Federal Court  Cour fédérale

Date: 20170215

Docket: T-1032-16

Citation: 2017 FC 190

Ottawa, Ontario, February 15, 2017

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

KAILESHAN THANABALASINGHAM

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [Act] for judicial review of a decision of the Parole Board of Canada [Board], dated May 26, 2016 [Decision], which denied the Applicant's request for a record suspension.

II. BACKGROUND

[2] The Applicant was a Tamil citizen of Sri Lanka and, at the time of this application, he was a permanent resident of New Zealand. However, he was seriously injured in a house fire and passed away on January 20, 2017. His wife and 5-year-old son were killed in the same fire, leaving his 12-year old daughter as an orphan.

[3] In 1991, the Applicant fled Sri Lanka and arrived in Canada. During his time spent in Canada, he was alleged to have been involved in a Tamil youth street gang which engaged in violence. While this was not a formal allegation, the Applicant was convicted of three charges in relation to violent activity: possession of a weapon in 1996; failure to comply with a recognizance in 1997; and conspiracy to commit assault in 1998. Other charges against the Applicant were withdrawn and a charge of perjury was stayed in 2006 due to his deportation.

[4] In 2001, the Applicant was arrested on the grounds that he was a member of an organized crime group and posed a danger to the public. The Applicant was ordered removed from Canada but appealed; as a result, the Applicant was charged with perjury for minimizing his involvement in a violent Tamil youth street gang. The charge was stayed when the Applicant was deported in March 2006. However, a few months after his arrival in New Zealand, he sought and was granted protection in that country, where he has resided ever since.

[5] In 2009, the Applicant was denied a record suspension for three reasons: he had not demonstrated good conduct within the past five years due to his perjury charge in 2004; unpaid fines of $168.75; he had been deported as a danger to the public in 2006.

[6] In August 2014, the Applicant again applied for a record suspension. In his application, he outlined his past criminal record and the positive steps he had taken since his last conviction. He also provided submissions as to why a record suspension would provide him with a measurable benefit and sustain his rehabilitation as a law-abiding citizen in the community; namely, he was inadmissible to Canada due to his criminal record and needed the record suspension so that he and his family could return to Canada and be with their family, some of whom could not travel to be with them in New Zealand.

[7] In July 2015, the Board had reached a preliminary decision to refuse the Applicant's request for a record suspension, identifying concerns such as the stayed charge of perjury in 2006, that the Applicant had not been of good conduct since his last conviction, and that the record suspension would likely bring the administration of justice into disrepute in light of the Applicant's involvement in a street gang.

[8] The Applicant was given the opportunity to respond to the Board's concerns and did so by letter dated April 11, 2016. In his letter, the Applicant provided the context for his involvement in criminal activities, which included the difficulties faced by racialized Tamil youth fleeing war and persecution. He also defended himself against the Board's assertions that

his convictions were all related to violent offences and that he had been a high-level gang member.

III. DECISION UNDER REVIEW

[9] In a Decision dated May 26, 2016, the Board refused the Applicant's request for a record suspension.

[10] The Applicant had sought a record suspension of three convictions: possession of a weapon from 1996; failure to comply with a recognizance in 1997; and conspiracy to commit assault in 1998. In addition to these convictions, the Board also reviewed the rest of the Applicant's record, which included for 1995: withdrawn charges for attempted murder; assault with a weapon; possession of a weapon; attempt to obstruct justice; uttering threats; and failure to comply with a recognizance. There were also withdrawn charges for assault with a weapon and assault causing bodily harm, both in 1996, and a stayed charge of perjury in 2006.

[11] Next, the Board reviewed the considerations for an order of a record suspension. This review included: whether the Board was satisfied that the Applicant had met the legislative criteria; whether the Applicant had been of good conduct; whether a record suspension would provide the Applicant with a measurable benefit; whether the record suspension would sustain the Applicant's rehabilitation into society; the nature, gravity and duration of the offences; and whether record suspension would bring the administration of justice into disrepute.

[12] The Board then acknowledged the July 2015 review of the application in which the Board had proposed to deny the Applicant's application. At the time, there had been concerns about the stayed perjury charge and that the Applicant had not been truthful before a tribunal of the Immigration Appeal Division. The charge had been stayed due to the Applicant's deportation from Canada. Additionally, the Board had been concerned with reliable and persuasive police reports that suggested the Applicant had been involved with a violent street gang. In light of these considerations, the Board was not satisfied that the Applicant had met the criteria of good conduct since his last conviction or that the order of a record suspension would not bring the administration of justice into disrepute.

[13] In response to the Board's concerns, the Applicant was permitted to submit written representations. These representations included a letter from the Applicant and additional documentation, which were all reviewed by the Board.

[14] In the Decision, the Board noted the additional documentation submitted by the Applicant that had been considered: a copy of the perjury charge; a copy of a Supreme Court Judgment; publications regarding Tamil gangs; publications regarding migrants; a letter from the United Nations High Commissions for Refugees; and a letter from an MP for New Zealand Immigration.

