Federal Court Cour fédérale

Date: 20140429

Docket: T-2290-12

Citation: 2014 FC 398

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 29, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

MARC BABINEAU

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision by the Canadian Forces Provost Marshal, Colonel T.D. Grubb (Provost Marshal), dated November 30, 2012, to revoke the applicant’s military police credentials.

[2] For the following reasons, I am of the opinion that this application for judicial review must be allowed.

Facts

[3] The applicant, Marc Babineau, was deployed to Afghanistan in August 2010 as Deputy Commander of the Canadian mission to train Afghan police officers. He assumed his duties until July 2011.

[4] While he was deployed, the applicant had difficulty operating the magazines provided by the Canadian Forces. Ammunition apparently fell out of the magazine numerous times. The applicant questioned the quality of the magazines and consequently feared for his safety if there were to be a surprise attack.

[5] The applicant's American counterparts advised him to purchase other magazines from the American Personnel Exchange (PX) as replacements for his Canadian magazines. The applicant purchased 14 of those magazines.

[6] After that purchase, the applicant's Canadian counterparts apparently warned him about using those magazines, and told him that he risked being reprimanded if he used equipment that had not been provided by the Canadian Forces.

[7] The applicant wanted to return the magazines to the American PX, but he had lost his receipt and was therefore unable to return them. He then chose to send them to his spouse in Canada, by mail, in a parcel that also contained a telescope. He did note on the transmittal sheet that the parcel contained 14 magazines, and told the post office worker that there were magazines in the

parcel before he mailed it. The parcel was then intercepted and seized by the Canada Border Services Agency (CBSA).

[8] After sending the parcel, the applicant learned that mailing magazines of more than five rounds was prohibited. He then contacted his spouse and told her to contact a friend, an officer of the Sûreté du Québec, so the friend could destroy the magazines when they arrived in Canada. However, the parcel had already been seized by the CBSA, which simply confiscated the magazines and required a customs fee for the telescope. No charges were laid by the CBSA regarding the sending of the parcel.

[9] Further to that incident, the applicant was informed that the Canadian Forces National Investigation Service (CFNIS) was going to conduct an investigation. The applicant cooperated fully with the CFNIS and provided all documents and exhibits that he had in his possession. At the end of that investigation, in April 2011, the CFNIS charged him with exporting a prohibited device (the 14 magazines) without authorization, in violation of the *Firearms Act*, SC 1995, c 39 or any other Act of Parliament.

[10] The applicant completed his mission in Afghanistan and, upon his return to Canada, resumed his duties as a Deputy Commander of the 5th Military Police Company. The applicant also asked that Court Martial proceedings be scheduled in a timely manner so that he could participate in an exercise scheduled for the fall.

[11] The applicant was charged with breaching section 130 of the *National Defence Act* for having illegally imported magazines prohibited in Canada in violation of paragraph 104(1)(*a*) of the *Criminal Code*, and for having committed an act to the prejudice of good order and discipline under section 129 of the *National Defence Act*. He pleaded guilty to the second charge and was sentenced by the Court Martial to a reprimand and a fine of $2,000. Given the applicant's guilty plea, and because the second charge was an alternate to the first charge, the military judge ordered a stay of proceedings on the first charge: *R v Babineau*, 2011 CM 3009.

[12] Following his guilty plea, the applicant's case was submitted to the Military Police Credentials Review Board (MPCRB or Board) for an examination as to whether the applicant's actions constitute a breach of the *Military Police Professional Code of Conduct* (MPPCC or Code). The Board may make any recommendation to the Provost Marshal that is considers appropriate, depending on the circumstances of the case, and must provide written reasons: *Queen's Regulations and Orders for the Canadian Forces*, section 22.04; *Military Police Policies and Technical Procedures*, c 3, sections 17, 39 and 41. The applicant provided written submissions for the review by a five-member panel (review panel). All of the members found that the applicant had breached the MPPCC. Four out of the five members recommended a 180-day suspension, whereas the fifth member recommended that the applicant's credentials be revoked. Previously, the applicant's supervisor, Major Vouligny, had recommended a 90-day suspension and a 12-month probation.

