

Federal Court



Cour fédérale

Date: 20100917

Unrevised certified translation

Docket: T-1436-09

Citation: 2010 FC 931

Ottawa, Ontario, September 17, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

LUMUMBA OLENGA

Applicant

and

**ATTORNEY GENERAL
OF CANADA**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, of the decision of the Appeal Division of the National Parole Board (Appeal Division), dated July 24, 2009, upholding the decision of the National Parole Board (NPB), dated April 16, 2009, to impose a residency condition on the applicant's statutory release as well as a special condition not to be in the company of minors without being accompanied by a responsible adult who has been informed about his sexual offending and authorized by the supervising officer.

[2] The applicant has been serving a three-year sentence for sexual assault and incest since April 2007. The offences were committed over a three-year period and the victim was his nine-year-old daughter. The applicant denies having committed these offences, in spite of DNA evidence establishing the assaults.

[3] He has not undergone treatment for the factors contributing to his criminality during his incarceration. He claims to be a victim of a conspiracy by his former spouse, the police and the courts. Having served two-thirds of his sentence, the applicant was to be released on statutory release on April 23, 2009.

[4] The Correctional Service of Canada (CSC) recommended to the NPB before his release date that he be subject to certain special conditions during his statutory release. Among these conditions was a residency requirement.

[5] The applicant challenged this condition by way of written submissions to the NPB. On April 16, 2009, the NPB imposed the condition of residency at a correctional centre supervised by the CSC as well as other special conditions during his statutory release.

[6] The applicant filed an appeal of that decision with the Appeal Division and it is the decision of the Appeal Division which is the subject of the present judicial review.

[7] On September 4, 2009, a warrant of suspension of the applicant's statutory release was issued because he had failed to comply with a normal condition of his certificate. He was therefore returned to the La Macaza Institution.

[8] On December 23, 2009, the NPB reviewed his case and he was returned to a community correctional centre, namely, the Laferrière Community Correctional Centre in St-Jérôme, with the same special conditions. The warrant of committal for the applicant expired on April 23, 2010.

[9] At the hearing on September 13, 2010, the applicant asked the Court to declare his incarceration from April 22, 2009, to April 23, 2010, to have been unlawful and unconstitutional.

[10] His principal argument is based on the provisions of subsections 129(3) and 130(1) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the Act). He claims that the NPB's decision on April 16, 2009, was not consistent with the provisions set out in subsection 129(3) of the Act.

[11] He added that the NPB disregarded a report that was favourable to him prior to making its decision (see applicant's allegation, paragraph 6, oral submissions, August 13, 2010).

[12] However, as the respondent noted, the decision was made under subsections 133(3) and (4.1).

[13] The Court agrees with the respondent's arguments on this question because the NPB, as the releasing authority, may impose any conditions that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender (subsection 133(3)). It may also impose other conditions set out in subsection 133(4.1).

[14] In spite of the fact that the Court is of the view that the applicant's application for judicial review has become moot given that he has served his sentence and that his warrant of committal expired on April 23, 2010, the Court intends to rule on the reasonableness of the Appeal Division's decision upholding the decision of April 16, 2009. Thus, the findings of the Appeal Division are owed deference and the Court should intervene only if the decision does not fall within a "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at paragraph 47).

[15] In the case at bar, the NPB analyzed the applicant's record and his submissions of March 9 and March 25, 2009. The Board therefore did take into account the favourable report mentioned by the applicant in his oral submissions on August 13, 2010 (paragraph 6). It also took into account the seriousness of the sexual offences committed and the applicant's attitude of denial. The Board was also concerned that his release plan did not, in its view, provide for adequate supervision to prevent him from re-offending.

[16] The NPB added a *caveat* to its decision, saying it would be willing to review the situation if the CSC felt that the situation had improved to the extent that the condition imposed could be set aside.

[17] The Appeal Division upheld this decision and the Court is of the view that its intervention is not warranted.

[18] The relevant legislation is appended to these reasons.

JUDGMENT

THE COURT ORDERS that this application be dismissed, without costs.

“Michel Beaudry”

Judge

Certified true translation

Sebastian Desbarats, Translator

ANNEX

Federal Courts Act (R.S.C, 1985, c. F-7)

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

Time limitation

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

- (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
- (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

Délai de présentation

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

- a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
- b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
 (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

Defect in form or technical irregularity

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

Vice de forme

(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

Corrections and Conditional Release Act, S.C. 1992, c. 20.

