Federal Court  Cour fédérale

Date: 20101124

Docket: T-662-10

Citation: 2010 FC 1179

Ottawa, Ontario, November 24, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

JOHN ANTHONY FRANCHI

Applicant

and

THE ATTORNEY GENERAL OF CANADA
AND NATIONAL PAROLE BOARD

Respondents

REASONS FOR ORDER AND ORDER

[1] Mr. Franchi was a con artist. The real question in this judicial review of the revocation of his parole is whether he is still a con artist.

[2] Mr. Franchi is a recidivist. He has been twice convicted on fraud charges. He has proven to be very adept at creating fictitious law firms to serve fictitious corporations, and has misused social

insurance numbers, among other things. He began serving a six-year sentence imposed in light of his second conviction in October 2007. He was released on day parole in April 2009.

[3] Every grant of day parole is subject to certain statutory conditions as set out in section 161 of the *Corrections and Conditional Release Regulations.* More particularly, sections 161(1) (g) (ii) and (iii) require an offender to:

[…]	[…]
(g) […] report immediately	*g*) […] l'informer sans délai de :
(ii) any change in the offender's normal occupation, including employment, vocational or educational training and volunteer work,	(ii) tout changement d'occupation habituelle, notamment un changement d'emploi rémunéré ou bénévole ou un changement de cours de formation,
(iii) <u>any change in the</u> domestic or <u>financial situation of the offender</u> […]	(iii) <u>tout changement dans sa situation</u> domestique ou <u>financière</u> […]
(My emphasis.)	

[4] In addition, section 133 of the *Corrections and Conditional Release Act* provides that the "releasing authority", in this case the National Parole Board, may impose special conditions. It may also relieve the offender from compliance with any statutory condition or vary the application thereof.

[5] In this case, two special conditions were imposed. One was that his employment be pre-approved and the other was that he:

> Provide full financial disclosure, including assets, income and expenditure, <u>immediately</u> to [his] parole supervisor <u>upon request</u>.

(My emphasis.)

[6] All was going well. Indeed Mr. Franchi was being seriously considered for full parole. In that connection, Correction Services Canada obtained updated credit information from EquiFax on 1 September 2009. This report set out facts, which if true, indicated that Mr. Franchi had breached the conditions of his parole by changing his employment without approval. It also revealed considerable credit card and banking activity in August 2009. However, no default was noted.

[7] This led to a meeting on 3 September 2009 between Mr. Franchi and his Community Parole Officer. As a result, Mr. Franchi's parole was suspended because he "fail[ed] to disclose financial dealings, employment and/or volunteer activity."

[8] Following a post-suspension meeting held on 9 September, the next step was a post-suspension hearing before a National Parole Board panel. It was decided that his day parole would be revoked and his application for full parole denied. Mr. Franchi appealed to the Appeal Division of the Board which on 19 March 2010 affirmed the decision. This is the judicial review of the Appeal Panel's decision.

[9] My order of analysis will be to lay down the precise terms of Mr. Franchi's release, to analyze in turn the decisions of the National Parole Board and its Appeal Division, and then to consider the relevant portions of the *Corrections and Conditional Release Act*, and the case law pertaining thereto.

[10] It transpired that Mr. Franchi had borrowed over $100,000 in August 2009. His avowed plan was to invest that money and apply the profits derived therefrom to pay down his debts. He protested that he was not in breach of his parole conditions because when requested he provided financial disclosure. Parole was nevertheless suspended.

[11] At the hearing before the National Parole Board, it was found there was insufficient evidence to support a finding that Mr. Franchi had changed his employment. However, it was found that he had breached the financial conditions. According to its decision, contained in what is called a "post-release decision sheet", the Board applied both the standard conditions of release and the special condition "that you provide financial disclosure to your parole officer upon request, including assets, debts, incomes and expenditures."

[12] The Board also found that he had had at least two supervision interviews with his parole officer which gave him ample opportunity to disclose his financial activities. The Board concluded that he breached not only his special condition but also the standard condition to immediately inform his parole officer about changes in his finances. More specifically, it held that the information that was given on request was incomplete and only submitted after he had made the transactions in question. The Board was not satisfied with the exact nature of his investments which were not documented to its satisfaction.