[13] The case was then referred to the Provost Marshal for a decision. As the military police Commanding Officer (the highest ranked military police officer), he is the ultimate authority when

it comes to disciplining members of military police. It was up to him to make the final decision in the applicant's case and he was not bound by the Review Board's recommendations.

[14] After examining the Review Board's reasons and recommendations, the Provost Marshal told the applicant about his intention to revoke his military police credentials in a letter dated August 28, 2012. The Provost Marshal gave the applicant the opportunity to submit any last written representations or other new relevant documents before making his final decision. After considering the applicant's additional submissions, the Provost Marshal communicated his final decision to revoke his military police credentials on November 30, 2012.

[15] The applicant filed this application for judicial review before this Court on December 28, 2012.

Impugned decision

[16] The Provost Marshal first noted that the panel did not attach enough weight to a fundamental factor, that is, the leadership that a military police commanding officer must demonstrate.

[17] While he acknowledged that the applicant's performance was sometimes noteworthy, the Provost Marshal stated that the acts committed by the applicant are not those expected of a member of the Canadian Forces, and especially not of someone who is not only a member of the military police, but an officer who must command other military police officers responsible for enforcing the law in the Canadian Forces. He added the following: [TRANSLATION] "I have lost the full confidence

that I had in Captain Babineau's ability to carry out his duties as a military police officer, and I believe that his credibility with his subordinates is non-existent": Respondent's Record, page 508.

[18] The Provost Marshal also noted that Captain Babineau admitted to not knowing that the importation of large capacity magazines was contrary to the *Criminal Code* and to theatre standing orders and pleaded guilty at Court Martial even though he has more than 20 years of experience in the Canadian Forces, is a former member of combat arms, a competent investigator with the military police and someone who regularly carries a firearm. In the eyes of the Provost Marshal, breaches to the MPPCC cannot be taken lightly, and it is impossible to justify letting a military police officer keep his credentials when he acted in a manner that would lead to the disqualification of a candidate who was in a similar situation during his or her participation at the Military Police Assessment Centre. In that regard, the Provost Marshal found the following: [TRANSLATION] "In my opinion, Captain Babineau was deceitful in those circumstances and that is reflective of an aspect of his character. I cannot resolve the breach with a suspension": Respondent's Record, page 509.

[19] The last substantive paragraph of the Provost Marshal's notice of intent warrants being reproduced in its entirety for a proper understanding of the substance of his decision:

> [TRANSLATION]
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> As part of my deliberations in this case, I have raised major concerns regarding the severity of Captain Babineau's conduct. Even though the MPCRB is mandated to examine MPPCC-related issues, it is my duty as Canadian Forces Provost Marshal to consider all of the factors that reflect the abilities of those appointed within the military police force, including a person's leadership. Captain Babineau, by his own admission, is guilty of actions that are directly related to his honesty and

> integrity. His discredit within the military police force was exacerbated by the publication of his actions in the national media and by his subsequent conviction. Furthermore, I note that Captain Babineau did not acknowledge the severity of that contravention in his guilty plea. To the contrary, he made considerable efforts to justify his actions; he tried to minimize the severity of the offence and challenged the investigation process and the investigator. Rather than admitting his contravention, showing remorse for his actions and apologizing for having been discredited and harming the reputation of his commission and the military police, he claimed that the matter was a minor error and accused others of submitting the case to the MPCRB. The MPCRB determined that Captain Babineau's actions were clearly disreputable and contrary to public interest, and that they could only harm the reputation of the military police. That directly contributed to my decision.

Issue

[20] The only issue on this application for judicial review is whether the Provost Marshal's decision to revoke the applicant's military police credentials was reasonable.

