Federal Court  Cour fédérale

Date: 20160408

Docket: T-521-15

Citation: 2016 FC 390

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 8, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

BRIAN ABRAHAM

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Under section 18.1 of the *Federal Courts Act*, R.S.C., 1985, chapter F-7, the applicant is challenging a decision by the Parole Board of Canada's Appeal Division (the Appeal Division), dated February 20, 2015, confirming the refusal of the Parole Board of Canada (the Board) to

grant him day parole or full parole under the *Corrections and Conditional Release Act*, S.C, chapter 20 (the Act).

[2] The applicant maintains that the Board's decision—and therefore indirectly the Appeal Division's decision—should be set aside on the ground that the Board allegedly failed to determine the persuasive value and the accuracy of an incident report the Board mentions in its decision. He alleges that the Board thus breached the rules of procedural fairness.

[3] For the reasons that follow, this argument cannot stand.

II. Background

[4] The applicant is currently serving a life sentence in prison for second-degree murder committed in 1987, as well as for assault with a weapon against a fellow inmate in 2008. The murder was described by the trial judge as a "*brutal and cold-blooded killing.*" The assault with a weapon required the hospitalization of the inmate whose throat the applicant attempted to slit.

[5] The applicant's correctional file reveals a long criminal history, which began when the applicant was 16 years old. He has also had a tumultuous journey through the correctional system, marked by violence, placements in preventive custody, numerous transfers between medium- and maximum-security institutions, and a total lack of cooperation with correctional workers. His file also shows that each of the applicant's releases since his incarceration has been followed by a re-offence.

[6] On September 5, 2014, the applicant appeared before the Board for a parole hearing. His application was rejected that same day. After reviewing the applicant's criminal and prison history, the Board noted that:

a) a psychological assessment dated July 2014 identified a moderate to high risk of violent recidivism, and recommended a transfer to a minimum-security institution before considering parole;

b) in December 2009, after having had his security classification cascaded and having been transferred from a maximum-security prison to a medium-security institution, the applicant became a concern to Preventive Security in the institution, given that he was suspected of tobacco use and of trafficking illicit substances within the institution;

c) on November 23, 2013, the applicant's stay in this institution culminated in his placement in segregation after security-related information linked him to an instance of trafficking illicit substances within the institution;

d) the applicant denied any involvement in this incident;

e) in January 2014, the applicant was transferred to another medium-security institution and from that moment on, his behaviour in the institution improved even though, according to his case management team, he remained relatively closed toward the caseworkers on the team and continued to pose at least a moderate risk of reoffending.

[7] The Board found that the applicant continued to present an undue risk to society and that his release would not contribute to the protection of society by facilitating his reintegration into society as a law-abiding citizen. The Board noted that, despite the applicant's efforts to engage in serious reflection regarding his criminal behaviour and contributing factors, he had continued until "relatively recently" to make poor choices. The Board was therefore of the opinion that the applicant needed to continue his introspection in order to take control of his life and be able to successfully reintegrate into society—something which, in the Board's opinion, the applicant had the potential to do.

[8] The Board concluded as follows:

> After careful analysis of your file and the hearing, the Board observes that you are engaged in serious reflection on your criminality and your contributing factors. As you indicated, your psychological counseling really helped you in understanding the source of your negative choices and of the presence of such gratuitous violence in your offences. You indicated that you identified three triggers to your violence which are fear, pride and anger.
>
> The Board keeps in mind that your criminality led to the loss of the life of a human being for whom you seem to present with sincere regrets. Nevertheless, the Board cannot omit the fact that you continued your negative choices while incarcerated until very recently.
>
> In this regard, the Board concludes that you must continue your reflection in order to deepen you understanding of your dynamics and your vulnerabilities.
>
> In addition, the views expressed at the hearing highlight that you do not yet present with a clear perception of the challenge that will represent your reinsertion.
>
> Your openness with your CMT is the key to being able to consider options available to support you in your reinsertion. You need to accept to take the time needed before your release and to plan a

> very gradual reinsertion process to increase your chances of succeeding on the long term.
> [*sic*]

[9] On February 25, 2015, the Appeal Division upheld the Board's decision, finding it to be reasonable and in compliance with the requirements of the Act.