[13] However, the Board found there was insufficient information to conclude he had provided false information to his creditors. Nevertheless, it concluded: "Your failure to disclose crucial

financial information to your parole officer in a timely fashion is evidence of a continuing pattern of deceit. Consequently, the Board has determined that risk is undue for community release."

[14] The Panel had before it an "Assessment for Decision" Report prepared by the parole officer. He recommended that Mr. Franchi's day parole be revoked and that full parole be denied. The report deals both with Mr. Franchi's alleged change of employment and his financial situation. He was clearly of the view that the EquiFax Report was correct with respect to a change of employment. The allegation was that he was employed with a family investment concern. As noted above, the Panel found there was insufficient evidence to support that allegation. The parole officer stated that during the supervision meeting on 3 September 2009, a review of the financial disclosure documents "revealed that the offender has not been forthcoming about his financial activities and failed to advise the undersigned about any changes within his overall financial situation." He had also had the opportunity to make this disclosure at two previous supervision meetings. Mr. Franchi had advised that he had borrowed money in order to invest it with the same family investment concern at which he was alleged to be employed. The parole officer was disappointed that Mr. Franchi did not have papers establishing what the company, run by a cousin, was doing with the money. Mr. Franchi was criticized for withholding information about his investments until he recognized that his parole was in jeopardy.

[15] Mr. Franchi appealed the National Parole Board's decision to its Appeal Division, which, as we shall see, has somewhat of a special status when it comes to judicial review. He raised a number of issues which are no longer pertinent and which were not pursued at the hearing before me. In essence it was found that the original decision was reasonable. Mr. Franchi was told:

> You failed not only to immediately advise your CPO of the changes in your financial situation, but also failed to provide full financial disclosure upon request, in violation of your special and standard release conditions. You have an extensive fraudulent criminal history and a pattern of being deceitful. It was, therefore, not unreasonable for the Board to conclude that your failure to be completely forthright about your financial activities with your CPO was evidence that you had returned to a pattern of deceit.

THE *CORRECTIONS AND CONDITIONAL RELEASE ACT*

[16] It must be kept in mind that parole is a privilege, not a right (*Aney v. Canada (Attorney General)*, 2005 FC 182, 270 F.T.R. 262, at paragraph 31, and *Coscia v. Canada (Attorney General)*, 2005 FCA 132, [2006] 1 F.C.R. 430, at paragraph 44).

[17] The guiding principles are set out in section 101 of the *Corrections and Conditional Release Act*. The paramount consideration is the protection of society. Parole boards are to make the least restrictive determination consistent therewith.

[18] Section 107 of the Act provides that the Board "has exclusive jurisdiction and absolute discretion" to terminate or revoke parole and to cancel a decision to grant parole.

[19] More to the point, section 135 goes on to provide that parole may be suspended. The Board may, among other things, suspend parole if an offender breaches a condition thereof or same is necessary to prevent a breach of any condition or to protect society. Section 135(1)(7) adds that independently of the above, the Board may revoke parole if satisfied that continued parole "would constitute an undue risk to society by reason of the offender re-offending before the expiration of the sentence."

[20] "Absolute" is actually relative. As Mr. Justice Rand stated in *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at page 140:

> […] there is no such thing as absolute and untrammeled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.

In *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, 1 S.C.R. 539, at paragraph 91, Mr. Justice Binnie seized upon another passage from that same set of reasons.

> The Minister does not claim an absolute and untrammelled discretion. He recognizes, as Rand J. stated more than 40 years ago in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, that "there is always a perspective within which a statute is intended to operate".

