Federal Court Cour fédérale

Date: 20131031

Docket: T-1868-12

Citation: 2013 FC 1113

Ottawa, Ontario, October 31, 2013

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

CESAR LALO

Applicant

and

ATTORNEY GENERAL OF CANADA AND THE CHAIRPERSON OF THE PAROLE BOARD OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

UPON reading the materials filed, the Certified Tribunal Record (CTR) and hearing the parties for the judicial review, of a decision of the Parole Board of Canada (PBC or the Board) to maintain restrictions on Cesar Lalo (the Applicant) regarding the conditions of his Long Term Supervision Order (LTSO);

I. Background

[1] The Applicant was convicted of over 50 offences in total against 22 minor males of which he had authority over. The offences took place while he was a Child protection worker with Family Court, ward worker for Department of Welfare, youth probation officer and a child protection worker. His sexual convictions include buggery or bestiality, indecent assault, sexual assault, acts of gross indecency and sexual exploitation and touching, mutual masturbation, fellatio and anal intercourse. The offences took place in Family Court facilities, his vehicle, a park, a knights of Columbus hall, and two cottages where he brought some victims for a short holiday and finally the son of his homosexual partner in a church. The Applicant's victims were children he was charged with placing in foster care, Young Offenders, youth who had not committed any offences but were referred to him as part of a diversion project sponsored by the Police, and children of adults he had relationships with.

[2] The Applicant was sentenced to further incarceration for 5 years and one month, during which time he was already serving an 8 year and 11 month sentence for six counts of Indecent Assault and Sexual Exploitation.

[3] The Applicant has been diagnosed with homosexual paedophilia and hebephilia, and is deemed to be a long-term offender, subject to a ten-year supervision order following his release in 2009. The Honourable Justice Robertson, in making her August 4, 2004 determination as to the Applicant's status as a long-term offender, made recommendations regarding conditions.

[4] The Applicant remained in detention until the expiry of his warrant in September 2009. At that time he became subject to a LTSO. The LTSO remains in effect for 10 years after the Applicant's expiration of his sentence.

[5] The conditions required that the Applicant:

1. follow psychological counsel, to include by not limited to sex offender relapse prevention;
2. reside at a community correctional centre or a community-based residential facility;
3. not access directly or indirectly the world wide web or internet services without pre-approval from his parole officer;
4. not purchase, possess or access in any way any computer system, camera, cellular phone, or any other electronic equipment that has the capacity to capture, upload, download, share and store images;
5. not possess, produce, download, upload, view or purchase pornography or any other form of erotica, including but not limited pictures of children;
6. have no direct or indirect contact with children under the age of eighteen, including written or telephone contact, and contact through internet use such as email or chat rooms.

[6] The PBC placed a 180 day period on the residency condition, at which time the condition could be removed, altered or extended. Following his release from custody, the Applicant moved into a Community Based Residential Facility, and in February 2010 the residency condition was extended. The PBC's decision to extend the residency condition took into account the

Psychological/Psychiatric assessment by Dr. Firestone, the Applicant's psychologist, which advised that he considered the Applicant to be at a low risk to re-offend while under the residency condition, and at a low-moderate risk should the residency condition be lifted. Dr. Firestone advised the PBC that he was in favour of the residency condition being extended, but did not agree with the internet restriction.

[7] In April 2010, Dr. Firestone provided another report in which he concluded that the Applicant's risk to re-offend was low and that the residency condition was not necessary. Dr. Firestone stated the same in his next report in May 2010. The reports also noted historical evidence of the Applicant's minimization, distortion and difficulty with empathy.

[8] Dr. Firestone's reports were considered by the PBC when the Applicant's residency conditions were next up for review. The PBC also considered that the Applicant had acquired pornography from another Facility resident contrary to his parole conditions. While the Applicant was never charged for the breach, the PBC was concerned that the incident was contrary to his professed lack of interest in sexual activity and concluded that he remained a risk to re-offend. As such, in August 2010 the residency condition was again left in place, with consideration given to a possible lifting of it in the future.

[9] The PBC amended the Applicant's conditions in March 2011, on the recommendation of the Ottawa Parole Office, and permitted the Applicant limited internet access with his parole supervisor's permission. The residency condition was also lifted and the Applicant began living in his own apartment. In July 2011, it was found that he had violated his parole conditions and had

accessed pornography on a computer in his apartment. He was subsequently detained and sentenced to six months custody for the LTSO breach.