Analysis

[21] Even though this Court has never ruled on the standard of review applicable to decisions by the Provost Marshal when the MPPCC is applied, there seems to me to be no doubt that the appropriate standard is reasonableness. First, the applicant does not challenge the fact that he breached subsection 4(l) of the MPPCC; his issue is with the severity of the sanction that was imposed on him by the Provost Marshal. It was a discretionary decision that was based essentially on an assessment of the facts. Furthermore, the Provost Marshal clearly knows the military context and has more expertise than this Court in that area.

[22] Second, the Court has already determined that the standard of review applicable to decisions by the Chief of the Defence Staff in grievance matters is reasonableness. For example, Justice Near (while a member of this Court) stated the following in *Moodie v Canada*, 2009 FC 1217, at paragraph 18:

> The decision of the CDS will be reviewed under a standard of reasonableness (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190). I come to this conclusion after considering the following: the fact that decisions of the CDS are final and binding, except for judicial review under the *Federal Courts Act*, R.S.C. 1985, c. F-7; that the CDS is charged with control and administration of the Canadian Forces and is interpreting its own statute; that the statutory scheme provided the CDS with discretionary power in his determination of such grievances, and that the issues to be addressed are predominantly those of fact or mixed fact and law.
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> See also: *Rompré v Canada (Attorney General)*, 2012 FC 101, at paragraph 22-25; *Birks v Canada (Attorney General)*, 2010 FC 1018, at paras 4-5 and 25-27; *Armstrong v Canada (Attorney General)*, 2006 FC 505, at paragraph 35.

In my view, the same factors apply when the Provost Marshal makes a decision stemming from the MPPCC. As a result, deference should apply to the Provost Marshal's decision. To the extent that his decision falls within the range of "possible, acceptable outcomes which are defensible in respect of the facts and law", and is the result of an intelligible and transparent process and has justification, this Court will not intervene. Such attitude does not involve, however, an abdication of the responsibilities assigned to the judiciary in its examination of administrative decisions. As the Supreme Court took pains to point out in *Dunsmuir* (at paragraph 48), "[i]t does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations", or that they may be content to pay lip service to the concept of

reasonableness review while in fact imposing their own view. It is therefore in that perspective that the Provost Marshal's decision must be examined.

[23] The respondent is correct in maintaining that the Provost Marshal was in no way bound by the Review Board's findings or recommendations, but was simply required to consider them: *Queen's Regulations and Orders for the Canadian Forces*, c 22, paragraph 22.04(11); *Military Police Policies and Technical Procedures*, c 3, sections 17 and 41. However, the Provost Marshal's decision to depart from an almost unanimous recommendation (4 out of 5 members) by the Review Board must be based on solid justification and rely on the evidence in the record. It is in this respect that the Provost Marshal's decision is deficient.

[24] The Provost Marshal first criticizes the applicant for not expressing remorse or recognizing the severity of the offence that he committed. Two comments are required in that respect. First, the severity of the act committed by Captain Babineau must be qualified. First, the fact that he mailed a parcel to Canada that contained magazines, which are devices prohibited by law, was a military offence under section 129 of the *National Defence Act* and not a criminal offence, like the Provost Marshal stated. It is true that a military police officer is expected to have better knowledge of the law than a regular member of the Canadian Forces military and demonstrate, at the very least, more prudence. That being said, the offence committed seems, by in large, quite technical, given the fact that sending magazines of less than five rounds does not constitute an offence. Moreover, the fact that the applicant acted in good faith is not challenged because he never concealed the nature of the shipped merchandise; to the contrary, he explicitly described what was inside the parcel and seems to have packed it in full view of the postmaster, who the respondent did not deem necessary to call as a witness. Captain Babineau's statement that he asked a friend who is a member of the Sûreté du

Québec to destroy the magazines once he learned of their illegal nature was also not challenged. Given all of the facts, there is no doubt that the applicant was negligent, but nothing indicates that he acted in bad faith.

