Federal Court  Cour fédérale

Date: 20140513

Docket: T-1298-13

Citation: 2014 FC 375

Ottawa, Ontario, May 13, 2014

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

MANJIT SINGH SAINI

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Parole Board of Canada (the Board) dated July 16, 2013, in which the Board refused the applicant, Manjit Singh Saini's, application pursuant to section 3 of the *Criminal Records Act*, RSC 1985, c C-47 (the Act), for suspension of his criminal record (the Decision).

I. Background

[2] On June 26, 1992, the applicant was convicted of sexual assault involving a young woman who was a customer in his taxi pursuant to section 271 of the *Criminal Code*, RSC, 1985, c C-46. He was sentenced to a period of incarceration of nine months, and completed his sentence.

[3] On November 1, 1995, he was convicted of obtaining property through false pretences for an amount not exceeding $5,000 pursuant to section 362 of the *Criminal Code*. He was fined $250 and paid the fine.

[4] In 1995 he was charged with failure to provide or refusal of a breath sample pursuant to section 254(5) of the *Criminal Code*, and those charges were subsequently stayed upon appeal.

[5] On or about August 17, 2012, the applicant submitted an application for a suspension of his criminal record (the application). In his statement accompanying the application, he stated that 20 years prior, when the sexual assault occurred, he was a new immigrant, had little understanding of Canadian society, and "was drinking then." He stated that at the time he was "immature, foolish, and consuming alcohol."

[6] The Board caused inquiries to be made to ascertain the applicant's conduct since the date of the conviction. More specifically, Lori-Anne Beckford (Ms. Beckford) of the Clemency and Record Suspension Division of the Board communicated with the Surrey Detachment of the

Royal Canadian Mounted Police (RCMP), the Delta Police Department, and the Vancouver Police Department in order to obtain information about the applicant's conduct since his criminal convictions.

[7] In response to Ms. Beckford's request for information, the Surrey RCMP provided information about two incidents:

- The applicant was the subject of an assault complaint on July 5, 2007. He told police that he was chasing away two females using the basement suite of his home for drugs and prostitution. There was nothing to confirm an assault, and the file was concluded.
- On February 19, 2009, a vehicle with B.C. license plate number 6614JD was seen leaving the scene of an accident. The RCMP issued the applicant a ticket for failure to remain at the scene. The applicant advised that there was no record of who was driving, and the file was also concluded.

[8] The Delta police provided their police file with information about an August 31, 2009 incident. According to the file, a civilian reported that the driver of a white van with the license number 6614JD was possibly impaired. A police officer responded to the call by following the vehicle, and pulled it over after observing erratic driving. The van drove up on the sidewalk before coming to a complete stop. The officer noted a strong odour of alcohol from the driver and lone occupant, the applicant, who had bloodshot eyes. The applicant indicated in a slurred voice that he had had one beer to drink that night.

[9] On forming the opinion that the applicant was impaired, the officer arrested him and transported him to the police station. While there, the applicant spoke to two lawyers, and twice refused to provide a breath sample for analysis. He was released on a promise to appear. The report also noted that the applicant was argumentative and confrontational with officers throughout, and that he refused to be fingerprinted.

[10] The next day, the applicant was released from police custody on a Promise to Appear for October 30, 2009. Ms. Beckford's report states that "Follow up with the Delta police by phone enabled writer to ascertain that the charges were granted a stay of proceedings in court."

[11] Ms. Beckford provided a summary of the information she had obtained (the Beckford Report) to the Board, and recommended that the application be denied.

[12] A panel of two Board members considered the information provided in relation to the application, including that from law enforcement agencies and written representations provided by the applicant. The Board proposed to refuse the record suspension (the pre-decision), noting in particular that the applicant's conduct had required police intervention since his last conviction. The Board made specific reference to the hit and run incident in February 2009, and the criminal charges of operating a motor vehicle while impaired by alcohol and failing to provide a breath sample subsequently brought against the applicant. The Board found this conduct not indicative of someone living a law-abiding life-style, and proposed to refuse the application because the applicant did not meet the "good conduct" criteria pursuant to the Act.

[13] On May 2, 2013, the Board provided the pre-decision to the applicant, and invited him to make further representations.