III. Issue and standard of review

[10] As I recently stated in *Coon v. Canada (Procureur général)* 2016 CF 340 [*Coon*], regarding parole, although the Court is theoretically dealing with an application for judicial review of the Appeal Division's decision, the Court actually has to examine the legality of the Board's decision when, as in this case, the Appeal Division confirms the Board's decision. Thus, save for a particular error on its part, which the applicant does not invoke in this case, the Court will not intervene with regard to the Appeal Division's decision unless it deems that there are grounds to intervene against the Board's decision (*Coon*, paragraphs 18–19; *Cartier v. Canada (Attorney General)*, 2002 FCA 384, paragraphs 6–10, 233 FTR 181 [*Cartier*]; *Collins v. Canada (Attorney General)*, 2014 FC 439, paragraph 36, 454 FTR 106; *Scott v. Canada (Attorney General)*, 2010 FC 496, paragraphs 19–20, 369 FTR 162).

[11] Therefore, the question here is whether, as the applicant alleges, the Board breached the rules of procedural fairness by mentioning the incident of November 23, 2013, without first confirming the clear and convincing nature of the security-related information linking the applicant to this incident.

[12] It is well established that when an accusation made against the Board is in regard to following the rules of procedural fairness, the applicable standard of review is typically the standard of correctness (*Mission Institution v. Khela*, 2014 SCC 24, at paragraph 79, [2014] 1 S.C.R. 502 [*Khela*]; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at paragraph 43, [2009] 1 S.C.R. 339; *Prevost v. Canada (Attorney General)*, 2015 FC 702, at paragraph 37).

IV. Analysis

[13] Under section 107 of the Act, the Board has "exclusive jurisdiction and absolute discretion" to grant parole, which it will do if, as stated in section 102 of the Act, in its opinion, "the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen." However, under section 100.1 of the Act, the protection of society remains the paramount consideration (see also: *Mooring v. Canada (National Parole Board)*, [1996] 1 SCR 75, paragraphs 19, 29, 192, NR 161 [*Mooring*]; *Cartier*, above, at paragraph 19; *Fernandez v. Canada (Attorney General)*, 2011 FC 275, at paragraph 15, 387 FTR 37; *Korn v. Canada (Attorney General)*, 2014 FC 590, at paragraph 16, 456 FTR 307).

[14] The Board's duty is therefore to observe the personality and behaviour of the offender during the offender's imprisonment in order to assess the danger he or she presents to society and his or her ability to re-enter the community (*Ouellette v. Canada (Attorney General)*, 2013 FCA 54, at paragraph 30 [*Ouellette*]). To this end, the Board must, under section 101 of

the Act, take into consideration all relevant information available, including the information provided by the offender and correctional authorities.

[15] Under section 141 of the Act, the documents containing the relevant information, or a summary thereof, must be sent to the offender (unless he or she waives this right) at least 15 days before the day set for the review of the offender's case by the Board, or as soon as is practicable where the information is obtained less than 15 days before the day set for the review. However, where the Board has reasonable grounds to believe that any information should not be disclosed on the grounds of public interest, or that its disclosure would jeopardize the safety of any person, the security of a correctional institution, or the conduct of any lawful investigation, the Board may withhold from the offender as much information as is strictly necessary in order to protect the interest identified.

[16] Therefore, even though it is understood that parole is granted at the Board's discretion, the Board must nonetheless follow the requirements of procedural fairness when deciding whether or not to grant parole (*Ouellette*, above, at paragraph 30). It must ensure that the information upon which it bases its decision is "reliable and persuasive" (*Mooring*, above, at paragraph 36). This obligation acts as a counterbalance to the fact that the Board has the power to consider information that would not otherwise be admissible as evidence before a court of law (*Ouellette*, above, at paragraph 68).

[17] In this case, the applicant's whole theory rests on the fact that the Board allegedly failed to determine the reliable and persuasive nature of the information contained in the jail authorities' report implicating him in the November 23, 2013 incident regarding the trafficking of illicit substances, an incident in which the applicant has consistently denied any involvement.