[25] Regarding his supposed lack of remorse, the evidence in the record tends to demonstrate to the contrary. First, the Court Martial judge considered the fact that Captain Babineau pleaded guilty to the offence that he was accused of as a mitigating factor, and added that he "showed very clearly that [he is] remorseful and sincerely intend[s] to remain a solid asset within the Canadian Forces" (Respondent's Record, page 260). Second, the Review Board also disclosed as a mitigating factor that Captain Babineau acknowledged his errors and pleaded guilty at Court Martial. He even took the initiative to take a specialized course on prohibited weapons after the incident with which he was charged, which is some evidence that he recognized his deficiencies and wanted to address them.

[26] It is true that in the observations that he submitted to the Review Board, the applicant argued that the equipment put at the disposal of the Canadian military was not always adequate and he tried to explain why he had sent the magazines by mail. Those statements do not seem to me to reflect a lack of remorse or a willingness to avoid responsibility; to the contrary, they are clearly part of an approach to explain the context in which the offence was committed in a manner to convince the Review Board that he does not deserve an unduly harsh punishment.

[27] The Provost Marshal also seems to challenge the applicant's credibility with his subordinates. However, the evidence demonstrates that he received Personnel Evaluation Reports

(PERs) according to which his performance was considered [TRANSLATION] “satisfactory”, [TRANSLATION] “above average” or [TRANSLATION] “mastered”, even after the offence with which he was charged. Those reports clearly establish that his superiors still had confidence in him. Furthermore, he was kept in his position as Deputy Commander of the Canadian mission to train Afghan police officers despite the charges against him, and resumed his duties as Deputy Commander of the 5th Military Police Company upon his return to Canada.

[28] In its decision, the Court Martial stated the principle that “any sentence imposed by a court, be it civilian or military, must be adapted to the individual offender and constitute the minimum necessary intervention, since moderation is the bedrock principle of the modern theory of sentencing in Canada”. In this case, I am of the opinion that the sanction imposed by the Provost Marshal is not proportional to the severity of the offence with which the applicant was charged. Four out of five members of the Review Board found that a 180-day suspension, the longest possible suspension under subsection 22.04(11) of the *Queen’s Regulations and Orders for the Canadian Forces*, would be appropriate. His immediate superior, Major Stéphane Vouligny, recommended a 90-day suspension and 12-month probation period. The Provost Marshal, by raising considerations that are not supported by the evidence in the record, chose to not accept those recommendations and to impose the most severe sentence, that is, the revocation of his military police credentials. Not only is that sanction not proportional to the severity of the offence, but it is undeniably unreasonable in the circumstances.

[29] It also appears from section 39 regarding the MPPCC that the Review Board can only proceed with a revocation “only after all other possible recommendations have been considered,

and when no other alternative approach may be envisaged". That same provision also states that the Review Board must make its recommendations based on all relevant factors such as the severity of the violation of the Code, the member's offence history and the existence of mitigating circumstances. Even though that provision applies formally only to the Review Board, it is difficult to understand how the Provost Marshal could ignore it, unless there were perhaps very exceptional circumstances, which is not the case here. At risk of acting arbitrarily, the Provost Marshal's discretion cannot be absolute. If he wanted to depart from the Review Board's recommendations, he was required to provide a convincing explanation for doing so, which he unfortunately failed to do. To the contrary, he relied on grounds that are not supported by the evidence, he did not consider the applicant's clear record and performance evaluations and he overlooked the mitigating circumstances that the Court Martial and the Review Board nonetheless accepted. Under these circumstances, his decision must be set aside to allow him to redetermine the matter on the basis of these reasons.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is allowed, with costs to the applicant, and that the Provost Marshal's decision dated November 30, 2012, is set aside. As a result, the matter it sent back to him for redetermination on the basis of these reasons.

"Yves de Montigny"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2290-12
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