[15] In his letter to the Board, the Applicant noted the difficulties surrounding his arrival in Canada after fleeing war and persecution in Sri Lanka in 1991, including his living in an area of Toronto that was plagued with racism and discrimination against Tamils. The Applicant admitted

that these conditions led to poor decision-making and the convictions at the center of the application. However, since leaving that environment, the Applicant said that his life had changed. He had married, had two children, obtained a bachelor's degree in engineering, was employed full-time with several companies, and volunteered with the Refugee Council of New Zealand. These accomplishments were supported by letters that praised his integrity, reliability, generosity, and hard work.

[16] The Applicant had also taken issue with the allegation that he had been a high-ranking member of a street gang, which had never been proven in court. He felt the denial of a record suspension was due to his unwillingness to admit to this allegation. In the Decision, the Board acknowledged the Applicant's statements; however, it noted that there had been sufficient evidence to support serious charges including three charges of attempted murder, assault with a weapon, possession of a weapon, and uttering threats. Additionally, the Board noted that the Applicant had been deported under s 36 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 for serious criminality. Furthermore, the Applicant had admitted he had been untruthful in his appearances before the Immigration Appeal Division, which resulted in the stayed charge of perjury.

[17] The Board also acknowledged the Applicant's claim that it was unjust and contrary to the purpose of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act*, 1982 (UK), 1982, c 11 to be punished because the Canadian authorities had chosen not to pursue the charge of perjury which had expired on

August 10, 2007 and the Applicant had maintained a clean record and several positive achievements since then.

[18] Despite these positive factors, the Board noted that the Applicant had involved himself in a violent lifestyle within four years of arrival in Canada and had been charged with numerous violent offences. The Board also stated that his time in Canada did not produce any positive achievements and that he had been deported due to serious criminality. Furthermore, he had not demonstrated good conduct prior to the deportation, which resulted in a charge of perjury. Thus, based on all of the information available in the Applicant's file, the Board denied the request for a record suspension on the basis that to grant the request would bring the administration of justice into disrepute.

IV. ISSUES

[19] The Applicant submits that the following are at issue in this application:

(a) Whether the Board erred in law in misinterpreting its discretion under s 4.1(1) of the *Criminal Records Act*, RSC 1985, c C-47 [*CRA*]?

(b) Whether the Board erred in law in failing to consider relevant factors?

(c) Whether the Board's Decision is unreasonable?

V. STANDARD OF REVIEW

[20] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a

satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[21] The jurisprudence establishes that where a decision of a specialized tribunal, interpreting and applying its enabling statute, is subject to judicial review there is a presumption that the standard of review is reasonableness: see *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 21. In regards to the Board's interpretation of s 4.1 of the *CRA* and the Board's Decision not to grant a record suspension, this Court has applied the standard of reasonableness to both: see *Spring v Canada (Attorney General)*, 2016 FC 87 at paras 28-29 [*Spring*].

[22] The other issues raised by the Applicant are also reviewable on a standard of reasonableness.

[23] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above,

at para 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[24] The following provisions from the *CRA* are relevant in this proceeding:

Jurisdiction of the Board	**Attributions**
2.1 The Board has exclusive jurisdiction and absolute discretion to order, refuse to order or revoke a record suspension.	2.1 La Commission a toute compétence et latitude pour ordonner, refuser ou révoquer la suspension du casier.
Quorum	**Instruction**
2.2 (1) An application for a record suspension shall be determined, and a decision whether to revoke a record suspension under section 7 shall be made, by a panel that consists of one member of the Board.	2.2 (1) L'examen des demandes de suspension du casier ainsi que des dossiers en vue d'une révocation de suspension du casier visée à l'article 7 est mené par un membre de la Commission.
…	…
Application for record suspension	**Demandes de suspension du casier**
3 (1) Subject to section 4, a person who has been convicted of an offence under an Act of Parliament may apply to the Board for a record suspension in respect of that offence, and a Canadian offender, within the meaning of the International	3 (1) Sous réserve de l'article 4, toute personne condamnée pour une infraction à une loi fédérale peut présenter une demande de suspension du casier à la Commission à l'égard de cette infraction et un délinquant canadien — au sens

Transfer of Offenders Act, who has been transferred to Canada under that Act may apply to the Board for a record suspension in respect of the offence of which he or she has been found guilty.

de la Loi sur le transfèrement international des délinquants — transféré au Canada par application de cette loi peut présenter une demande de suspension du casier à la Commission à l'égard de l'infraction dont il a été déclaré coupable.

