Federal Court  Cour fédérale

Date: 20140623

Docket: T-1832-13

Citation: 2014 FC 599

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 23, 2014

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

M.Y.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is a review of the legality of a decision rendered in 2013 by the Parole Board of Canada [Board], revoking the applicant's pardon on the ground that he was no longer of good conduct. In passing, since 2012, there are no longer pardons, but rather suspensions of records, and the waiting period has been extended before a pardon application can be submitted.

[2] The pardon in question today was granted in 2011 by the Board to the applicant for a conviction from 2007. At the time, the applicant was found guilty of conspiring to export more than a kilogram of pseudoephedrine without an export permit as required under the *Export and Import Permits Act*, SC, c E-17, S1.

[3] In 2012, the applicant pleaded guilty to a charge of having operated a motor vehicle a few months earlier with a blood alcohol level greater than the limit allowed under paragraph 253(1)(*b*) of the *Criminal Code*, RSC 1985, c C-46 [Code]. This is what initiated the pardon revocation procedure.

[4] The applicant presented evidence to the Board to support the argument that his pardon should not be revoked, including a certificate of integrity, documentation on the circumstances of his 2007 conviction and his rehabilitation following the latest conviction, as well as on the consequences of the pardon revocation on his work situation.

[5] Unfortunately for him, the Board did not accept his arguments and found that the applicant was no longer of good conduct, thereby leading to the present application for judicial review.

Applicable legislative provisions and standard of review

[6] First, section 2.1 of the *Criminal Records Act*, RSC 1985, c C-47 [the Act], states the following:

2.1 The Board has exclusive jurisdiction and absolute	2.1 La Commission a toute compétence et latitude pour

discretion to order, refuse to order or revoke a record suspension.	ordonner, refuser ou révoquer la suspension du casier.
[emphasis added]	

[7] And paragraph 7(*b*) of the Act, which applies in this case, states the following:

7. A record suspension may be revoked by the Board	7. La Commission peut révoquer la suspension du casier dans l'un ou l'autre des cas suivants :
[…]	[…]
(*b*) on evidence establishing to the satisfaction of the Board that the person to whom it relates is no longer of good conduct; or	*b*) il existe des preuves convaincantes, selon elle, du fait que l'intéressé a cessé de bien se conduire;
[…]	[…]
[emphasis added]	

[8] The parties agree that the Board exercises a very broad exclusive and discretionary power to grant, order, refuse and revoke pardons [record suspension]. The applicant hopes that the correctness standard would apply since he argued that the Board committed [TRANSLATION] "an excess of jurisdiction" whereas the respondent alleges that the standard of review should be reasonableness.

[9] The applicant presented three main grounds for challenging the legality of the impugned decision. First, the Board did not truly exercise its discretion. Second, it did not take relevant

elements into consideration and did not follow its own policies. Lastly, the Board did not respect natural justice or procedural fairness.

[10] The first two reasons the applicant raised are largely based on the way in which the Board interpreted the Act and the facts underlying the pardon revocation. The allegations involve the exercise of the Board's jurisdiction; either it did not exercise or did not properly exercise the discretion conferred on it under section 7 of the Act. The case law clearly establishes that the applicable standard of review for the Board's decision to revoke a pardon is reasonableness (see *Foster v Canada (Attorney General),* 2013 FC 306 at paragraph 18, [2013] FCJ No 353). There is certainly no excess of jurisdiction in the present case.

[11] That said, with regard to the third reason, which raises an issue of natural justice or procedural fairness, the applicable standard of review is correctness (*Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 at paragraph 43, 2009 SCC 12).

First reason

[12] To begin, the applicant submits that the Board did not truly exercise its discretion because it did not consider relevant evidence and it must take paragraph 7(*b*) of the Act into consideration. In this case, according to the applicant, the Board revoked his pardon solely because of his recent conviction.

[13] The applicant argues that the offence of operating a motor vehicle with a blood alcohol level exceeding the legal limit (paragraph 253(1)(*b*) of the Code) does not result in an automatic

pardon revocation. On the other hand, sections 7.2 and 7(*a*) of the Act, which address the revocation and cessation of effect of a record suspension, leave the Board no discretion. The offence the applicant committed in 2012 is not included in this category of offences. Since there is no automatic application of paragraph 7(*b*) of the Act, a conviction for an offence under paragraph 253(1)(*b*) of the Code is not sufficient to conclude that a person is "no longer of good conduct".

[14] As for the respondent, he argues that the Board exercised its discretion under paragraph 7(*b*) of the Act and based its decision on many relevant considerations, including the applicant's conviction, fine and penalty, his blood alcohol level, the need for police and court interventions, and the fact the offence shows the applicant was likely to endanger the safety of others.