[10] Upon his release the Applicant's LTSO conditions included the 180 day residency condition and the restriction from owning a computer or any other device that would allow him unsupervised access to the internet unless approved by his parole supervisor.

[11] PBC received submissions from both Correctional Service of Canada (CSC) and the Applicant. CSC applied to modify the Applicant's special condition regarding possessing a computer, and to recommend overnight leave privileges and to continue the residency condition for an additional 180 days. The Applicant requested access to a computer for the purposes of journaling and to have supervised access to the internet, have the residency clause removed and to have the restrictions against pornography removed.

[12] The CSC's request does not mention the removal of the pornography condition.

[13] The PBC made a decision dated September 12, 2012 and said for overnight leave privileges, they were taking no action as only 5 months since he returned from incarceration brought about from the breach of LTSO, so the overnight application is premature and the existing residency clause remains.

[14] The PBC changed the no computer condition such that the Applicant "could possess a computer or similar electronic device with prior consent is reasonable as the conditions relating to

pornography remain fully in place and your parole supervisor will have the ability to ascertain what web sites you are accessing."

II. Issues

[15] The issues in the present application are as follows:

a. Was the decision of the PBC reasonable?

b. Where there Charter breaches or procedural unfairness by the PBC in making that decision?

III. Standard of review

[16] The standard of review for decisions of the PBC that are an exercise of the PBC's discretion is reasonableness and the Court must show deference for the PBC's expertise in imposing conditions under Section 134.1 of the *Corrections and Conditional Release Act*, SC 1992, c 20 (the CCRA) (*Hurdle v Canada (Attorney General)*, 2011 FC 599, at para 11; *Gaudreau v Canada (Attorney General)*, 2011 FC 953, at para 7; both decisions upheld by FCA; *Gaudreau v Canada (Attorney General); Hurdle v Canada (Attorney General)*, 2012 FCA 116).

[17] The question of whether the Applicant's rights under section 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act* 1982, (Canadian Charter), were violated is reviewable on a correctness standard (*Scott v Canada (Attorney General)*, 2010 FC 496, at para 33), as is the question of whether the Applicant was afforded procedural fairness (*Miller v Canada (Attorney General)*, 2010 FC 317, at para 39).

IV. Decision and Analysis

A. *Preliminary*

[18] I asked the Applicant's counsel if the conditions at issue were moot and he indicated all were still in place.

[19] The Applicant is seeking review of three conditions. He is seeking review of the 180 day extension of the residency condition, the maintenance of the internet prohibition and the condition not to purchase or possess any form of pornography.

[20] The Applicant submits that the relevant question to ask for each of the three conditions are whether it was reasonable for PBC to decide the condition was necessary and reasonable to achieve the dual goals of facilitating the Applicant's successful reintegration into society while protecting society. The Applicant submits that the PBC's reasons and decision suggest factors were not considered.

[21] I find the decision of the PBC to be reasonable, and I find no procedural unfairness or Canadian Charter infringements for the reasons as set out below.

B. *Residency Condition*

[22] The Applicant has his own apartment and in the past was allowed to live there. At the time of the decision, the Applicant was being allowed to keep his apartment and to spend approximately 8 hours every Saturday and Sunday in it.

[23] The PBC, after reviewing the material, determined the residency clause was reasonable as when it was previously lifted he breached another condition by viewing porn on his computer at his residence. The PBC said that as it had been 6 months since being released and he breached and it was directly related to being alone in his residence, they were not prepared to lift it.

[24] The PBC clearly set out the reasons for not changing the residency condition:

> …Minimizing a flagrant breach of your special conditions is consistent with your past behaviour and attitude. You continue to demonstrate little insight into your offending or your risks. Accordingly, given the risk you pose, the poor prognosis you have in terms of treatment, your sexual deviancy and diagnosis as set out in the several clinical reports the Board concludes that you present an undue risk to the public to commit a Schedule One offence in the absence of a residency requirement."

[25] With regards to the application to alter the condition to allow for overnight privileges the PBC said "… The Board is taking no action on this request as it has only been about five months that you have returned from incarceration brought by your breach of the LTSO and overnight leave is premature at this time." These reasons are clear why they are not removing the residency clause.

C. *Internet Prohibition*

[26] The Applicant submits that having access to the internet could be a positive step towards his reintegration to society. He submits that none of his crimes were internet related so that this condition is not reasonable. The Applicant submitted that because of his age and medical condition he probably would not re offend if the internet prohibition was removed. He submits he has shown significant progress in his treatment which is not reflected in the decision.