…

…

Restrictions on application for record suspension

Restrictions relatives aux demandes de suspension du casier

4 (1) A person is ineligible to apply for a record suspension until the following period has elapsed after the expiration according to law of any sentence, including a sentence of imprisonment, a period of probation and the payment of any fine, imposed for an offence:

4 (1) Nul n'est admissible à présenter une demande de suspension du casier avant que la période consécutive à l'expiration légale de la peine, notamment une peine d'emprisonnement, une période de probation ou le paiement d'une amende, énoncée ci-après ne soit écoulée :

(a) 10 years, in the case of an offence that is prosecuted by indictment or is a service offence for which the offender was punished by a fine of more than five thousand dollars, detention for more than six months, dismissal from Her Majesty's service, imprisonment for more than six months or a punishment that is greater than imprisonment for less than two years in the scale of punishments set out in subsection 139(1) of the National Defence Act; or

a) dix ans pour l'infraction qui a fait l'objet d'une poursuite par voie de mise en accusation ou qui est une infraction d'ordre militaire en cas de condamnation à une amende de plus de cinq mille dollars, à une peine de détention de plus de six mois, à la destitution du service de Sa Majesté, à l'emprisonnement de plus de six mois ou à une peine plus lourde que l'emprisonnement pour moins de deux ans selon l'échelle des peines établie au paragraphe 139(1) de la Loi sur la défense nationale;

(b) five years, in the case of an

b) cinq ans pour l'infraction

offence that is punishable on summary conviction or is a service offence other than a service offence referred to in paragraph (a).

qui est punissable sur déclaration de culpabilité par procédure sommaire ou qui est une infraction d'ordre militaire autre que celle visée à l'alinéa a).

Ineligible Persons

Personnes inadmissibles

(2) Subject to subsection (3), a person is ineligible to apply for a record suspension if he or she has been convicted of

(2) Sous réserve du paragraphe (3), n'est pas admissible à présenter une demande de suspension du casier la personne qui a été condamnée :

(a) an offence referred to in Schedule 1; or

a) soit pour une infraction visée à l'annexe 1;

(b) more than three offences each of which either was prosecuted by indictment or is a service offence that is subject to a maximum punishment of imprisonment for life, and for each of which the person was sentenced to imprisonment for two years or more.

b) soit pour plus de trois infractions dont chacune a fait l'objet d'une poursuite par voie de mise en accusation, ou, s'agissant d'infractions d'ordre militaire passibles d'emprisonnement à perpétuité, s'il lui a été infligé pour chacune une peine d'emprisonnement de deux ans ou plus.

Exception

Exception

(3) A person who has been convicted of an offence referred to in Schedule 1 may apply for a record suspension if the Board is satisfied that

(3) La personne qui a été condamnée pour une infraction visée à l'annexe 1 peut présenter une demande de suspension du casier si la Commission est convaincue :

(a) the person was not in a position of trust or authority towards the victim of the offence and the victim was not in a relationship of dependency with him or her;

a) qu'elle n'était pas en situation d'autorité ou de confiance vis-à-vis de la victime de l'infraction et que la victime n'était pas en situation de dépendance vis-à-vis d'elle;

(b) the person did not use, threaten to use or attempt to

b) qu'elle n'a pas usé de violence, d'intimidation ou de

use violence, intimidation or coercion in relation to the victim; and

contrainte envers la victime, ni tenté ou menacé de le faire;

(c) the person was less than five years older than the victim.

c) qu'elle était de moins de cinq ans l'aînée de la victime.

Onus – exception

(4) The person has the onus of satisfying the Board that the conditions referred to in subsection (3) are met.

Fardeau : exception

(4) Cette personne a le fardeau de convaincre la Commission de l'existence des conditions visées au paragraphe (3).

Amendment of Schedule 1

(5) The Governor in Council may, by order, amend Schedule 1 by adding or deleting a reference to an offence.

Modification de l'annexe 1

(5) Le gouverneur en conseil peut, par décret, modifier l'annexe 1 pour y ajouter ou en retrancher une infraction.

…

…

Record suspension

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

Suspension du casier

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

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

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.

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.

Onus on applicant

(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.

Fardeau du demandeur

(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.

Factors

(3) In determining whether ordering the record suspension would bring the administration of justice into disrepute, the Board may consider

Critères

(3) Afin de déterminer si le fait d'ordonner la suspension du casier serait susceptible de déconsidérer l'administration de la justice, la Commission peut tenir compte des critères suivants :

(a) the nature, gravity and duration of the offence;

a) la nature et la gravité de l'infraction ainsi que la durée de sa perpétration;

(b) the circumstances surrounding the commission of the offence;

b) les circonstances entourant la perpétration de l'infraction;

(c) information relating to the applicant's criminal history and, in the case of a service offence, to any service offence history of the applicant that is relevant to the application; and

c) les renseignements concernant les antécédents criminels du demandeur et, dans le cas d'une infraction d'ordre militaire, concernant ses antécédents à l'égard d'infractions d'ordre militaire qui sont pertinents au regard de

	la demande;
(d) any factor that is prescribed by regulation.	d) tout critère prévu par règlement.