[14] On May 8, 2013, the applicant's counsel requested the police information concerning the incidents referred to in the pre-decision. He noted that the Board had erroneously stated that the applicant had an earlier conviction for failure to provide a breath sample, although that charge was stayed in 1996.

[15] On May 27, 2013, Ms. Beckford provided the information requested, and indicated that the stay of the charge for failure to provide a breath sample in June 1996 had been taken into account and no longer needed to be addressed. She also noted that this information would be sent to the RCMP Identification Services to ensure that the correction was made in their computer systems.

[16] On June 27, 2013, the applicant's counsel provided written submissions in response to the pre-decision. He included an affidavit from the applicant, attaching Ms. Beckford's letter acknowledging the 1996 stay of proceedings, and his driver's abstract.

[17] The applicant's counsel's submissions focused, in particular, on the "two specific acts" noted in the pre-decision. He argued that:

1. Mr. Saini was never found guilty of the hit and run;
2. The second alleged bad conduct was the applicant's "argumentative and confrontational" behaviour with police officers in August, 2009. He submitted that this is not criminal

behaviour contemplated by the Act or the Policy Manual and that the applicant had no obligation to give fingerprints; and,

3. The applicant's driving record showed the only violation was failing to wear a seatbelt. He noted that a 24-hour driving prohibition also on the record was not known when the pre-decision was made, and so was not relevant at the time.

[18] The applicant's application was subsequently refused, and on July 5, 2013, he was provided with written reasons by the Board.

II. Impugned Decision

[19] In the decision, Board Member Louis Renault stated that the applicant's submissions in response to the pre-decision were taken into consideration.

[20] Member Renault then stated that the onus was on the applicant to satisfy the Board that the suspension of his record would provide him with a measurable benefit and sustain his rehabilitation as a law-abiding citizen, as well as that the administration of justice in Canada would not be brought into disrepute should a record suspension be ordered.

[21] Member Renault stated that the Board is an administrative tribunal and is not governed by the same rules of evidence as a common law court, and its process is discretionary.

[22] Finally, Member Renault concluded that review of the applicant's application demonstrated that years after his initial criminal charges, which involved alcohol, the applicant

continues to have problems with the law because of problems with alcohol. In Member Renault's opinion, that indicates that the applicant has not demonstrated good conduct.

[23] Board Member Steven Dubreuil stated that "after a thorough review of the file," he concurred with his colleague.

III. Issues

[24] Various issues were pleaded by the parties in their written submissions, but I find that there are only two which require consideration:

1. Was there a breach of the applicant's right to procedural fairness relating to the failure of the Board to provide the applicant with a copy of the Beckford Report?
2. Was the decision reasonable in its reliance on the incident of impaired driving to conclude that the applicant "continue[s] having problems with the law because of an obvious problem with alcohol which, in the opinion of the Board, is not indicative of someone who has a good conduct"?

IV. Standard of Review

[25] I agree with both parties that the standard of review for questions of procedural fairness is correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paras 55 and 79; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43).

[26] In regard to the Board's decision to refuse the application, I agree with the respondent's submissions that the Board's authority to grant a record suspension is highly discretionary, and within its exclusive jurisdiction. The notion of "good conduct" contained in the Act is not clearly defined and hinges on the Board's assessment of the facts, falling squarely within its expertise. The applicant is challenging a discretionary privilege, and therefore the applicable standard of review is reasonableness (*Conille v Canada (Attorney General*), [2003] FCJ No. 828 at para 14; *Yussuf v Canada (Attorney General)*, 2004 FC 907 at para 9; *Foster v Canada (Attorney General)*, 2013 FC 306 at paras 18-19).

[27] Furthermore, the Board's interpretation of good conduct is also subject to the standard of reasonableness. Since *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], the Supreme Court has consistently stated that deference should apply where a specialized tribunal interprets its home statute or one closely related to its function, with which it will be familiar (*Dunsmuir* at para 54; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at paras 30 and 39).

