Federal Court  Cour fédérale

Date: 20150508

Docket: T-882-14

Citation: 2015 FC 608

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 8, 2015

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

ARLÈNE GALLONE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant is challenging the lawfulness of a decision of the Parole Board of Canada [PBC] recommending a laying of information charging her with an offence under section 753.3 of the *Criminal Code*, RSC 1985, c C-46.

I. Facts

[2] The applicant is a 22-year old woman who pleaded guilty to charges of robbery, criminal harassment, assaulting a peace officer and breach of conditions on June 22, 2012, for which she received a sentence of ten months and fifteen days' imprisonment plus a long term supervision order (LTSO) for a six-year period. The applicant has been subject to the LTSO since the end of her incarceration, namely, since January 18, 2013; the LTSO came with a number of conditions, including residing at a Community Correctional Centre or a Community Residential Facility for a period of 180 days, refraining from consuming or possessing alcohol or drugs, not communicating with people who have a criminal record or who are involved in criminal activities, and following all recommended psychiatric treatment. On May 24, 2013, the PBC added another condition: to seek or remain employed or pursue academic upgrading.

[3] Since January 18, 2013, community supervision of the applicant was suspended on three occasions, which resulted in additional periods of incarceration for her. The first two suspensions occurred between February 1 and May 1, 2013, and between June 7 and September 4, 2013. The last suspension occurred on November 25, 2013, and due to new criminal charges, the applicant was incarcerated until the PBC decision in January 2015.

[4] After the suspension on November 25, 2013, counsel for the applicant filed written representations with the PBC and requested that it hold a hearing in order for the PBC to be able to better assess the behaviour and intellectual capacities of the applicant and her explanations with regard to the incidents having led to the suspension; the request was not granted. As with

the previous two suspensions, the PBC made its decision on the basis of the record, without holding a hearing.

[5] On January 31, 2014, the PBC recommended the filing of a charge under section 753.3 of the *Criminal Code*. In its decision, the PBC noted that there was sufficient information in the record for it to make a well-informed decision, even without holding a hearing. The PBC considered the applicant's criminal history, her psychiatric and psychological assessments, the comments of the applicant's case management team and parole supervisor, the applicant's behaviour since the beginning of the community supervision, the applicant's submissions and her post-suspension interview. Despite the case management team's recommendation that the suspension be cancelled, the PBC found that the applicant's behaviour over the past months demonstrated that she knowingly breached her conditions and that she presented a high risk of recidivism, and as a result the PBC did not cancel the suspension and instead recommended the filing of a criminal charge.

II. Issues and standard of review

[6] This case raises the following issues:

> 1. Is this application moot? If so, should the Court exercise its discretion to hear the matter?
>
> 2. If so, did the PBC breach procedural fairness and the principles of natural justice by refusing to hear the applicant *viva voce*?

[7] Questions of procedural fairness are reviewable on a standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12).

III. Analysis

A. *Mootness of the application*

[8] The respondent submits that the application has been rendered moot. Indeed, recent documents support this claim because the applicant was released and her LTSO conditions, which are not part of this judicial review, were determined by the most recent decision of the PBC, dated January 16, 2015. I share this view. As the Supreme Court of Canada pointed out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*], if, subsequent to the introduction of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.

[9] Such is the case here, as the Court cannot provide any remedy. Should the Court exercise its discretion to hear the matter? I believe it should, in accordance with the principles set out in *Borowski* (see also *Kippax v Canada (Citizenship and Immigration)*, 2014 FC 429 at para 7). Indeed, the questions raised in this matter will continue to be raised during the upcoming reviews by the PBC of the conditions of supervision, or, if necessary, during a review subsequent to a suspension of parole, both for the applicant and for other individuals in similar situations. In this regard, the Supreme Court in *Borowski* affirmed that:

> [A]n expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly. [at p. 360]

B. *Did the PBC breach procedural fairness by refusing to hear the applicant* viva voce*?*

[10] With respect to the holding of a hearing, a person subject to a long term supervision order is deemed to be an offender under the Act (section 99.1 of the Act). Subsections 140(1) and (2) of the Act set out the circumstances under which the PBC must hold a hearing and those under which it has discretion to decide whether to hold a hearing:

140. (1) The Board shall conduct the review of the case of an offender by way of a hearing, conducted in whichever of the two official languages of Canada is requested by the offender, unless the offender waives the right to a hearing in writing or refuses to attend the hearing, in the following classes of cases:	**140.** (1) La Commission tient une audience, dans la langue officielle du Canada que choisit le délinquant, dans les cas suivants, sauf si le délinquant a renoncé par écrit à son droit à une audience ou refuse d'être présent :
(*a*) the first review for day parole pursuant to subsection 122(1), except in respect of an offender serving a sentence of less than two years;	*a*) le premier examen du cas qui suit la demande de semi-liberté présentée en vertu du paragraphe 122(1), sauf dans le cas d'une peine d'emprisonnement de moins de deux ans;
(*b*) the first review for full parole under subsection 123(1) and subsequent reviews under subsection 123(5) or (5.1);	*b*) l'examen prévu au paragraphe 123(1) et chaque réexamen prévu en vertu des paragraphes 123(5) et (5.1);
(*c*) a review conducted pursuant to section 129 or subsection 130(1) or 131(1);	*c*) les examens ou réexamens prévus à l'article 129 et aux paragraphes 130(1) et 131(1);
(*d*) a review following a cancellation of parole; and	*d*) les examens qui suivent l'annulation de la libération conditionnelle;
(*e*) any review of a class	*e*) les autres examens prévus

specified in the regulations.	par règlement.
(2) The Board may elect to conduct a review of the case of an offender by way of a hearing in any case not referred to in subsection (1).	(2) La Commission peut décider de tenir une audience dans les autres cas non visés au paragraphe (1).