[25] The following provisions from the *Criminal Records Regulations,* SOR/2000-303 [*Regulations*] are relevant in this proceeding:

Determination relating to the granting of a pardon	**Octroi d'une réhabilitation**
1.1 For the purposes of paragraph 4.1(3)(d) of the Act, in determining whether granting a pardon to an applicant would bring the administration of justice into disrepute, the Board may consider whether	1.1 Pour l'application de l'alinéa 4.1(3)d) de la Loi, la Commission, afin de déterminer si le fait d'octroyer la ré- habilitation à un demandeur serait susceptible de déconsidérer l'administration de la justice, peut tenir compte de ce qui suit:
(a) the commission of the offence constituted a threat to the safety or security of Canada;	a) la perpétration de l'infraction constitue une menace à la sûreté ou à la sécurité du Canada;
(b) the offence constituted an offence against the administration of law and justice, within the meaning of Part IV of the Criminal Code, that was prosecuted by way of indictment;	b) l'infraction constitue une infraction contre l'application de la loi et l'administration de la justice prévue à la partie IV du Code Criminel qui a fait l'objet d'une poursuite par voie de mise en accusation;
(c) the offence was a serious personal injury offence, as defined in section 752 of the Criminal Code;	c) l'infraction constitue des sévices graves à la personne au sens de l'article 752 du Code Criminel;
(d) the commission of the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin,	d) la perpétration de l'infraction est motivée par des préjugés ou de la haine fondés sur la race, l'origine nationale

language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor;

ou ethnique, la langue, la couleur, la religion, le sexe, l'âge, la déficience mentale ou physique, l'orientation sexuelle ou tout autre facteur;

(e) the offence was a service offence

e) l'infraction est une infraction d'ordre militaire :

(i) that is set out in sections 73 to 82 of the National Defence Act and for which the applicant received a sentence of imprisonment for life, or

(i) qui est prévue aux articles 73 à 82 de la Loi sur la défense nationale et pour laquelle le demandeur a été condamné à l'emprisonnement à perpétuité,

(ii) that is set out in section 130 of the National Defence Act and that is also an offence referred to in any of paragraphs (a) to (d) and (f) to (h) of this section;

(ii) qui est prévue à l'article 130 de la Loi sur la défense nationale et qui est également une infraction visée à l'un des alinéas a) à d) et f) à h) du présent article;

(f) the commission of the offence caused serious physical or psychological injury to another person;

f) la perpétration de l'infraction a causé un préjudice physique ou psychologique grave à une autre personne;

(g) the offence constituted a fraudulent transaction relating to contracts and trade within the meaning of Part X of the Criminal Code, and any of the following apply:

g) l'infraction constitue une opération frauduleuse en matière de contrats et de commerce prévue à la partie X du Code Criminel et l'un des faits ci-après s'y applique :

(i) the value of the fraud committed exceeded one million dollars,

(i) la fraude commise a une valeur supérieure à un million de dollars,

(ii) the offence adversely affected, or had the potential to adversely affect, the stability of the Canadian economy or financial system or any financial market in Canada or investor confidence in such a financial market,

(ii) l'infraction a nui — ou pouvait nuire — à la stabilité de l'économie canadienne, du système financier canadien ou des marchés financiers au Canada ou à la confiance des investisseurs dans un marché financier au Canada,

(iii) the offence involved a large number of victims,	(iii) l'infraction a causé des dommages à un nombre élevé de victimes,
(iv) in committing the offence, the applicant took advantage of the high regard in which the applicant was held in the community;	(iv) le demandeur a indûment tiré parti de la réputation dont il jouissait dans la collectivité;
(h) the commission of the offence involved the use of cruelty or the harming of children or vulnerable persons;	h) la perpétration de l'infraction a donné lieu à l'abus ou à l'agression d'un enfant, d'une personne vulnérable ou à l'utilisation de cruauté;
(i) the applicant has a criminal record outside Canada for an offence that, if it were committed in Canada, could have been an offence prosecuted by way of indictment in Canada; or	i) le demandeur a un casier judiciaire à l'étranger pour une infraction qui aurait pu faire l'objet d'une poursuite par voie de mise en accusation si elle avait été perpétrée au Canada;
(j) the applicant's criminal record demonstrates a pattern of criminal activity within the meaning of subsections 462.37(2.04) and (2.05) of the Criminal Code or a pattern of increasing gravity of offence.	j) le casier judiciaire du demandeur démontre un cycle d'activités criminelles répétées selon les paragraphes 462.37(2.04) et (2.05) du Code Criminel ou la perpétration d'infractions d'une gravité croissante.

VII. ARGUMENTS

A. *Applicant*

(1) Section 4.1(1) of the *CRA*

[26] The Applicant submits that the Board erred in law in failing to understand the scope of its discretion. In finding that the Applicant did not meet the good conduct requirement, the Board should have assessed the relevant time period, which is the ten-year period preceding the application. Instead, the Board relied on past charges and the allegations of high-level involvement in a street gang, which all occurred prior to 2004. The Applicant points out that: his last conviction occurred in 1998; the stayed charge of perjury related to events that occurred in 2001 or 2002; the withdrawn charges occurred in 1997 and 1998; and the alleged involvement in a gang related to activities that occurred before 2004.

[27] The Applicant also argues that the Board did not consider the nature, gravity, and duration of the offences nor the circumstances surrounding the commission of the offences. Instead, the Board considered alleged offences that did not result in a conviction, such as the Applicant's alleged involvement in a gang. The failure to assess the actual offences and the circumstances surrounding their commission demonstrates a lack of engagement in the balancing analysis required for the exercise of discretion. Instead of balancing all of the factors, the Board focused on the withdrawn charges and unproven allegations. The Applicant submits that this is a misapplication of the *CRA* and is an error in law. Furthermore, the Board did not indicate the reports that were relied upon and why they were relied upon, which is particularly egregious

since there are no recorded convictions or evidence of criminal conduct in regards to these withdrawn charges and unproven allegations.