V. Legislative Scheme

[28] The most important provision of the Act for the purposes of these proceedings is 4.1(1), which states the following:

4.1 (1) The Board may order that an applicant's record in respect of an offence be suspended if the Board is satisfied that	**4.1** (1) La Commission peut ordonner que le casier judiciaire du demandeur soit suspendu à l'égard d'une infraction lorsqu'elle est convaincue :

(*a*) the applicant, during the applicable period referred to in subsection 4(1), has been of good conduct and has not been convicted of an offence under an Act of Parliament; and	*a*) que le demandeur s'est bien conduit pendant la période applicable mentionnée au paragraphe 4(1) et qu'aucune condamnation, au titre d'une loi du Parlement, n'est intervenue pendant cette période;
(*b*) in the case of an offence referred to in paragraph 4(1)(*a*), ordering the record suspension at that time would provide a measurable benefit to the applicant, would sustain his or her rehabilitation in society as a law-abiding citizen and would not bring the administration of justice into disrepute.	*b*) dans le cas d'une infraction visée à l'alinéa 4(1)*a*), que le fait d'ordonner à ce moment la suspension du casier apporterait au demandeur un bénéfice mesurable, soutiendrait sa réadaptation en tant que citoyen respectueux des lois au sein de la société et ne serait pas susceptible de déconsidérer l'administration de la justice.
(2) In the case of an offence referred to in paragraph 4(1)(*a*), the applicant has the onus of satisfying the Board that the record suspension would provide a measurable benefit to the applicant and would sustain his or her rehabilitation in society as a law-abiding citizen.	(2) Dans le cas d'une infraction visée à l'alinéa 4(1)*a*), le demandeur a le fardeau de convaincre la Commission que la suspension du casier lui apporterait un bénéfice mesurable et soutiendrait sa réadaptation en tant que citoyen respectueux des lois au sein de la société.

[29] Subparagraphs (a) and (b) of section 4.1(1) set out a conjunctive test, the elements of which must all be fulfilled by an applicant. In the case at hand, the pleadings of the parties and the analysis turns on step 1, which is an analysis of whether the Board's conclusion that applicant failed to demonstrate "good conduct" should be set aside.

VI. Procedural Fairness

[30] In his arguments regarding procedural fairness, the applicant relied on the decision in *Armstrong v Canada (Royal Canadian Mounted Police)* (1998), 156 DLR (4th) 670, [1998] FCJ No 42 (QL) [*Armstrong*], in which the Federal Court of Appeal at para 45 quoted Lord Denning from his decision in *Selvarajan v Race Relations Board*, [1976] 1 ALL ER 12 (CA):

> The courts in England have accepted that there is a proper role for staff in assisting statutory decision makers and a line over which they must not cross. In *Selvarajan v. Race Relations Board*, [1976] 1 All E.R. 12 (C.A.), which involved the duty of an investigating body to act fairly, Lord Denning M.R., in referring to the tribunal's decision-making process, put the matter this way at page 19:
>
> > Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report.
>
> He added these views at page 20:
>
> > It was, I think, unfortunate that the conciliation officer headed her report: "Clearly predictable case." But there was a good reason underlying it. In preparing the papers, it is very helpful for the staff to estimate the length of time needed to discuss the case and the amount of work to be done by the members to make a summary. But it was a mistake of the staff to prejudge the case by calling it "clearly predictable" and by recommending to the board the opinion which it should form. That is undesirable because it might tempt the members of the board to take a short cut "and not read the papers" and merely rubber stamp the recommendation. The summary should outline the facts, the point in controversy and the issues. It should not tell the committee what the result should be.

> To my mind, these views are pertinent to the present discussion. I would not characterize the disputed comments in the present case as in any way suggesting that the result was foregone or as recommending how the appeal should be disposed of by the Commissioner. In my view, nothing in the record indicates that the Commissioner did not come to his own decision in the matter, as he was obliged to do under the statute.

[31] I interpret the decision in *Armstrong* as standing for the proposition that an investigator or analyst such as Ms. Beckford should not tell the Board what its final decision should be for fear that Board would be perceived as not making the final decision, thereby raising issues of procedural fairness or the fettering of discretion. Ms. Beckford's comments should have been restricted to a description of the factual background, issues, and any other relevant factors, without any indication that the matter was being prejudged and not left for the Board's consideration.

[32] The question, therefore, is how the recommendation of an investigator fits into this picture. Depending upon how forcefully it is made, I would venture that a recommendation falls somewhere between mere comments and directing the Board as to what decision to take.