[11] Prior to the legislative amendments brought about by section 527 of the *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19, paragraph 140(1)(*d*) of the Act read as follows:

(*d*) a review following a suspension, cancellation, termination or revocation of parole or following a suspension, termination or revocation of statutory release; and	*d*) les examens qui suivent, le cas échéant, la suspension, l'annulation, la cessation ou la révocation de la libération conditionnelle ou d'office;

[12] Accordingly, until 2012, the PBC was required to hold a hearing during a review following a suspension of parole. Since December 2012, in accordance with subsection 140(2) of the Act, the PBC may decide to hold a hearing during a review following a suspension of parole, but it is not obliged to do so.

[13] Given that the applicant did not file a notice of constitutional question, the Court cannot rule on either the validity of subsection 140(2), or the validity of the legislative amendments at paragraph 140(1)(*d*) of the Act (for an analysis of this subject, see *Way c Commission des libérations conditionnelles du Canada*, 2014 QCCS 4193). However, the Court can examine the exercise of discretion by the PBC, which decided in this case not to grant the applicant a *viva voce* hearing.

[14] The Court must therefore determine whether this was one of the circumstances in which the PBC could adhere to the principles of procedural fairness by making its decision on the basis of the applicant's written submissions rather than doing so following a hearing.

[15] The principles of procedural fairness that govern the exercise of discretion were developed in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]. A non-exhaustive list of five factors to assist in determining the nature of the duty of procedural fairness is set out in *Baker*. The first factor is the nature of the decision being made, namely, the closeness of the administrative process to the judicial process in the process provided for, the function of the decision-maker and the determinations that must be made to reach a decision (*Baker* at para 23). The second factor is the nature of the statutory scheme, namely, the role of the particular decision within the statutory scheme, including, for example, appeal procedures or opportunities to submit further requests (*Baker* at para 24). The third factor is the importance of the decision to the individual or individuals affected, namely, the extent of the impact of the decision on the lives of those persons (*Baker* au para 25). The fourth factor regards the legitimate expectations as to the procedure to be followed or result (*Baker* at para 26). The fifth factor is the choice of procedure made by the agency itself, taking into account the expertise of the agency and what the statutes provides to the decision-maker in terms of choosing its own procedures (*Baker* au para 27).

[16] In this case, it is true that the PBC acts in neither a judicial nor a quasi-judicial manner (*Mooring v Canada (National Parole Board)*, [1996] 1 SCR 75 at paras 25-26) and that subsection 140(2) of the Act provides the PBC with the discretion decide whether to hold a

hearing. However, greater procedural protections are required as there is no appeals process for persons subject to a long-term supervision order and the decision is final (sections 99.1 and 147 of the Act).

[17] The most significant criterion in this case is the importance of the decision to the person affected. The Supreme Court in *Baker*, wrote "[t]he more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated" (at para 25). In this case, not only was the applicant incarcerated following the suspension of an LTSO, the PBC also recommended that a charge be filed under section 753.3 of the *Criminal Code*. The suspension of the long-term supervision and ensuing incarceration amount to a curtailment of the applicant's residual liberty. That decision constitutes a significant factor affecting the content of the duty of procedural fairness owed the applicant by the PBC. It is an important factor that the PBC must take into account in deciding whether to hear *viva voce* testimony.

[18] As Justice Wilson held in *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177, where a decision will have an impact on the rights set out in section 7 of the *Canadian Charter of Rights and Freedoms*, such as the right to liberty, a hearing will generally be required:

> If "the right to life, liberty and security of the person" is properly construed as relating only to matters such as death, physical liberty and physical punishment, it would seem on the surface at least that these are matters of such fundamental importance that procedural fairness would invariably require an oral hearing. I am prepared, nevertheless, to accept for present purposes that written submissions may be an adequate substitute for an oral hearing in appropriate circumstances. (at para 58)

[19] In addition, where the assessment of physical or mental capacities may have an impact on the type of conditions to be imposed, a hearing would be appropriate. Here, the Correctional Service's community mental health team, as well as the staff member supervising her, raised concerns about the applicant's cognitive abilities and intellectual limitations. Meeting with the applicant would have certainly allowed for an assessment of the grounds of the staff's concerns, in addition to hearing the applicant's explanations regarding the events leading up to the suspension, a decision which significantly restricted her residual liberty.

[20] To be sure, the nature of the duty of procedural fairness is flexible and depends on the circumstances. A hearing will not be required in every case. However, the factors set out in *Baker* should not remain in the abstract. They must be examined in each case in order to ensure that administrative decisions made are adapted to the type of decision and institutional context.

[21] In this case, the duty of procedural fairness was particularly onerous given that, as the applicant pointed out, she was subject to highly restrictive constraints during her re-admissions (in a maximum security penitentiary, in solitary confinement 23 hours a day, with nothing in her cell but the clothes on her back).

[22] In short, I am of the view that in the circumstances of this case, in particular the questions surrounding the applicant's capacities, the recommendations of the case management team and parole supervisor that the suspension be cancelled, and the significant impact to the applicant of the decision, not only not to cancel the suspension, but to recommend a criminal charge, the PBC should have held an in-person hearing. The submissions made by the applicant's counsel and by

her case management team showed that the applicant may have been suffering from a psychiatric or psychological problem, which could obviously have an effect on the decision of the PBC and on the conditions to be imposed. In such circumstances, the PBC lacked sufficient, reliable and convincing information to base its decision on the record.

[23] For these reasons, the application for judicial review is allowed. The Court declares that the decision, dated January 31, 2014, breached the principles of procedural fairness.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is allowed. The Court declares that the decision, dated January 31, 2014, breached the principles of procedural fairness.

"Danièle Tremblay-Lamer"
Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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