[27] The CSC report is a very detailed report of his current position. It outlines the progress that the Applicant has made and the positive recommendations. It also recites some of the negative recommendations and the "case with the various Parole Officer Supervisors that have been involved in this case since his releas.", as well as victim impact statements.

[28] When the conditions were applied the PBC had detailed reasons why they placed this and other conditions on the Applicant. These materials were before the Board as well as the submissions by CSC and the Applicant with his supporting documents from Dr. Firestone.

[29] The detailed reasons show that the community parole officer used research linking the use of the "internet" to "lure" children and to "reinforce deviant sexual fantasies." She stated that although the Applicant's crimes were not linked to the internet or child pornography, he was no longer in a position with easy access to children and was now more likely to use the internet inappropriately. She also had concerns about him viewing even legal pictures of young boys on the internet.

[30] Remembering that when the Applicant was committing his crimes, the internet was not prevalent so the facts his crimes were not directly linked is not surprising for the time.

[31] The PBC decision was reasonable as the Applicant used the internet to view and download pornographic images and movies when he breached the LTSO condition he was under, so it is a perfectly reasonable condition that he be restricted use of the internet to only with approval of his parole officer.

[32] The change in the condition that the PBC allowed was tailored to the Applicant's needs. He was not denied assess to computers entirely so he could do his journaling but he could only do so with permission and supervision. This makes perfect sense yet is a reasonable decision given when he had no supervision and was allowed to be at home alone, he viewed porn on the internet and then downplayed the breach.

D. *Not to purchase or possess any form of pornography*

[33] The Applicant in the written and oral representations argue that the Board should have removed the condition regarding pornography. That condition was put on by the Board decision made September 24, 2009. There was no recommendation to remove that condition by CSC but as it was an overlaying part of the other two issues that were put before the Board and within the materials filed by Dr. Firestone and in case management reports, it appears the Board dealt with the no pornography condition.

[34] The Applicant submits that the condition is so broad it subsumed behaviours that do not go towards his risk to re-offend. Further he says that the porn he viewed was not of minor males but rather consensual adult homosexual sex and thus no illegal acts. He says it was limited in images and duration of only 17 minutes and he was prompted to by suggestions in treatment program to explore if he was a homosexual.

[35] The Applicant says that his medical professionals say it is healthy to have an outlet for sexual urges: "Mr. Lalo clarified that he was simply viewing short pornographic clips on the

internet and not downloading anything. He explained his interpretation what he was being told in his weekly treatment group was that viewing "legal porn" is ok and healthy…"

[36] He said that "the message that he felt he was getting in the sex offender treatment group was that, in general viewing pornographic material can be a positive thing."

[37] In stark contrast to what the Applicant submits, the Ottawa Police Service report states that the police "located 18 pornography movies (17 gay male pornography and 1 non-gay pornography) that had been downloaded. Furthermore, Detective Thompson advised that gay pornographic sites were visited on the 06th of June, 03rd of July, 04th of July, 05th of July and 06th of July 2011. Detective Thompson has listed the names of these sites in his report on this matter." This is not the minor breach that the Applicant has characterized before the Board and before the Court in the written and oral submissions.

[38] Nor was it the first as previously in March 2010 during a room search when he was at a Community Residential Facility a pornographic DVD was found and he was issued a warning.

[39] In the correction plan it is noted that "...it is worth reminding the reader that, Mr. Lalo was a probation officer at one time. If anybody should know the importance of being aware of court imposed conditions it would be him. The fact that he allowed himself to be influenced by his interpretation of information that he was receiving to the point of acting on it with no consideration for the special conditions of his LTSO is a serious concern. This is particularly true given that a similar violation had been dealt –with by way of a warning". The Applicant's accountability was

raised to a medium and noted that "manipulative duplicity associated with his offences and the noted difficulties with self-report".

[40] In addition the Board had before it that the Applicant had homosexual relationships in the past as he had sexually assaulted his homosexual partner's child. So it is perfectly reasonable to have found that the explanation was a minimization of his actions and that the explanation did not make sense.

[41] Dr. Firestone's report notes that in May 1, 2012, that Applicant had not been taking the sex drive reducer medication for approximately 2 years. This is not as recommended. Dr. Firestone says that the Applicant self reported a decrease in his sex drive. The materials state " given that Mr. Lalo has tended to minimize or outright deny deviant sexual urges, any such self-reports would need to be regarded with significant scepticism."