[33] It must be recognized that many investigators of administrative tribunals make recommendations on the final disposition of the issue in the context of an investigation. If the investigator's report is provided to the applicant before the final decision, there is no issue of fairness as this allows the parties to comment on the recommended findings. However, that is not what happened in the case at bar. The applicant was not provided with the Beckford Report, and as a result I think Ms. Beckford may have crossed the line in making a recommendation as to the final disposition of the file, which could be viewed as telling the Board what to do.

[34] This error, however, is not necessarily fatal to the final decision.

[35] Firstly, substantive portions of the Beckford Report were incorporated into the Board's pre-decision, which was described as a "recommendation" on the form on which it was drafted. The applicant was given the opportunity to comment on all of the issues it contained, and identified mistakes, which were resolved in conformity with his submissions. As a result, the pre-decision reflected the comments and mistakes made by Ms. Beckford in the Beckford Report, but those were no longer present in the final decision.

[36] The applicant nevertheless alleged that Ms. Beckford's report was improper in the following excerpts:

> "As for the sexual assault offence, Mr. Saini's explanation was minimal stating that 'I was a new immigrant to Canada. I had little understanding of Canadian society and I was drinking then."
>
> "While [the Applicant] claims that his sexual assault conviction was the result of drinking and that as a business man he now realizes the importance of setting a good example for others including those of his employees and the community at large, it does not appear that Mr. Saini has adhered to his own stance."
>
> [underlining of the Court]

[37] I am not convinced that the preceding comments affected the final decision in any significant way, and therefore I do not believe they impugn the fairness of the procedure followed in arriving at the Board's decision.

[38] Secondly, Member Renault clearly did not rely on Ms. Beckford's report, except in relation to the facts of the impaired driving incident in 2009, which were not controversial and can be drawn directly from the police report.

[39] Member Dubreuil, in concurring with Member Renault, stated that he agreed with the decision "after a thorough review of the file." The applicant argues that this demonstrates that Member Dubreuil relied on Ms. Beckford's report in arriving at his decision. This statement by Member Dubreuil is not sufficient to convey reliance, since the problematic elements of the pre-decision, which relied upon the report, were nowhere to be found in the final decision. In addition, Member Dubreuil concluded that the applicant had "not met the criteria for good conduct as set out in the Act given that [his] conduct has required the intervention of police since [his] last conviction." This conclusion, like that of Member Renault, can only refer to the 2009 impaired driving incident.

VII. The Reasonableness of the Decision

[40] The reasons for the final decision are contained near the end of the decision, where Member Renault stated the following:

> In conclusion and further to the review of your application and after carefully taking into consideration the representations of your attorney and the numerous letters of reference, the Board refuses to order the suspension of your criminal record. From your own admission, in 1992, you assaulted a women [sic] because you were under the influence of alcohol and, many years later, you continue having problems with the law because of an obvious problem with alcohol which, in the opinion of the Board, is not indicative of someone who has a good conduct.

[41] In determining the meaning of "good conduct", I am in agreement with the applicant's submission that the Board and the Court may rely upon the criterion contained at section 17of the Parole Board of Canada's Policy Manual *Pardons/Record Suspensions*. Section 17 outlines the factors used for assessing good conduct, the relevant of which are reproduced as follows:

> 17. The Board is responsible for validating and confirming the information that is presented by the applicant and criminal justice entities. All applications will be vetted to ensure that they meet the required minimum standard for verifiable and reliable information before they are submitted to Board members for decision. Moreover, Board decisions must be based on factual information. The type of documents and information that may be considered includes:
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> […]
>
> b. information about an incident that resulted in a charge that was subsequently withdrawn, stayed, or dismissed, or that resulted in a peace bond, in the use of alternative measures or in the acquittal of the applicant;
>
> c. the relevance of this information increases where the charge or charges are of a serious nature, and/or are related to convictions on the record for which the pardon or the record suspension is requested. With regards to a peace bond or the use of alternative measures (ex. community service work) adherence to the conditions, the date on which the conditions were imposed and the date of the originating incident should also be taken into account;
>
> […]
>
> f. the importance of this information depends on the nature, the number and the date of the infraction, and/or whether or not it is similar to the past criminal activity of the individual;
>
> […]
>
> h. representations provided by, or on behalf of, the applicant;
>
> […]
>
> [underlining of the Court]

[42] Paragraph 17(b) of the Policy Manual suggests that past criminal charges can be relied upon even where stayed, while paragraph (c) indicates that the seriousness of the charges in question can be taken into consideration.