(2) Failure to Consider Relevant Factors

[28] The Applicant submits that an exercise of discretion requires all relevant factors to be considered for a fair and reasonable decision. The Board's focus on the allegations and withdrawn convictions indicates an undue emphasis on a single factor as well as a failure to consider all relevant factors. Furthermore, the Applicant argues that the Board's assessment of the evidence is uneven due to its acceptance of police reports and other documentation without consideration of the Applicant's evidence and the rejection of some of the Applicant's evidence without providing reasons.

(3) Reasonableness

[29] In *Spring*, above, at paras 41-42, this Court stated that the reasons for the denial of a record suspension provided by the Board were inadequate in that the applicant was left to speculate as to what the credibility concerns of the Board were and what could be done to address those concerns; as such, the absence of reasons impugned the validity of the reasons and the result. The Applicant submits that the Board erred in the same manner with regards to the Applicant's request for a record suspension. The Board set out a number of factors about the Applicant, many unfavourable, and considered the Applicant's conduct in the 1990s to 2006, but not the actual convictions that were at issue or the circumstances surrounding their commission.

The Board did not engage in an analysis of why the administration of justice would be brought into disrepute.

B. *Respondent*

(1) Section 4.1(1) of the *CRA*

[30] The Respondent submits that the Board did not err in considering the perjury charge which was stayed as a result of a deportation order in 2006. There is no legislative mandate that suggests the Board is only permitted to consider the ten years preceding the date of an application for a record suspension.

[31] Section 4 of the *CRA* establishes eligibility to apply for a record suspension ten years after the expiration of the last conviction for which a record suspension is sought. In the current case, the Applicant's last criminal sentence expired in 1998 and he became eligible to apply for a record suspension in 2008. Section 4.1 of the *CRA* states the Board must consider the Applicant's conduct in that period.

[32] The Respondent concedes that the Board's approach to whether the review period should be applied from the date of the application or date of expiration of the sentence has not been consistent. In *Conille v Canada (Attorney General)*, 2003 FCT 613 at paras 15-19 [*Conille*], the Court found that the Board could consider conduct from the expiration of the sentence until the date of the application. In other cases, the Board has reviewed conduct from the years preceding the application. However, the Court has stated that the Board must conduct a balanced analysis

of all of the information for the chosen time frame. See *Gary Mark v Canada (Attorney General)*, Docket T-351-15 (unreported) [*Gary Mark*].

[33] Since the Applicant's perjury charge was laid in 2006, this places it within the time for the Board to review his conduct because it is within ten years of the expiration of his sentence and the application. Additionally, the Board has the power to review other source material because the rules of evidence are relaxed: see *Saini v Canada (Attorney General)*, 2014 FC 375 at paras 50-51. In its review, the Board determined the charge demonstrated that the Applicant did not satisfy the criterion of good conduct since the expiration of his sentences. Furthermore, the Board reviewed several other sources of information in making its determination, including the Crown brief on the perjury charge and letters from the Crown Attorney for Halton and the Peel Police.

[34] Thus, the Respondent submits that the finding that the Applicant had not met the criterion of good conduct was within a possible range of outcomes because there was reliable and persuasive information that the Applicant had perjured himself and was involved in a street gang.

(2) Consideration of Relevant Factors

[35] In *Spring*, above, at para 33, this Court stated that the factors to be relied on in deciding an application for a record suspension, aggravating or attenuating, and the weight they are given are left to the discretion of the Board. In the present Decision, the Board stated that the Applicant's representations were given considerable consideration but were rejected due to the Applicant's lengthy history of criminality, deportation order, and conduct that amounted to

perjury. The Board is permitted to weigh the relevant factors and draw conclusions. In light of the circumstances, it was not unreasonable for the Board to find that a record suspension would bring the administration of justice into disrepute.

[36] The Respondent also argues that it was reasonable for the Board to consider the Applicant's complete history. Furthermore, the order of a record suspension is a highly discretionary decision of the Board.

(3) Reasonableness

[37] The Board does not have to address every single issue or explore in-depth every argument or issue submitted "that does not impugn the validity of either the reasons or the result under a reasonableness analysis": see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Nurses*]. The Respondent argues that the Decision contains reasons that enable the reviewing court to understand why the particular decision was reached and whether it was within the range of acceptable outcomes based on the facts and law.

[38] The Respondent submits that the Decision not to order the record suspension is reasonable.

VIII. ANALYSIS

[39] As a result of the Applicant's tragic death on January 20, 2017, this judicial review application is moot. However, on the basis of the principles set out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, counsel for the Applicant has asked the Court to render a decision because of the confusion that exists with regards to the "applicable time" during which the Board should consider an applicant's conduct and how it should be assessed. The Respondent agrees that the Court may render a decision under these circumstances and I believe it is appropriate to do so because the central issue in this application transcends the Applicant's case and is likely to be helpful to applicants and the Board in future decision-making.