Referral of cases to Chairperson of Board

129.(3) Where the Commissioner believes on reasonable grounds that an offender who is serving a sentence of two years or more is likely, before the expiration of the sentence according

Renvoi du cas par le commissaire au président de la Commission

129.(3) S'il a des motifs raisonnables de croire qu'un délinquant condamné à une peine d'au moins deux ans commettra, s'il est mis en liberté avant l'expiration légale de sa peine, soit une

to law, to commit an offence causing death or serious harm to another person, a sexual offence involving a child or a serious drug offence, the Commissioner shall refer the case to the Chairperson of the Board together with all the information in the possession of the Service that, in the Commissioner's opinion, is relevant to the case, as soon as is practicable after forming that belief, but the referral may not be made later than six months before the offender's statutory release date unless

(a) the Commissioner formed that belief on the basis of behaviour of the offender during the six months preceding the statutory release date or on the basis of information obtained during those six months; or

(b) as a result of any recalculation of the sentence under this Act, the statutory release date of the offender has passed or less than six months remain before that date.

Review by Board of cases referred

130.(1) Where the case of an offender is referred to the Board by the Service pursuant to subsection 129(2) or referred to the Chairperson of the Board by the Commissioner pursuant to subsection 129(3) or (3.1), the Board shall, subject to subsections 129(5), (6) and (7), at the times and in the manner prescribed by the regulations,

(a) inform the offender of the referral and review, and

(b) review the case,

and the Board shall cause all such inquiries to be conducted in connection with the review as it considers necessary.

infraction causant la mort ou un dommage grave à une autre personne, soit une infraction d'ordre sexuel à l'égard d'un enfant, soit une infraction grave en matière de drogue, le commissaire défère le cas au président de la Commission — et lui transmet tous les renseignements qui sont en la possession du Service et qui, à son avis, sont pertinents — le plus tôt possible après en être arrivé à cette conclusion et au plus tard six mois avant la date prévue pour la libération d'office; il peut cependant le faire moins de six mois avant cette date dans les cas suivants :

a) sa conclusion se fonde sur la conduite du délinquant ou sur des renseignements obtenus pendant ces six mois;

b) la date prévue pour la libération d'office du délinquant est, en raison de tout nouveau calcul de la durée de sa peine prévu à la présente loi, déjà passée ou tombe dans cette période de six mois.

Examen par la Commission

130.(1) Sous réserve des paragraphes 129(5), (6) et (7), la Commission informe le détenu du renvoi et du prochain examen de son cas — déferé en application des paragraphes 129(2), (3) ou (3.1) — et procède, selon les modalités réglementaires, à cet examen ainsi qu'à toutes les enquêtes qu'elle juge nécessaires à cet égard.

Conditions set by releasing authority

133.(3) The releasing authority may impose any conditions on the parole, statutory release or unescorted temporary absence of an offender that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender.

Residence requirement

(4.1) In order to facilitate the successful reintegration into society of an offender, the releasing authority may, as a condition of statutory release, require that the offender reside in a community-based residential facility or in a psychiatric facility, where the releasing authority is satisfied that, in the absence of such a condition, the offender will present an undue risk to society by committing an offence listed in Schedule I before the expiration of the offender's sentence according to law.

Conditions particulières

133.(3) L'autorité compétente peut imposer au délinquant qui bénéficie d'une libération conditionnelle ou d'office ou d'une permission de sortir sans escorte les conditions qu'elle juge raisonnables et nécessaires pour protéger la société et favoriser la réinsertion sociale du délinquant.

Assignation à résidence

133.(4.1) L'autorité compétente peut, pour faciliter la réinsertion sociale du délinquant, ordonner que celui-ci, à titre de condition de sa libération d'office, demeure dans un établissement résidentiel communautaire ou un établissement psychiatrique si elle est convaincue qu'à défaut de cette condition la commission par le délinquant d'une infraction visée à l'annexe I avant l'expiration légale de sa peine présentera un risque inacceptable pour la société.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1436-09

STYLE OF CAUSE: LUMUMBA OLENGA
and THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: September 14, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** Beaudry J.

DATED: September 17, 2010

APPEARANCES:

Lumumba Olenga FOR THE APPLICANT
(Representing himself)

Stéphanie Dion FOR THE RESPONDENT

SOLICITORS OF RECORD:

Not applicable FOR THE APPLICANT

Myles J. Kirvan FOR THE RESPONDENT
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