[43] During oral submissions the applicant attempted to downplay the seriousness of the incident of impaired driving in 2009 in comparison with the incident of sexual assault, which he is seeking to have suspended from his criminal record.

[44] I cannot agree with this submission. Driving under the influence of alcohol is a highly serious offence because of the very real risk that drinking and driving poses to the security of persons, which is demonstrated by the daily accounts in the media of loss of life or serious bodily injury caused by the consumption of alcohol and drugs.

[45] Considering the evidence on the degree of the applicant's impairment puts this in perspective. The police report from the 2009 incident states that the applicant's van was seen by an independent witness driving in the middle of two lanes and weaving back and forth over the dividing lines. So obvious was the degree of impairment and the danger to the public that a witness felt compelled to call the police to report the driver of the van.

[46] The police witness who arrived observed the van run an amber traffic light while driving 40 km/hr along the white line that divides the driving lanes. The officer activated the emergency lights on his police vehicle, but the driver of the vehicle did not notice the lights of the police

vehicle until approximately four blocks after the activation, even though it was completely dark outside. After four blocks, the van drove up on to the sidewalk with the passenger side tires.

[47] When the officer approached the vehicle, he detected a strong odour of liquor coming from the driver's person. The officer noted that "the driver exhibited signs of impairment which included bloodshot, watery eyes." The officer asked the driver (identified as the applicant) if he had had anything to drink, and the applicant replied "in a slurred voice" that he had consumed one beer. The officer "formed the opinion that Saini's ability to operate a motor vehicle was impaired by alcohol."

[48] The officer arrested the applicant for impaired driving, and took him to the police station, where the applicant, after speaking with two lawyers, refused to provide a breath sample. He subsequently refused to provide a breath sample for a second time. This refusal would appear to indicate that his legal counsel had advised him that it would be more prudent to face the criminal charge of failing to comply with a demand for a breath sample rather than reveal the elevated alcohol levels in his blood via the breath sample.

[49] Counsel advised at trial that the charges were stayed for excessive delay pursuant to policies enacted after the Supreme Court decision in *R v Askov*, 1990 CanLII 45 (SCC), [1990] 2 SCR 1199.

[50] The Board had every right to consider the impaired driving charges and information relating to them as evidence that the incident was one of a serious nature, suggesting that the applicant did not meet the good conduct requirements.

[51] In respect of the relationship demonstrated between the conviction on record and the subsequent charges, which is described as a factor to be considered at subparagraphs 17(c) and (f) of the Policy Manual, the Board was entitled to draw a connection between the two incidents. Although the crimes of sexual assault and operating a motor vehicle while impaired by alcohol may be factually distinct, they are both relevant to the consideration of the applicant's conduct, as both incidents were fuelled by his excessive alcohol consumption.

[52] As a final point, the applicant submits that the Board erred in not giving sufficient consideration to the letters of reference provided on his behalf by members of the community, as per subparagraph 17(h) of the Policy Manual. This is not supported by the decision itself, or by the evidence on the file. The Board referred to the letters of reference, but can draw on its broad discretion in the weight that it wishes to attribute to the letters.

[53] Moreover, there is no indication in the case of the applicant that the authors of the reference letters were aware of all the facts of the 2009 impaired driving incident, or that they were aware of alcohol being a factor in both incidents. As a result, they could not have known that the applicant is continuing to have issues with his alcohol problems that require police intervention.

[54] In conclusion, I find that there is no error in the finding of fact by the Board that the applicant continues to suffer from an "obvious problem with alcohol" and that the 2009 incident is sufficient to deny his being of "good conduct". The decision of the Board to refuse the applicant's application falls well within the range of reasonable, acceptable outcomes in light of the facts and the law.

VIII. Costs

[55] The respondent is entitled to his costs. The respondent may file written submissions not to exceed three pages in addition to a bill of costs within 14 days of this amended decision. The applicant may reply within 14 days thereafter.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed with costs to the respondent.

"Peter B. Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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