[40] This is not a comprehensive Decision, yet there is a rationale and a line of reasoning for the Board's conclusions.

[41] The Board clearly states the framework within which the decision must be made:

> In considering whether to order your application for a record suspension, the Board must be satisfied that you have met the criteria as set out in legislation; if you have been of good conduct which is defined as behaviour consistent with and demonstrates the ability to lead a law-abiding lifestyle, whether a record suspension would provide you measurable benefit, whether a record suspension would sustain your rehabilitation into society as a law-abiding citizen. The Board must also consider the nature, gravity and duration of your offences and be satisfied that the ordering of a record suspension for the offences for which you have been convicted will not bring the administration of justice into disrepute.

[42] The Board made its concerns known to the Applicant and gave him an opportunity to respond to those concerns. The Applicant's response was fulsome and extensive.

[43] The Board then deals with salient points raised by the Applicant in his response, noting that connections made by the Applicant between the racism and discrimination against Tamils in Toronto in the 1990s led to the Applicant's involvement in criminal activities and his poor choices. The Board also notes the Applicant's subsequent progress and his marriage, his children, his degree, his employment and his volunteer work with the Refugee Council of New Zealand.

[44] The Board then addresses the Applicant's concerns about the quality of the evidence used to characterize his street gang involvement:

> In your letter you also challenge the reference made to you being as [*sic*] high ranking member of a gang and indicate this is not based on tested evidence or conviction. You state that this was never tested in a court of law and you are being punished for not admitting to these allegations and that not granting a record suspension based on these allegations should not occur in the absence of conviction. The Board acknowledges your statement however, the Board also considers that the police had sufficient information to lay some very violent changes such as Attempted Murder (x3), Assault with Weapon, Possession of Weapon and Uttering Threats. The Board also notes that you were deported under Section 36 for serious criminality. The charge of Perjury that resulted in a stay of proceedings as you were deported from Canada. You admitted in your written submissions that you were not totally forthcoming in your testimony in 2001 and 2002 when you went before the Immigration Tribunal. To your credit, you did present yourself to authorities in 2005 as directed and made yourself available for whatever the legal consequences would be.

[45] The Board further notes the time that has passed since the perjury charge in 2006 and the Applicant's clean record and positive achievements since that time. However, the Board also balances these factors against the negative factors in the Applicant's background:

> All of your representations have been given considerable thought in this decision. However, the Board also notes that within four

> years of arriving in Canada, you involved yourself in a violent lifestyle and have been charged with numerous violent offenses. The Board can use any information from official sources in determining your conduct which it has. Your time in Canada did not produce any positives and you were deported from Canada under Section 36, because of your serious criminality. In terms of your deportation, your case was heard for appeal to the Federal Court and Federal Court of Appeal and you lost on both accounts and refused a Stay of Deportation in January. 2006.

[46] The rationale for the Decision is clear: notwithstanding the positive developments in the Applicant's life since his last conviction in 1998, the Applicant has a significant criminal past in Canada which led to his deportation in 2006 and, of most importance for the Decision:

> You were not of good conduct prior to your deportation as you admit to not being totally forthcoming before the Immigration Tribunal which resulted in a charge of Perjury that resulted in a stay of proceedings in 2006, the year you were deported.

[47] A decision does not have to be exhaustive or deal with every point raised by an applicant in detail provided it contains sufficient clarity to allow an applicant and the Court to understand the reasoning and the evidence upon which the reasoning is based. See *Nurses*, above, at para 16.

[48] In my view then, this Decision contains the "justification, transparency and intelligibility within the decision-making process" that is required by paragraph 47 of *Dunsmuir*, above.

[49] So the issue before me is whether it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law," to quote *Dunsmuir* again.

[50] The only negative conduct factor since the Applicant's last conviction in 1998 is the perjury issue which the Applicant admitted to and disclosed himself. This is one of the issues that prevented the Applicant from securing a pardon in 2009 when he made his first application. This is why the Applicant allowed time to pass and made his second application in 2014. If the *CRA* is applied in the way that the Board applied it in this case, then the same perjury conduct issues will arise again in future applications, no matter how long the Applicant waits. In other words, if the Board goes on applying the statute against the Applicant in the way it applied it on this occasion, then the Applicant may never be pardoned. This would defeat the intent and purpose of the *CRA*. The problem arises from a literal application of the governing provisions.

A. *Relevant Time Period*

[51] The Applicant argues that, under the *CRA*, good conduct must be assessed within the relevant time period.

[52] In particular, he says that the Board treated the stayed perjury charge as though it constituted bad conduct within the period of time under review. The Applicant applied for his record suspension in August 2014 and argues that the relevant ten-year period should date back from that time to August 2004, or that some other approach to establishing a relevant time period is required in order to make the *CRA* workable in a way that was intended by Parliament. He says that the last good conduct issue arising on the facts was his lying to the Immigration Appeal Division in 2001 or early 2002, which he did not correct until April 2004. This places the perjury issue outside of the ten-year period under consideration. The Applicant

says that the Board committed a reviewable error by treating the stayed perjury charge as conduct within the relevant period.

