Federal Court  Cour fédérale

Date: 20130719

Docket: T-340-11

Citation: 2013 FC 803

Ottawa, Ontario, July 19, 2013

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

JOHN CHARLES CAMPBELL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] Mr. John Charles Campbell (the "Applicant") seeks judicial review of the decision dated January 17, 2011, in which the National Parole Board Appeal Division (the "Appeal Division") dismissed his appeal of the decision of the National Parole Board (the "Parole Board"), denying his request for day parole and full parole. In this proceeding, the Attorney General of Canada (the

"Respondent") represents the Appeal Division, pursuant to Rule 303(2) of the *Federal Court Rules*, SOR/98-106 ("the Rules").

BACKGROUND

[2] The Applicant is an inmate of Mission Institute, Mission, British Columbia. He is serving a life sentence for a conviction of second-degree murder in connection with the death of a former girlfriend in 1981.

[3] In 1994, the Applicant was granted day parole. In 1997, he obtained full parole. The parole was revoked in 1999 because the Applicant had been involved in a series of incidents of inappropriate sexual advances toward women. He has remained in prison since the revocation of his parole on December 2, 1999.

[4] As well as the conviction for second-degree murder, the Applicant has a history of sexually-aggressive behaviour toward women, including a 1963 conviction of assault against a woman, an incident of alleged rape or attempted rape in which no charge was laid in 1968, complaints in 1972 from three women that the Applicant had been aggressive in seduction attempts, a report in 1973 from a woman who was frightened by his sexual advances, and an incident in 1979 when he threatened to harm or kill a nurse.

[5] The Applicant has undergone several psychiatric and psychological assessments. In 2001, two psychologists found that he was at a moderate risk to violently reoffend. A similar finding was

made in 2004 by a psychiatrist. In 2006, yet another psychologist found that although the Applicant had not been convicted as a sex offender, he met the criteria for sex-offender treatment programming ("SOP"). Although his conviction was not for a sexual offence, this psychologist observed that there was evidence that the offence was sexually motivated.

[6] The Applicant did not participate in SOP, even though such treatment had been recommended by Correctional Services of Canada ("CSC") clinicians. He refused to follow such a program because he did not consider himself to be a sexual offender. In a report dated February 7, 2009, Dr. Robert Ley, a clinical psychologist who had assessed the Applicant over a number of years, expressed the opinion that the Applicant did not need an "institutionally-based SOP". He also expressed the opinion that the Applicant is at "low to low-moderate risk for future sexual offending."

[7] The Applicant is now aged 76. He says that he is suffering physical limitations, including a reduced libido. His wife confirmed this.

[8] The Parole Board, in its decision of May 14, 2010, reviewed the Applicant's history of criminal activity. It noted that his sentence had begun on December 8, 1981, with eligibility for full parole set at 10 years. It noted the risk factors contributing to the Applicant's criminal behaviour and noted that actuarial risk estimates showed a moderate risk of reoffending. It noted the Applicant's parole history, including the events that led to revocation of full parole in December 1999.

[9] The Parole Board also reviewed the various psychological and psychiatric assessments that the Applicant underwent over a number of years. A tendency of inappropriate sexual behaviour towards women was a continuing concern. The Parole Board referenced its decision in February 2009 to deny day and full parole; "aggressive sexuality" was identified as a concern when that decision was made.

[10] The Parole Board, in its May 2010 decision, referred to the psychological assessment dated February 7, 2009, by Dr. Ley. He had previously assessed the Applicant in 1987, 1989 and 2001.

[11] The Parole Board noted that submissions were made by a lawyer assistant on behalf of the Applicant and summarized those submissions, including the argument that the Applicant was no longer a threat to society and that the Applicant was willing to agree to a condition not to have contact with women, in the absence of another adult.

[12] The Parole Board acknowledged that the Applicant had gained insight into the relationship between substance abuse and his offending behaviour. At the same time it commented upon the fact that the Applicant had not followed "recent correctional programming" to deal with his aggression toward women. It concluded that the risk had not been mitigated by "age, declining health, medication or counselling to the extent that your risk can safely be managed on day or full parole." It also noted that the Applicant did not present a viable release plan since he had not been accepted at a community residential facility ("CRF") and release to his home would be premature.