[15] As the Court has already noted, the Board "has not been granted a general power to revoke pardons. Rather the National Parole Board has jurisdiction to revoke pardons in the circumstances listed in section 7 of the *Criminal Records Act"* (*Tanner v Canada* (*Attorney General)*, 2003 FCT 268 at paragraph 42, [2003] FCJ No 361). I therefore agree with the applicant that a violation of the Code does not necessarily mean a person is no longer of good conduct. The Board must consider the entire file. This is what it did in this case.

[16] In fact, the Board noted in its decision that the applicant [TRANSLATION] "was sentenced to a fine of $1,000 and prohibited from driving for one year for operating a motor vehicle with a blood alcohol level exceeding the legal limit". It also noted that the applicant's blood alcohol level was 147mg/100ml of blood, [TRANSLATION] "which is nearly twice the legal limit". Having

considered [TRANSLATION] "all the documentation it was given to determine whether [the applicant] always respects the statutory criteria", the Board concluded that the offence the applicant was charged with [TRANSLATION] "again shows that [his] behaviour was likely to endanger the live of others". Moreover, it noted that the applicant's actions required [TRANSLATION] "police and court intervention", thereby resulting in the decision to revoke the applicant's pardon.

[17] Having closely read the Board's reasons, I feel that the Board genuinely exercised its discretion and it did not ignore the good-conduct criterion noted at paragraph 7(*b*) of the Act. The applicant's first reason is therefore dismissed.

Second reason

[18] In the alternative, the applicant submits that if the Board did indeed exercise its discretion, then its conclusion is unreasonable.

[19] The applicant alleges that the Board strayed from the policies set out in the *National Parole Board Policy Manual* [Manual]. Paragraph 24, under section 14.1 (*Revocation of a Pardon or a Record Suspension Based on Subsequent Conviction for an Offence Punishable on Summary Conviction*) is raised in this case.

[20] This provision states the following:

> 24. When determining whether to revoke a pardon or a record suspension where the individual is subsequently convicted of an offence punishable on summary conviction under a federal act or

> its regulations, the Board will consider all relevant information, including:
>
> a. information that suggests a significant disregard for public safety and order and/or laws and regulations, given the offender's criminal history (see Assessing Good Conduct);
>
> b. whether the offence is similar in nature to the offence for which the pardon or the record suspension was received; and
>
> c. the time period since satisfaction of all sentences.

[21] The applicant submits that the Board neglected to consider and analyze information that was favourable to the applicant, namely: (1) there is no similarity between the two convictions, therefore the applicant is not a repeat offender; and (2) there was a period of nine years between the two events and five years and four months between convictions. Moreover, according to the applicant, there is no information on record that would allow the Board to find that [TRANSLATION] "the applicant showed a significant disregard for public safety and order and/or laws and regulations".

[22] The respondent, in return, alleges that the Board considered the only truly relevant and determining factor in the circumstances, namely the "good conduct" factor, found at paragraph 24(*a*). Additionally, the respondent alleges that the Manual is not restrictive (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708 at paragraph 16, 2011 CSC 62).

[23] As the Court noted in *Conille v Canada (Attorney General)*, [2003] FCJ No 828 at paragraph 22, 2003 FCT 613, "although the notion of good conduct is not defined in the Act, it involves a question of assessment of the facts that falls within the very expertise of the Board."

In this case, it was reasonable for the Board to find that the applicant no longer met the "good conduct" criterion. Although another decision maker may have acted otherwise, this is not the test that applies in the present case.

[24] On one hand, the applicant's allegation that the Board committed a reviewable error by not taking into consideration two other factors noted at section 24 (similarity and time between offences) seems unjustified to me. The Manual has no binding effect and the factors listed therein are purely illustrative. In each case, it is up to the Board to decide what degree of importance to grant any given factor: *Latimer v Canada (Attorney General)*, [2011] 4 FCR 88 at paragraphs 45 and 48, [2010] FCJ No 970; *Collins v Canada (Attorney General)*, 2014 FC 439 at paragraph 39, [2010] FCJ No 484).

[25] On the other hand, while the Board's decision may not have thoroughly addressed each and every one of the applicant's allegations, it did note the main elements at the basis of its reasoning, which is transparent and intelligible. In this case, the Board considered not only the applicant's conviction but also the circumstances of the offence and other relevant factors. The Board could take all the relevant information in the file into consideration, including the results of the Société de l'Assurance Automobile du Québec's evaluation program.

[26] The decision is also supported by the evidence on record. The Board noted that the applicant's blood alcohol level was nearly twice the legal limit and his actions endangered the lives of others. Moreover, the decision restates the observations noted in the proposal to revoke

to the effect that the applicant received a fine and a prohibition from driving for one year and his actions again required police and court intervention.