[53] The Respondent concedes that the Board has taken an inconsistent approach with regards to whether the applicable period of review runs from the date of the application for record suspension or the date of the expiration of the sentence. However, in the present case, the Applicant's perjury charge was laid in 2006 and the Respondent says that this means that the charge occurred both ten years after the expiration of his sentence and within ten years preceding this application.

[54] Sections 4.1(1)(a)and(b) of the *CRA* provide as follows:

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	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

and would not bring the administration of justice into disrepute.	des lois au sein de la société et ne serait pas susceptible de déconsidérer l'administration de la justice.

[55] So the applicable period for assessment is set out in s 4(1)(a) and (b) of the *CRA* which read as follows:

4 (1) A person is ineligible to apply for a record suspension until the following period has elapsed after the expiration according to law of any sentence, including a sentence of imprisonment, a period of probation and the payment of any fine, imposed for an offence:	4 (1) Nul n'est admissible à présenter une demande de suspension du casier avant que la période consécutive à l'expiration légale de la peine, notamment une peine d'emprisonnement, une période de probation ou le paiement d'une amende, énoncée ci-après ne soit écoulée :
(a) 10 years, in the case of an offence that is prosecuted by indictment or is a service offence for which the offender was punished by a fine of more than five thousand dollars, detention for more than six months, dismissal from Her Majesty's service, imprisonment for more than six months or a punishment that is greater than imprisonment for less than two years in the scale of punishments set out in subsection 139(1) of the National Defence Act; or	a) dix ans pour l'infraction qui a fait l'objet d'une poursuite par voie de mise en accusation ou qui est une infraction d'ordre militaire en cas de condamnation à une amende de plus de cinq mille dollars, à une peine de détention de plus de six mois, à la destitution du service de Sa Majesté, à l'emprisonnement de plus de six mois ou à une peine plus lourde que l'emprisonnement pour moins de deux ans selon l'échelle des peines établie au paragraphe 139(1) de la Loi sur la défense nationale;
(b) five years, in the case of an offence that is punishable on summary conviction or is a service offence other than a service offence referred to in	b) cinq ans pour l'infraction qui est punissable sur déclaration de culpabilité par procédure sommaire ou qui est une infraction d'ordre militaire autre que celle visée à l'alinéa

paragraph (a). a).

[56] It seems to me that, on their face, these provisions require the Board to examine whether an applicant for record suspension has been of good conduct and has not been convicted of an offence under an Act of Parliament "during the applicable period referred to in ss 4(1)." The applicable period referred to in s 4(1) must elapse "after the expiration according to law of any sentence, including a sentence of imprisonment, a period of probation and the payment of any fine, imposed for an offence." So, if read literally, the *CRA* seems clear that the relevant period for eligibility, runs from the "expiration according to law of any sentence" and that the Board's discretion to order or refuse record suspension under s 4.1(1) requires a review of an applicant's conduct "during the applicable period referred to in subsection 4(1)…."

[57] In the present case, the Applicant received sentences for criminal convictions from 1996 to 1998 and his last sentence expired in 1998. This means that, under the *CRA*, he became eligible to apply for record suspension in 2008. So the relevant period for review by the Board would extend from 1998 to 2008 if these provisions are applied literally.

[58] The perjury charge against the Applicant was laid in 2006, although that charge was stayed when the Applicant was deported in March 2006.

[59] However, the fact that the perjury charge was stayed does not, *per se*, make it irrelevant when considering the Applicant's conduct "during the applicable period…." The Applicant's last sentence for Conspiracy to Commit Assault expired in 1998 so that when the Applicant applied for record suspension in 2014, the review period under the provisions cited extended from 1998

to 2008. The problem arises because, although the perjury charge laid in 2006 falls within that period, the conduct upon which the perjury charge was based was the Applicant's lying before the Immigration Appeal Division in 2001 and 2002. So the Board treated the laying of the perjury charge in 2006 as though it was evidence of bad conduct during the review period, but the conduct upon which the perjury charge was based occurred in 2001 and 2002.

[60] The Applicant received no sentence for the perjury charge because it was stayed when he was deported in 2006. Hence the perjury charge is not relevant for the assessment of eligibility under s 4(1) of the *CRA*. Its only relevance is whether it shows the Applicant has not "been of good conduct" during "the applicable period." The "applicable period" in the present case would, if the *CRA* is read literally, appear to extend from 1998 to 2008, and the bad conduct upon which the perjury charge was based occurred in 2001 and 2002, which is within the relevant period.

[61] However, the problem with these statutory provisions is that the relevant period remains static, and future good conduct may not assist an applicant who becomes entirely reformed over a long period of time that does not fall within "the applicable period referred to in subsection 4(1)."

[62] The Board itself appears to have recognized this problem and, as the Respondent concedes, the Board has taken an inconsistent approach with regard to whether it applies the reviewing period from the date of the application or from the date of the expiration of the sentence. In fact, in *Conille*, above, this Court found that the Board could consider conduct from the expiration of the sentence up until the application is submitted.