[21] Perhaps parole should not have been granted in the first place. However that is not the issue. The reason invoked for suspending parole is a breach of conditions, no more no less. Were it not for the special condition, it could fairly be said that he was in breach because he failed to <u>immediately</u> report any change in his financial situation. Borrowing more than $100,000 is certainly a change in one's financial situation. However, in my opinion, the standard condition requiring an offender to "report i<u>mmediately</u> any change in [his] financial situation" and the special condition to provide full financial disclosure "upon <u>request</u>" are contradictory. The principle in contempt of court cases that the order that was breached must state clearly and unequivocally what should and should not be done is equally applicable in this context (*Prescott-Russell Services for Children and Adults v. G. (N.) et al.* (2007), 82 O.R. (3d) 686). Mr. Franchi was entitled to know where he stood.

[22] Why then would the standard condition be watered down so that he only had to disclose his financial situation upon request? Mr. Franchi's position is that it had been explained to him that he would be required to show his community parole officer his pay stubs and bank statements. It was never explained that he had to clear in advance any financial plans he had. He claims that he submitted financial disclosure of his investments on 3 September as requested, and after his incarceration had instructed his family and his cousin and his lawyer to provide any other information which was requested. The only way to read the standard and special conditions together is that the special condition modified the standard condition.

[23] As a matter of construction of his parole conditions, it was unreasonable for the National Parole Board to conclude that Mr. Franchi was on his own initiative required to disclose his financial dealings. On the contrary, he was supposed to be subjected to a more intense scrutiny than offenders at large. If the parole officer failed to make the demands he should have, the fault lies with him, not with Mr. Franchi. It is imperative that an offender on parole, or on statutory release, know exactly what he can and cannot do.

[24] He was not required to obtain pre-approval of any investment, unlike his employment. It was unreasonable for the Board to find that he was in breach of his conditions for failing to volunteer financial information.

[25] The Board went on to state that when requested, although he did provide financial information, that information was inadequate. However it is not stated why the disclosure was inadequate. The arrangement with his cousin was obviously more informal than in an arms length

relationship. However, it was the cousin's decision what to do with the money. It does not follow that Mr. Franchi had particulars of the investment immediately at hand. This failure on the Board's part to articulate constitutes a breach of procedural fairness, and no deference whatsoever is owed. Although a criminal case dealing with inadequacies of reasons issued by a Trial Judge, Mr. Justice Binnie said in *R. v. Sheppard*, 2002 SCC 26, 1 S.C.R. 869, at paragraph 55, among other things:

> An accused person should not be left in doubt about why a conviction has been entered. Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record. The question is whether, in all the circumstances, the functional need to know has been met.

[26] *R. v. Sheppard* has been applied by the Federal Court of Appeal in an administrative law context by Mr. Justice Pelletier in *North v. West Region Child and Family Services Inc.*, 2007 FCA 96, 362 N.R. 83. He pointed out that failure to give proper reasons is a breach of procedural fairness, in this context a breach of natural or fundamental justice.

[27] But of course, what is before this Court by way of a judicial review is not the National Parole Board's decision, but rather the decision of its Appeal Division upholding the original decision. Section 147 of the Act provides that an offender may appeal a decision of the Board to the Appeal Division on various grounds. The relevant portions of section 147 are:

147. (1) An offender may appeal a decision of the Board to the Appeal Division on the ground that the Board, in making its decision,	147. (1) Le délinquant visé par une décision de la Commission peut interjeter appel auprès de la Section d'appel pour l'un ou plusieurs des motifs suivants :
(*a*) failed to observe a principle of fundamental justice;	*a*) la Commission a violé un principe de justice fondamentale;

(*b*) made an error of law;

(*c*) breached or failed to apply a policy adopted pursuant to subsection 151(2);

(*d*) based its decision on erroneous or incomplete information; or

(*e*) acted without jurisdiction or beyond its jurisdiction, or failed to exercise its jurisdiction.

[…]

(4) The Appeal Division, on the completion of a review of a decision appealed from, may

(*a*) affirm the decision;

[…]

(*c*) order a new review of the case by the Board and order the continuation of the decision pending the review; or

(*d*) reverse, cancel or vary the decision.

(5) The Appeal Division shall not render a decision under subsection (4) that results in the immediate release of an offender from imprisonment unless it is satisfied that

b) elle a commis une erreur de droit en rendant sa décision;

c) elle a contrevenu aux directives établies aux termes du paragraphe 151(2) ou ne les a pas appliquées;

d) elle a fondé sa décision sur des renseignements erronés ou incomplets;

e) elle a agi sans compétence, outrepassé celle-ci ou omis de l'exercer.

[…]

(4) Au terme de la révision, la Section d'appel peut rendre l'une des décisions suivantes :

a) confirmer la décision visée par l'appel;

[…]

c) ordonner un réexamen du cas et ordonner que la décision reste en vigueur malgré la tenue du nouvel examen;

d) infirmer ou modifier la décision visée par l'appel.

(5) Si sa décision entraîne la libération immédiate du délinquant, la Section d'appel doit être convaincue, à la fois, que :

(*a*) the decision appealed from cannot reasonably be supported in law, under the applicable policies of the Board, or on the basis of the information available to the Board in its review of the case; and	*a*) la décision visée par l'appel ne pouvait raisonnablement être fondée en droit, en vertu d'une politique de la Commission ou sur les renseignements dont celle-ci disposait au moment de l'examen du cas;
(*b*) a delay in releasing the offender from imprisonment would be unfair.	*b*) le retard apporté à la libération du délinquant serait inéquitable.

[28] The leading case is the decision of the Federal Court of Appeal in *Cartier v. Canada (Attorney General)*, 2002 FCA 384, [2003] 2 F.C. 317, where Mr. Justice Décary stated:

> [7] Section 147(5)(*a*) is troubling, to the extent that it imposes a standard of review which for all practical purposes applies only when the Appeal Division, pursuant to s. 147(4)(*d*), reverses the Board's decision and permits the offender to be released. What standard should be applied when, as in the case at bar, the Appeal Division affirms the Board's decision pursuant to s. 147(4)(*a*)?
>
> [8] Section 147(5)(*a*) appears to indicate that Parliament intended to give priority to the Board's decision, in short to deny statutory release once that decision can reasonably be supported in law and fact. The Board is entitled to err, if the error is reasonable. The Appeal Division only intervenes if the error of law or fact is unreasonable. I would be inclined to think that an error of law by the Board as to the extent to which it must be "satisfied" of the risk of release - an error which is alleged in the case at bar - is an unreasonable error by definition as it affects the Board's very function.
>
> [9] If the applicable standard of review is that of reasonableness when the Appeal Division reverses the Board's decision, it seems unlikely that Parliament intended the standard to be different when the Appeal Division affirms it. I feel that, though awkwardly, Parliament in s. 147(5)(*a*) was only ensuring that the Appeal Division would at all times be guided by the standard of reasonableness.

> [10] The unaccustomed situation in which the Appeal Division finds itself means caution is necessary in applying the usual rules of administrative law. The judge in theory has an application for judicial review from the Appeal Division's decision before him, but when the latter has affirmed the Board's decision he is actually required ultimately to ensure that the Board's decision is lawful.

[29] The only reason it was thought that Mr. Franchi had returned to a life of deceit was that he had failed to respect the conditions of his parole, conditions which were ambiguous to say the least. The special condition with respect to financial disclosure cannot mean less than the standard conditions. What was required was an intense series of demands, not the casual relationship set out by Mr. Franchi. While he, and the parole officer, had different expectations, the documents support Mr. Franchi. Unfortunately, there was a misunderstanding between the two. However, it was unreasonable to support the parole officer, because he was a parole officer, when his report runs contradictory to the Special Conditions, while Mr. Franchi's statements are consistent therewith.

[30] There was no obligation on Mr. Franchi's part to voluntarily disclose financial information. He was required to disclose upon request. He did. The second finding that the disclosure was inadequate because he did not immediately know what is cousin was doing with the money was not explained in any way understandable to this Court. That is a breach of procedural fairness.

ORDER

THIS COURT ORDERS that:

1. The judicial review of the decision of the Appeal Division of the National Parole Board dated 19 March 2010 is granted.

2. The matter is referred back to a differently constituted Appeal Division to be dealt with in accordance with the reasons given.

3. The whole with costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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