[27] It is the Board's exclusive responsibility to weigh all the relevant factors and give them more or less importance, depending on the circumstances of each case. In the present case, the Board's decision seems reasonable to me in light of the observations regarding the applicant's blood alcohol level and the fact that the offence was serious enough that he was prohibited from driving for one full year.

[28] I do not agree with the applicant that the Board's decision strays from the spirit of the Act. Although the Act aims to allow certain individuals to suppress the negative consequences of a criminal record, the Board also has the obligation to protect the public and ensure, according to the Manual, that those persons who benefit from a pardon adopt "behaviour that is consistent with and demonstrates a law-abiding lifestyle." We must recall that driving under the influence is a serious crime and was identified as a serious public health issue in Canada. After reviewing a Board refusal to grant a record suspension in *Saini*, the Court concluded that "[d]riving 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."» (*Saini* v *Canada (Attorney General)*, 2014 FC 375 at paragraph 44, [2014] FCJ No 398)

[29] The applicant's second reason is therefore dismissed.

Third reason

[30] Lastly, the applicant submits that there was a violation of a rule of natural justice or procedural fairness.

[31] The applicant alleges that he could not know that the Board would draw an inference between [TRANSLATION] "the mere existence of his offence" committed in March 2012 and the Board's conclusion that he acted in such a manner as to put the life of people in danger. Moreover, since the revocation proposal did not address this ground, the Board prevented the applicant from responding in an appropriate time, thereby violating the *audi alteram partem* rule. Additionally, the applicant notes that the Board also violated a principle of procedural fairness by mentioning the defendant's blood alcohol level in its decision. Specifically, the Board did not ask to be informed of the applicant's blood alcohol level and did not indicate whether it considered this element to be evidence that satisfied the Board as defined under paragraph 7(*b*) of the Act.

[32] In response, the respondent submits that in a letter dated July 17, 2013, the Board did indeed inform the applicant that a review of the pardon was required under section 7 of the Act. The applicant also received the pardon revocation proposal and its supporting reasons. The revocation proposal clearly explained that the Board was informed that the applicant had been convicted for operating a motor vehicle with a blood alcohol level greater than the legal limit. Moreover, the proposal noted that [TRANSLATION] "the charges and conviction against you show that your behaviour in society might still be problematic...and they raise doubt about whether

you still satisfy the good conduct criterion." Moreover, the Board gave the applicant 60 days to file submissions.

[33] All the applicant's allegations based on the violation of natural justice or procedural fairness seem unfounded. The applicant received a letter from the Board, with a proposal for the revocation of his pardon, dated July 15, 2013. The proposal formally advised him that it may revoke the pardon [TRANSLATION] "on evidence establishing to the satisfaction of the Board that the [applicant] is no longer of good conduct". It notes that the Board was informed of the applicant's sentence and sanctions for impaired driving, and they show [TRANSLATION] "that [his] behaviour in society may still be problematic." Moreover, the Board notes that the applicant's behaviour [TRANSLATION] "again required the intervention of the police and the court." The letter enclosed with the proposal refers to the definition of good conduct as found in the Manual, section 14.1, paragraph 12, namely "behaviour that is consistent with and demonstrates a law-abiding lifestyle." The Board invited the applicant to file written submissions before a final decision was rendered.

[34] In this case, the Board fulfilled its obligation to advise the applicant that it was considering issuing an order to revoke his pardon and gave him the opportunity to reply to the fact the Board felt he was no longer of good conduct. The revocation proposal clearly indicates that the new offence committed was a factor that was taken into consideration. It was not necessary for the Board to also indicate that it would consider whether driving with a blood alcohol level greater than the legal limit could put the lives of other people in danger.

[35] Although the summary evaluation report identifies certain positive points about the applicant's behaviour, in particular a [TRANSLATION] "favourable recommendation" in the assessment of the compatibility of the applicant's behaviour with regard to alcohol and drug consumption, the Board did not violate a procedural fairness principle by using negative elements found in the summary evaluation report, since it was the applicant himself who provided the Board with the report. The Board was also entitled to draw certain negative inferences based on its judicial notice (i.e. dangers of drinking and driving to safety and society, police and legal interventions following the arrest of a person found driving under the influence).

[36] The applicant's third reason is also dismissed.

Conclusion

[37] For all these reasons, the application for judicial review is dismissed. As a result, the respondent is entitled to costs.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed.

"Luc Martineau"

Judge

Certified true translation
Elizabeth Tan, translator

FEDERAL COURT

SOLICITORS OF RECORD

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