[42] The Board found the explanation of why he breached his condition and downloaded and viewed the pornography to be a made up sexual experiment and a flagrant breach. They say that it cannot be an unreasonable condition given the lengthy serious criminal record of sexual crimes against young boys. The Board was sceptical regarding his explanation for the breach. They found that he minimizes and does not take responsibility for his actions and has little insight into his risk and offending.

[43] It seems that the PBC's finding that he minimizes his crimes is in fact a reasonable finding as the evidence before them regarding the breach was far more egregious than what was presented by the Applicant.

[44] The Ottawa Parole office did not recommend the removal of the porn condition and the Board addressed it as "the conditions relating to pornography remain fully in place and your parole supervisor will have the ability to ascertain what web sites you are accessing."

[45] It was reasonable for the Board not to remove the condition.

E. *Breach of Fundamental Justice*

[46] The Applicant submits that by imposing a residency clause his liberty is clearly restricted as is limiting his access to information and ability to communicate with others on the internet. His written submissions characterize the residency as a form of custody. The submissions see the residency as not a justifiable breach of the Applicant's rights under section 7 of the Canadian Charter and furthermore that the conditions have to be made in accordance with the principles of fundamental justice.

[47] The Applicant is on a LTSO. In fact his rights are restricted and it has been legislated to the PBC to make those decisions regarding conditions (*Normandin v Canada (Attorney General)*, 2005 FCA 345, at para 40).

[48] The Federal Court of Appeal in *Deacon v Canada (Attorney General)*, 2006 FCA 265 (*Deacon*), reviewed a condition imposed was that the Applicant take medication to control his sexual urges which the Applicant said was a breach of his s. 7 Canadian Charter rights. The FCA found that the board acted within the administrative law jurisdiction and then considered whether the condition was inconsistent with the charter (*Ross v New Brunswick School District No 15*, [1996] 1 SCR 825, at paras 31-33). They found that PBC imposing this far more invasive condition than which the Applicant has was within the jurisdiction of the Board to impose conditions under the CCRA and not a breach of his section 7 Charter rights (*Deacon*, above, at paras 46 and 67). Clearly the conditions placed on the Applicant are not breaches of the Applicant's Canadian Charter rights under section 7.

[49] Subsection 101 (e) of CCRA sets out the applicable principles that are to guide parole boards in achieving the purposes of conditional release. Under those principles, the offenders are to be provided with relevant information, reasons for decision to ensure a fair and understandable release process.

[50] The Applicant submits that the reasons are not sufficient. He says that the Board is only to make conditions if necessary and underscores that the objective of section 134.1 of the CCRA is to promote successful reintegration of offenders.

[51] The Applicant submits that the report of Dr. Firestone, CSC Community Contract Psychologist was not considered, nor were any of the positive recommendations of his considered by the board as they did not mention his report.

[52] I find that the Board did consider all of the Applicant's material and submissions including Dr. Firestone's report.

[53] The Ottawa Parole Board complied a report which is part of the Assessment for decision that included the report of Dr. Firestone that recommended to the PBC that the conditions be changed. This report was provided to the board in advance of the review for their consideration. The recommendations include Dr. Firestone's recommendation to remove all three conditions complained of. The materials they relied on were all in the CTR and were before the PBC.

[54] The Board acknowledged those submissions in the decision. Specifically in the PBC Post release decision sheet which was attached to the decision the Dr's report is mentioned states "The board received a submission from the CSC to modify a special condition; to recommend overnight leave privileges and to continue your residency condition for an additional 180 days. The Board has also received a written submission form you with respect to the issue of residency condition supported by a report from your treating psychiatrist."

[55] It must be remembered that when the PBC put the conditions on originally it was fully explored and then fulsome reasons were given. The material was all before the decision maker and is in the CTR so reciting it again on every review or request is not necessary.

[56] I find it was reasonable of the PBC with their expertise to decide the conditions were necessary and reasonable to achieve the dual goals of facilitating the Applicant's successful reintegration into society while protecting society.

[57] The Applicant may not like the decision but it was fair, reasoned and supported by the evidence.

[58] The decision falls within a range of possible acceptable outcomes which are defensible in respect of the facts and law. I will dismiss the application.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Judicial Review is dismissed;

2. Costs in the amount of $100.00 is payable forthwith by the Applicant.

"Glennys L. McVeigh"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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