[13] Upon appeal to the Appeal Division, the Applicant argued that the hearing before the Parole Board was unfair because that Board took into account the fact that he had not been accepted into a CRF. He also argued that the CRFs should have had access to Dr. Ley's report. He also submitted that the Parole Board failed to give enough weight to the positive aspects of his history and erred by not considering the report prepared by Dr. Ley that disputed the characterization of the Applicant as a sex offender. Finally, he argued that the Parole Board failed to consider the least restrictive means of controlling the risk of reoffending.

[14] The Appeal Division, after summarizing the Applicant's submissions, described the criteria for granting parole, first that the Applicant's release does not pose a risk to society and second, that his release will contribute to the protection of society by facilitating re-entry to society as a law-abiding citizen.

[15] The Appeal Division found that the Applicant had not raised any grounds which would cause it to intervene in the Parole Board's decision. The Appeal Division reviewed the Parole Board's reasons, including the Parole Board's consideration of the Applicant's murder conviction, his history of problematic behaviour with women and the revocation of his parole due to inappropriate sexual behaviour.

[16] The Appeal Division also stated that the Parole Board had noted that the Applicant had acknowledged his history of aggression against women and had made some gains in understanding his substance abuse, but that the Case Management Team did not support his release since the Applicant did not want to participate in SOP.

[17] The Appeal Division determined that it was reasonable for the Parole Board to find that the negative aspects of the Applicant's file outweighed the positive aspects. It concluded that the Parole Board had considered the psychological assessment of February 7, 2009, as provided by the Applicant, and that the Parole Board was mandated to reach its own conclusions on risk, without being bound by the opinions of others.

[18] The Appeal Division highlighted its role, that it is not to reassess risk but to assess the reasonableness of the decision of the Parole Board. The Appeal Division found that the Parole Board had given sufficient reasons for its decision and that the decision was reasonable. Accordingly, the Appeal Division dismissed the appeal.

SUBMISSIONS

i) The Applicant

[19] In this application for judicial review, the Applicant seeks an Order setting aside the decision of the Appeal Division. He argues that the Appeal Division erred by failing to respect subsection 101(d) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, (the "Act"), that is "to make the least restrictive determination consistent with the protection of society." He submits that the Parole Board ignored his offer to be subject to a condition not to have any contact with women.

[20] Further, the Applicant argues that he is entitled to the duty of fairness and that the duty "includes a fair opportunity to obtain parole." He submits that he did not receive such a fair chance because the Parole Board unfairly weighed the negative factors over the positive ones, including the failure to make Dr. Ley's February 2009 report available to potential CRFs. He says that those facilities may have ultimately rejected him but they did not have the opportunity to make an informed decision about him because they did not have all the information about him.

[21] Finally, the Applicant argues that the Appeal Division's decision is unreasonable, according to the test set out in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

ii) The Respondent

[22] The Respondent submits that the Appeal Division made a reasonable decision and committed no reviewable error. He submits that the Appeal Division is mandated to intervene only if the decision of the Parole Board is unreasonable.

DISCUSSION AND DISPOSITION

[23] The first matter to be addressed is the applicable standard of review. Questions of procedural fairness are reviewable on the standard of correctness and findings of fact are reviewable on the standard of reasonableness; see the decision in *Dunsmuir, supra*, at paras. 51, 129. Reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process, as well as with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[24] The role of the Appeal Division, as a reviewing body, was discussed in the decision of *Cartier v. Canada (Attorney General)*, [2003] 2 F.C. 317 (F.C.A.) at paras. 8-9 where the Federal Court of Appeal said the following:

> Paragraph 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 [page327] which is alleged in the case at bar -- is an unreasonable error by definition as it affects the Board's very function.
>
> 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 paragraph 147(5)(a) was only ensuring that the Appeal Division would at all times be guided by the standard of reasonableness.

[25] It is not to make independent factual findings or risk assessments, but to review the decision of the Parole Board upon a standard of reasonableness. According to the decision in *Aney v. Canada (Attorney General)* (2005), 270 F.T.R. 262 at para. 38, the Parole Board is the authorized finder of fact and has the power to weigh the evidence before it and to draw its own conclusion from the evidence.