[63] A literal interpretation of the *CRA* is bound, in some cases, to result in a grave injustice and/or defeat the whole purpose of the legislation. In my view, that has occurred in the present case. The perjury relied upon by the Board to ground its Decision occurred in 2001/2002 and the Applicant voluntarily revealed it in 2004. So his 2014 application was at least ten years beyond the conduct that was relied upon to reject his application. To avoid this injustice, the Applicant suggests that the Board should have counted back ten years from the date of the application, or the Board should have taken into account the whole period from 2001 to the date of the application and looked at his whole record during that time. It seems to me that both the Board and the Court in past cases have acknowledged that injustices and absurdities can occur if the *CRA* is applied literally and have looked for ways to avoid this.

[64] I note that Justice McDonald faced this very problem in *Gary Mark*, above, and addressed it as follows:

> There is jurisprudence on the issue of the relevant time period when the Act referred to a 5 year time frame versus the current 10 year reference. This case law is still relevant to the analysis in this case. In *Conille v Canada (Attorney General)*, 2003 FCT 613, the Court found that the Board can consider conduct from the expiration of the sentence up until the date the application is submitted. In that case, the Applicant applied for a pardon in 1999 for an offence going back to 1988. The Applicant submitted that the Board erred by limiting its analysis to the 5 year period following his conviction and not considering comprehensively his conduct since the date of his conviction. The Court found that the 5 year period following the expiration of the applicant's sentence "constitutes an important period that the Board must take into account." (para. 17) The Court went on to find that the Board did not perform a "static and fixed" analysis limiting itself to that 5 year period, but did consider conduct beyond the 5 year period following the conviction. (para. 19)
>
> In two other cases, *Foster*, above, and *Yussuf v Canada (Attorney General)*, 2004 FC 907, the relevant time period considered by the Board, was the time period preceding the

applications. In *Foster*, above, the Court found that the Board reviewed various charges that had been laid against the applicant over the years, but focused on the charges in the 5 years preceding the application. (para. 8). In *Yussuf,* the Applicant applied for a pardon in May 2000. His last conviction was entered in May, 1993. The Parole Board of Canada refused his application, relying on charges laid in 2001. In reviewing the decision to deny the Applicant a pardon, the Court found that the Board had an obligation to consider relevant evidence during the relevant 5 year period; which, according to the Court's analysis was the 5 year period preceding the application. (paras. 17-18)

It is similarly evident from the judicial review in *Saini*, above, that the Parole Board in that case relied upon the period preceding the application to evaluate good conduct. The applicant applied for a record suspension in August 2012. His last conviction was in 1995, and his sentence was a fine which he paid. In refusing the application, the Board found that the applicant had not demonstrated good conduct based on a charge he received in 2009.

It is clear from the cases referenced above that the Parole Board does not take a consistent approach to the relevant time frame for consideration. In different cases different approaches have been taken. Regardless, the Parole Board must nonetheless conduct a balanced analysis of all of the information for the chosen time frame.

In this case, the Parole Board's decision is based entirely on charges dating from 1999 to 2002. Unlike the situation in the *Conille* case, here the Parole Board did not consider Mr. Mark's conduct beyond the years 1999 to 2002 regardless of the start date for the 10 year consideration. The decision is completely lacking in any analysis of the years when Mr. Mark was not charged or convicted of any Federal offence. It is not clear that this was even considered by the Parole Board. Nor did the Board take into account the significant evidence of the positive changes in Mr. Mark's life all of which demonstrate good conduct and rehabilitation. This is relevant evidence of "good conduct" and "behaviour that is consistent with and demonstrates a law-abiding lifestyle." The Board should have considered this evidence. See: *Cepeda-Gutierrez v. Canada (Minter of Citizenship and Immigration)* (1998), 157 F.T.R. 35 at para 17.

I find that the Board erred in focusing only on the 1999 to 2002 timeframe when the legislation specifically references consideration of a 10 year timeframe. I therefore conclude that the

> Board's approach was unreasonable and the request for judicial review will be allowed.

[65] In my view, the Board's approach to the relevant ten-year time period in the present case has resulted in a reviewable error that creates an injustice. The Board should have addressed the purposes of the legislation and realized that the Board's static approach means that the Applicant may never be able to redeem himself. The evidence is clear that, since the perjury matter in 2001/2002 and his deportation in 2006, the Applicant has completely turned his life around in admirable ways. His request for a pardon should not remain fixated on conduct going back to 2001/2002. In other cases, the Board itself has found ways to avoid this kind of result by either counting back from the time of the application or examining the whole period up to the time of the application and the Court has endorsed this more flexible and purposeful approach. Both the Board and the Court have recognized that the inflexible, fixed approach can cause severe injustice and, in effect, defeat the purposes of the *CRA*. The Board in the present case did not turn its mind to the practices of the Board itself, and the jurisprudence of the Court on this issue, and thus failed to consider the strong evidence of good conduct and rehabilitation during a meaningful period of time. The result is an entirely unreasonable Decision that falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[66] The Applicant raises other issues for review but it is not necessary to address them given my conclusions set out above. The Decision must be quashed but, given the Applicant's tragic death, there is no point in returning it for reconsideration.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Barbara Jackman Razmeen Joya	FOR THE APPLICANT
Derek Edwards	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jackman, Nazami & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT