated the existence of irreparable harm if his application for judicial review does not proceed on an expedited basis. The Respondent also argues that the Applicant has been aware of the residency condition since April 2020 and if one were to accept the Applicant's mootness argument, the same argument would apply to several other cases where an application for judicial review is brought in the last year of an inmate's incarceration. Finally, the Respondent adds that the Appeal Division currently renders its decision on appeal within approximately three (3) months

of the appeal being brought. To support its position, the Respondent filed an affidavit from an employee of the Appeal Division stating that a decision in respect to the Applicant's appeal should be made around March 7, 2021.

[21] As the Supreme Court of Canada noted in *R v Bird*, 2019 SCC 7 [*Bird*], "[w]hen someone's liberty is at stake, efficiency and timeliness take on greater significance" (*Bird* at para 59). While this Court is very flexible and makes every effort to ensure that applications are determined in an expeditious, fair and cost-efficient manner, I am not persuaded that expediting the application for judicial review will assist the Applicant in obtaining the ultimate relief he is seeking – a decision on the validity of the residency condition – before the expiry of the warrant on April 15, 2021.

[22] In his application for judicial review, the Applicant is seeking *mandamus* relief. He wants the Court to order the Appeal Division to render its decision within a delay of ten (10) days of this Court's order. Contrary to the Applicant's position, the appropriateness of issuing *mandamus* relief in the case at bar has not been plead in the context of the prior application for judicial review. The Applicant's record has not yet been filed and the Respondent's counsel has indicated that to provide a meaningful response, she would require a delay of two (2) weeks to serve and file her Respondent's record given her current workload. Even if the Court were to reduce the delay for filing the Respondent's record to one (1) week, the fact remains that a judge of this Court would have to hear the application and then issue a decision. Should the Applicant be ultimately successful in convincing the judge that *mandamus* relief lies against the Appeal Division, it is more than likely that the delay in which the Appeal Division will have to render its

decision will coincide with the March 7, 2021 timeframe advanced by the employee of the Appeal Division. I am confident that if the Appeal Division did not think it could meet this timeframe, it would not have proposed it in an affidavit.

[23] The matter does not necessarily end when the Appeal Division renders its decision. If it dismisses the appeal, the Applicant will have to bring another application for judicial review. Even if that application is expedited, it is unlikely that the issue of the residency condition's validity will be determined in advance of the warrant's expiration on April 15, 2021. An appeal before the Federal Court of Appeal by the Respondent cannot be excluded either.

[24] In any event, I am not satisfied that the circumstances of this case warrant this Court's exercise of discretion. I agree with the Respondent that the Applicant is in great part responsible for the predicament he finds himself in today and has not conducted himself as if his situation is urgent. The decision of the Parole Board of Canada imposing the residency condition on the Applicant is dated April 23, 2020. It clearly stated that it would remain in effect until the expiry of the warrant. The Parole Board of Canada also explicitly informed the Applicant that if he wanted to appeal the decision, he had to bring his appeal to the Appeal Division within three (3) months of the date of the decision. The Applicant did not approach the Appeal Division until September 20, 2020. That is almost five (5) months after the Parole Board of Canada issued its decision and two (2) months after the Applicant's statutory release date of July 16, 2020. When he did file an appeal in September 2020, he failed to seek an extension of time. Had he done so, the Appeal Division's decision would likely have been rendered by this time.

[25] Unlike in *McCulloch*, the Applicant has failed to persuade me that there are exceptional circumstances in this file that would justify bypassing the already expeditious scheme for judicial review set out in the Rules. As this Court noted in *CWB* at paragraph 14, quoting from *Gordon v Canada (Minister of National Defence)*, 2004 FC 1642, at paragraph 17:

> Section 18.1 of the *Federal Courts Act* establishes a scheme for judicial review of federal administrative tribunals. In furtherance of that scheme, section 18.4 provides that judicial review applications "shall be heard and determined without delay and in a summary way." The timeframes provided by the *Rules* are designed to give the parties adequate time to prepare the case so that the Court can properly decide the matter before it, thereby rendering justice to the parties, while also respecting the objective of deciding the matter without delay. <u>Any departure from these rules – and especially an abridgement – is exceptional.</u>
>
> [My emphasis.]

[26] In *McCulloch*, the applicant was seeking an order expediting his application for judicial review of the Parole Board of Canada's failure to render a decision within a reasonable time on his request for exceptional parole. That request was based on the risk of contracting COVID-19 while detained. The applicant suffered from asthma and his doctor had confirmed that COVID-19 could be fatal in people with pre-existing conditions. Unlike in this matter, the Attorney General of Canada agreed that the application should be expedited, but requested more time than that suggested by the applicant's counsel. The Court found that the applicant had a legitimate interest in having the application heard within the proposed timeframe given the COVID-19 pandemic and its effect on persons with pre-existing conditions.

[27] In the case before me, the Applicant argues that his residual liberty rights are more restrained because of the residency condition. In his affidavit, the Applicant states:

> 26. As I have to continue to reside at the half-way house, I have to go sleep (sic) at the half-way house except weekends (Friday and Saturdays nights) because I have week-end passes.
>
> 27. Prior to the curfew imposed by the provincial government in Quebec I had a curfew of 11 p.m.. Since the imposition of the curfew by the Province I have to remain at the half-way house from 8pm until the next morning.

[28] Without expressing any view on the merit of the Applicant's argument regarding the deprivation of his liberty, the harm he is alleging above does not in my view meet the threshold of exceptionality demonstrating urgency and justifying a departure from the timelines prescribed in Part 5 of the Rules.

[29] I recognize that the issue of the legality of the residency condition may become moot. As explained above, given that the Applicant's warrant expires on April 15, 2021, this question may become moot notwithstanding this Court proceeding in an expedited manner. If the Applicant does indeed come before this Court again to seek judicial review of a decision by the Appeal Division dismissing his appeal, he can always make the argument that the Court should exercise its discretion to hear the application even if it becomes moot (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342).

[30] In my view, allowing applicants to jump the queue (*Alani* at para 14) when they had an effective remedy at their disposal but failed to exercise it in a timely manner and thus are responsible for the matter becoming urgent would not serve the public interest and would place a significant burden on the courts and the respondents.

[31] For all of these reasons, the Applicant's motion for an order expediting the hearing of the application for judicial review and setting an expedited hearing date and a timetable for the remaining steps is therefore dismissed.

ORDER in T-111-21

THIS COURT ORDERS that:

1. The Applicant's motion is dismissed without costs.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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