[26] The authority of the Parole Board is set out in section 102 and paragraph 107(1)(a) of the Act which provide as follow:

102. The Board or a provincial parole board may grant parole to an offender if, in its opinion,	102. La Commission et les commissions provinciales peuvent autoriser la libération

(a) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and (b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.	conditionnelle si elles sont d'avis qu'une récidive du délinquant avant l'expiration légale de la peine qu'il purge ne présentera pas un risque inacceptable pour la société et que cette libération contribuera à la protection de celle-ci en favorisant sa réinsertion sociale en tant que citoyen respectueux des lois.
107. (1) Subject to this Act, the Prisons and Reformatories Act, the International Transfer of Offenders Act, the National Defence Act, the Crimes Against Humanity and War Crimes Act and the Criminal Code, the Board has exclusive jurisdiction and absolute discretion (a) to grant parole to an offender;	107. (1) Sous réserve de la présente loi, de la Loi sur les prisons et les maisons de correction, de la Loi sur le transfèrement international des délinquants, de la Loi sur la défense nationale, de la Loi sur les crimes contre l'humanité et les crimes de guerre et du Code criminel, la Commission a toute compétence et latitude pour : a) accorder une libération conditionnelle;

[27] The purpose of Parole is described in section 100 of the Act as follows:

100. The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.	100. La mise en liberté sous condition vise à contribuer au maintien d'une société juste, paisible et sûre en favorisant, par la prise de décisions appropriées quant au moment et aux conditions de leur mise en liberté, la réadaptation et la réinsertion sociale des délinquants en tant que citoyens respectueux des lois.

[28] The powers of the Appeal Division are set out in subsections 147(4) and (5) of the Act as follow:

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

(a) affirm the decision;

(b) affirm the decision but order a further review of the case by the Board on a date earlier than the date otherwise provided for the next review;

(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

(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

(b) a delay in releasing the offender from imprisonment would be unfair.

147. (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;

b) confirmer la décision visée par l'appel, mais ordonner un réexamen du cas avant la date normalement prévue pour le prochain examen;

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) 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) le retard apporté à la libération du délinquant serait inéquitable.

[29] The sole question before this Court is whether the Appeal Division's decision, dismissing the Applicant's appeal, is reasonable. This issue is subject, of course, to respect for procedural fairness.

[30] In my view, the Applicant's submissions about the lack of a fair hearing before the Parole Board really raises an issue about the manner in which the Board dealt with the evidence. He complains that the Parole Board should have disclosed the more recent report of Dr. Ley to potential CRFs. With respect, the report was part of the evidence before the Parole Board. The Parole Board, not the CRFs, is to weigh relevant evidence. There was no breach of procedural fairness in the non-disclosure by the Parole Board of the evidence to the CRFs.

[31] In assessing the negative decision of the Appeal Division, this Court must consider the reasonableness of the Parole Board's ultimate conclusion that the Applicant's release on either day or full parole would constitute undue risk. In my opinion, the availability of a CRF for the Applicant was only one part of the evidence and factors to be assessed by the Parole Board. I am not persuaded that the Parole Board committed any reviewable error in the manner in which it considered this factor.

[32] The Applicant also argues that the Parole Board erred in denying his parole on the grounds that he is a sexual offender.

[33] This is incorrect. In my opinion, the basis of the Parole Board's decision is not that he is a sexual offender, but that he has a documented history, over many years, of aggressive behaviour

towards women. The Board noted a pattern of that behaviour, as well as the Applicant's failure to participate in SOP or recent correctional programming addressing his violence towards women.

[34] It was not necessary for the Parole Board to find the Applicant to be a sexual offender in order to find that his release on either day or full parole would pose an undue risk to the public.

[35] As noted above, the Act requires the Parole Board to consider public safety in deciding an application for parole.

[36] The Appeal Division was tasked with assessing the reasonableness of the Parole Board's decision. It considered all the relevant arguments presented by the Applicant, as well as evidence in the record, including Dr. Ley's report of February 2009. Its rejection of the Applicant's appeal, in my opinion, was reasonable.

[37] In the result, the application for judicial review is dismissed. Although the Respondent seeks costs, in the exercise of my discretion pursuant to Rule 400(1) of the Rules, I decline to make any award of costs.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, in the exercise of my discretion no order as to costs.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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