[18] The main problem with the applicant's position stems from the fact that even if the Board were found guilty of such a failure, the materiality of this breach on the fate of the applicant's application for parole would still have to be established. In my opinion, this was not done. Indeed, it is well established that in order for the Court to intervene in a case of procedural fairness, the alleged breach needs to have had a major impact on the outcome of the dispute (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, at paragraphs 54–55, 111 DLR (4th) 1; *Émond v. Canada (Attorney General)*, 2015 FC 1148, at paragraph 21; *Hassani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283, at paragraph 40; *Roy v. Canada (Citizenship and Immigration)*, 2013 FC 768, at paragraph 34; *Canada (Minister of Citizenship and Immigration) v. Patel*, 2002 FCA 55, at paragraph 12, 219 FTR 159).

[19] Although the Board refers to this incident and to the fact that it was followed by a transfer to another institution, it is careful to note that the applicant has consistently contested his involvement in this incident. I see nothing in the decision at hand that would cause me to think that the Board drew a negative inference based on this incident, in view of what it had to decide. Rather, the file shows that the Board's concerns arise from the fact that the applicant admitted, at the hearing, that he had been involved in tobacco trafficking until just before the

November 2013 incident (applicant's file, pages 71–72) and that he was still using tobacco at the time of this incident, which is prohibited by prison regulations (applicant's file, pages 44–45). In this respect, the Board noted the following about the applicant's transfer to a medium-security institution in 2009:

> In December 2009, your security classification was lowered and you were transferred back to a medium institution. There, you required several interventions for your use of tobacco and other illicit substances and had been a concern to the Preventive Security Department since your arrival.

[20] In summary, when the Board reproached the applicant for his "negative choices while incarcerated until relatively recently" and deemed that he therefore needed to continue the introspection he had begun in January 2014 after his transfer following the November 23, 2013 incident, its decision was sufficiently justified without taking this incident into account.

[21] The current situation differs greatly from that in *Khela*, cited above, upon which the applicant bases his claim that the Board's decision was unlawful. In *Khela*, the security-related information in dispute was at the core of the decision to proceed with the inmate's emergency transfer to the higher security institution. In other words, without this information, there was nothing to justify the measures taken against this inmate. This is not the case in this instance, where, as I have already mentioned, the November 23, 2013 incident seems to have played only a marginal role in the Board's decision to deny the applicant parole.

[22] The applicant's lawyer nonetheless maintains that this incident was the main reason for the applicant's January 2014 transfer to a new medium-security institution and that this, at the very least, influenced the approach taken by the applicant's case management team at his parole

hearing before the Board. I am not convinced by this argument. Once again, there is nothing indicating that this incident had any influence whatsoever on the Board's decision. It was up to the Board—not the Correctional Service of Canada—to decide, based on the criteria set out in the Act, whether the applicant could be granted parole under the circumstances in this case.

[23] Regardless, the applicant was issued, within the time frame set out in section 141 of the Act, a summary of the information contained in the report on the incident of November 23, 2013. At the hearing before the Board, neither the applicant nor his counsel made any objections with regard to the sufficiency of this summary or to the fact that he had not been provided with a copy of the report itself. In my opinion, the respondent is right in saying that the applicant should have raised this objection at the first opportunity, which he failed to do. This was, in my opinion, a fatal mistake on his part (*Hudon v. Canada (Procureur général)* 2001 FCT 1313, at paragraph 29, 214 FTR 193 [*Hudon*]).

[24] In short, the applicant has not shown me that he has suffered any particular harm as a result of the situation that he laments, since he has not shown that the alleged breach, assuming it were founded, had any impact on the Board's ultimate decision (*Hudon*, at paragraph 28).

[25] The respondent seeks costs, whereas the applicant did not seek costs and hopes—in the event that his proceeding is unsuccessful—not to have to pay them. As an alternative, he would like the Court to limit the amount to $500. I feel that, under the circumstances of this case, the respondent is entitled to his costs. However, I will limit them to the amount of $500, disbursements included.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. With costs to the respondent set at an amount of $500, disbursements included.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-521-15
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APPEARANCES:

Maxime H. Lafontaine	FOR THE APPLICANT
Marjolaine Breton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Latour, Dorval, Del Negro Barristers and Solicitors Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT