Federal Court Cour fédérale

Date: 20170619

Docket: T-1158-16

Citation: 2017 FC 605

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 19, 2017

PRESENT: The Honourable Justice Martineau

BETWEEN:

JEAN-BAPTISTE BLACKSMITH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant, Mr. Jean-Baptiste Blacksmith, is a long-term offender subject to a long-term supervision order (LTSO). In this case, the Parole Board of Canada (the Board) maintained the suspension of the LTSO and recommended that an information be laid charging the applicant with an offence under section 753.3 of the *Criminal Code*, RSC 1985, c. C-46. However, in exercising the discretion conferred upon it under subsection 140(2) of the *Corrections and*

Conditional Release Act, SC 1992, c. 20 (CCRA), it determined that an oral hearing was not warranted in this case, hence this application for judicial review and declaratory relief.

[2] The applicant is Aboriginal, from Mashteuiash, and a member of the Innu and Cree Nations. He is currently 34 years old. His parents went through the residential school system, and his childhood was marked by great instability, varied abuse and deviant role models. His personal history includes placement in more than 30 foster homes before he reached the age of majority.

[3] His criminal history dates back to his teenage years. The applicant's criminal record was opened in 1999, at age 16, when he was accused of sexual contact involving a 13-year-old girl. An information had also previously been laid against him in relation to physical touching of a six-year-old girl. His juvenile criminal record also documents a sexual assault in 2002 committed against a young woman with an intellectual disability. The victim appears to have suffered significant injuries requiring emergency surgery.

[4] In 2011, the applicant was charged with two counts of sexual assault. In one case, on December 8, 2008, he assaulted a friend's partner while she was pregnant, causing her to have a miscarriage. In the other, he assaulted his sister on January 15, 2010. The applicant pleaded guilty to these criminal charges.

[5] At the time of his appearance, the Court of Québec ordered him to undergo a psychiatric assessment, which revealed a risk of violent recidivism and concluded that the applicant met the

criteria for classification as a “long-term offender” under the law. In addition, a specialized sexual deviance assessment conducted in 2011 indicated a valid, non-deviant but problematic profile.

[6] On June 8, 2011, the Court of Québec sentenced the applicant to four years, two months and 15 days in prison after he was found guilty of two charges of sexual assault. At that time, the Court declared the applicant a “long-term offender” and ordered that his name be added to the sex offender registry for a period of 20 years.

[7] The applicant is under the legal authority of the Correctional Service of Canada (the Service) and is subject to an LTSO that will expire in 2021. Specifically, the Board imposed supervision conditions it considered reasonable and necessary to protect society and facilitate his reintegration. In addition to his assignment to a community correctional centre, the LTSO sets out numerous conditions with which the applicant must comply, including not consuming alcohol, not communicating directly or indirectly with the victims or their families, and informing his supervisor if he begins seeing or having intimate relations with any woman. Agreements were also made between the applicant and his case management team to restrict his travel and his use of Facebook among other activities.

[8] On March 27, 2014, the applicant was released subject to the special condition of house arrest. However, this release was suspended on April 14, 2015, after he entered into a relationship with a woman that resulted in deterioration of his behaviour. The Board agreed

nevertheless to vacate the suspension and to release him again while varying his release conditions.

[9] Long-term supervision of the applicant in the community consequently began on August 22, 2015. However, the Service suspended the applicant's community supervision on two occasions as a result of various breaches of these conditions.

[10] On September 18, 2015, the applicant's LTSO was suspended after he failed to inform his team immediately concerning a new relationship and then provided a misleading explanation. On November 12, 2015, following this suspension, the Board ordered that a hearing be held. Before the Board could make a decision concerning the applicant, however, the Attorney General filed charges against him on November 24, 2015, for breach of conditions. The applicant eventually pleaded guilty to these charges and was sentenced to 15 days in prison. He was released on March 4, 2016, and his long-term supervision resumed a few days later.

[11] On March 17, 2016, the applicant's LTSO was suspended once again due to the applicant's failure to comply with its conditions. While supervising the applicant unannounced at the Aboriginal friendship centre, the applicant's parole officer surprised him sitting with a woman, telephone in hand, and talking with her for more than 15 minutes. When confronted concerning these events by his case management team, the applicant provided inconsistent and false explanations.

[12] On March 31, 2016, the applicant was confronted with the facts alleged against him during a post-suspension interview conducted by an authorized Service representative. The Service subsequently decided to maintain the suspension and refer the case to the Board.

[13] On April 7, 2016, the Service prepared an “Assessment for Decision” (Assessment), including a recommendation that an information be laid charging the applicant with an offence under section 753.3 of the *Criminal Code*. The Assessment, which must be read in conjunction with the most recent correctional plan update and the applicant’s criminal profile, was shared with the applicant on April 2, 2016.

[14] On May 9, 2016, counsel for the applicant submitted written representations to the Board, while requesting an in-person post-suspension hearing to assess the applicant’s understanding of the numerous special conditions to which he was subject. Counsel also noted that failure to hold a hearing would violate the jurisprudential principles established by the Supreme Court in *R. v. Gladue*, [1999] 1 SCR 688, and *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433, which provide that members of the justice system shall take into consideration the specific realities of Aboriginals.

[15] The request for a post-suspension hearing was based on two arguments:

a) Subsection 140(2) of the CCRA – which provides for a discretionary post-suspension hearing for offenders subject to an LTSO – violates sections 7 and 9 of the *Canadian Charter of*

Rights and Freedoms – Part I of the *Constitution Act, 1982* [*Charter*] [the *Charter* argument]; and

b) In the applicant's case, a hearing is all the more necessary to maintain procedural fairness, notably in relation to the cultural considerations specific to the applicant [administrative law argument].

[16] On May 24, 2016, the Board expressed its opinion on the case, finding that the information in its possession was [TRANSLATION] "reliable and relevant" and enabled it to make an [TRANSLATION] "informed decision." With respect to the Charter and administrative law arguments, the Board said nothing in the impugned decision. With regard to considerations relating to the applicant's Aboriginal origins, the Board takes into consideration his childhood and difficult teenage years but notes regardless that his [TRANSLATION] "criminal behaviour calls for the greatest prudence." The Board concludes by noting that the applicant needs to show greater [TRANSLATION] "transparency, cooperation and understanding in regard to the factors contributing to [his] criminal behaviour and situations that could lead to additional victims."

[17] Examining his behaviour in terms of public safety and the protection of society, the Board maintained the suspension of the LTSO and recommended that a new information be laid under section 753.3 of the *Criminal Code*, finding that no supervision program could adequately protect society against the applicant's risk of recidivism and that, by all appearances, he had failed to comply with his supervision conditions. That decision is the subject of this application.

[18] On June 10, 2016, the attorney general filed two criminal charges for breach of conditions imposed under the LTSO against the applicant, concerning which he pleaded guilty and was sentenced to 90 days in prison.

[19] The Attorney General of Canada is currently the respondent in this case. In accordance with section 57 of the *Federal Courts Act*, RSC 1985, c. F-7, a notice of constitutional question was duly served on the respondent, as well as on the attorney general of each province, though they decided not to participate in the hearing.

[20] At issue is the extent of the Board's obligations with respect to natural justice, the law and/or the *Charter* when, following the suspension of an LTSO, it decides under subsection 135.1(6) of the CCRA to maintain the suspension of the LTSO and/or to recommend that an information be laid charging the offender with an offence under section 753.3 of the *Criminal Code*.

[21] This Court heard the parties' submissions on the merits concurrently with the application for judicial review and declaratory judgment of another long-term offender regarding a similar decision by the Board, raising the same questions of administrative and constitutional law (see *Bilodeau-Massé v. Attorney General of Canada*, 2017 FC 604 [*Bilodeau-Massé*]).

[22] At the hearing, counsel for the two applicants stated that the applicants were abandoning any claim regarding the violation of section 9 of the *Charter*, which provides that "[e]veryone has the right not to be arbitrarily detained or imprisoned." Nevertheless, counsel for the

applicants argues that the lack of guarantee of a post-suspension hearing violates section 7 of the *Charter* [constitutional question]. For one, the suspension of the LTSO and the resulting reincarceration affect the offender's residual liberty. Moreover, the principles of fundamental justice require that the offender be able, in all cases, to appear in person before the Board for a post-suspension hearing. The hearing must be held prior to the expiration of the statutory time limit of 90 days set out in section 135.1 of the CCRA, unless the offender waives this right in writing or refuses to attend the hearing. In addition, the two applicants argue that the Board also breached procedural fairness, or otherwise rendered an unreasonable decision, by refusing to hold a post-suspension hearing, which warrants Court intervention.

[23] Although the Federal Court has jurisdiction to decide the constitutional question and make a formal declaration of invalidity, the respondent defends the constitutionality of subsections 140(1) and (2) of the CCRA. The Board acted under the authority of the law. The discretion to hold a hearing granted to the Board in subsection 140(2) of the CCRA does not violate section 7 of the *Charter*: the offender's freedom is not involved, and the discretion to hold a post-suspension hearing is not incompatible with the principles of fundamental justice. The Court must interpret the legislation in a manner that is consistent with these principles. A hearing is not necessarily required in all cases. Because the authority to hold a post-suspension hearing is not removed, subsections 140(1) and (2) of the CCRA do not violate section 7 of the *Charter*. Additionally, any violation is justifiable under section 1. Regardless, there was no breach of procedural fairness, and the impugned decision by the Board is reasonable in all regards.

[24] The standard of correctness applies to the review of the constitutional question, to the determination of the legal scope of the rules of natural justice or procedural fairness, and to the question as to whether – given the particular facts of the case – the Board breached procedural fairness by maintaining the suspension of the LTSO and recommending that an information be laid charging the offender with an offence under section 753.3 of the *Criminal Code*, without having held a hearing. At the same time, the standard of reasonableness applies to the review of the Board's determinations regarding the case (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] SCJ No. 9; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] SCJ No. 12 [*Khosa*]; *Gallone v. Canada (Attorney General)*, 2015 FC 608, [2015] FCJ No. 598 at paragraph 7 [*Gallone*]; *Laferrière v. Canada (Attorney General)*, 2015 FC 612, [2015] FCJ No. 578 [*Laferrière FC*]).

[25] The same issues debated by the parties in *Bilodeau-Massé* – including the theoretical nature of certain questions or remedies, the jurisdiction of the Court and discretion to render a declaratory judgment and the merit of the *Charter* and administrative law arguments – are raised in relation to the present application for judicial review and declaratory judgment. In light of the particular facts of the case and the applicable federal statutory provisions, and having considered all of the parties' submissions and the relevant case law, I am satisfied that the Federal Court has jurisdiction to decide the constitutional question. It is also appropriate to issue a declaratory judgment on the constitutionality of subsections 140(1) and (2) of the CCRA, clarifying the extent of the Board's obligations under the principles of fundamental justice. The immediate result of the declaratory judgment that follows these reasons will be to bind the parties to the

case and the tribunal against which it is rendered. The reasoning of the Court in *Bilodeau-Massé* is entirely applicable to the present matter.

[26] For these reasons, the applicant has a right to a declaratory judgment, which is mentioned in the next paragraph.

[27] In terms of exercising the jurisdiction set out in section 135.1 of CCRA, the long-term offender's residual liberty is limited through the suspension of an LTSO. The Board must act fairly before upholding the LTSO suspension and recommending that a charge referring to section 753.3 of the *Criminal Code* be laid by the Attorney General. The principles of fundamental justice oblige the Board, before it refuses to hold an in-person, post-suspension meeting with the offender, to ensure that the reliable and convincing nature of information in the file enables it to make an informed decision. When the file contains incomplete or contradictory information that is relevant to the case review or that could be clarified by the offender, a post-suspension hearing must be held. This is also the case when the offender has difficulties (cognitive, mental health, physical or other) that prevent him from communicating effectively in writing or when a question of credibility is a determining factor in the file. Any refusal to hold an oral hearing must be given in writing. Consequently, the legislative discretion to hold a post-suspension hearing does not violate section 7 of the *Charter*. Subsections 140(1) and (2) of the CCRA are not constitutionally invalid or inoperative in the case of long-term offenders whose file is referred to the Board following the suspension of an LTSO.

[28] The Court otherwise refuses the other compensation or statements sought by the applicant. Without costs.

JUDGMENT in file T-1158-16

RULING on the merit of this application for judicial review and declaratory judgment;

THE COURT ADJUDGES AND DECLARES:

In terms of exercising the jurisdiction set out in section 135.1 of the *Corrections and Conditional Release Act*, SC 1992, c. 20 [CCRA], the long-term offender's residual liberty is limited by the suspension of a long-term supervision order [LTSO]. The Parole Board of Canada must act fairly before upholding the LTSO suspension and recommending that a charge referring to section 753.3 of the *Criminal Code*, RSC 1985, c. C-46, be laid by the Attorney General. The principles of fundamental justice oblige the Board, before it refuses to hold an in-person, post-suspension meeting with the offender, to ensure that the reliable and convincing nature of information in the file enables it to make an informed decision. When the file contains incomplete or contradictory information that is relevant to the case review or that could be clarified by the offender, a post-suspension hearing must be held. This is also the case when the offender has difficulties (cognitive, mental health, physical or other) that prevent him from communicating effectively in writing or when a question of credibility is a determining factor in the file. Any refusal to hold an oral hearing must be given in writing. The legislative discretion to hold a post-suspension hearing does not violate section 7 of the *Canadian Charter of Rights and Freedoms*. Consequently, subsections 140(1) and (2) of the CCRA are not constitutionally invalid or inoperative in the case of long-term offenders whose file is referred to the Board following the suspension of an LTSO.

THE COURT REFUSES otherwise the other compensation or statements sought by the applicant;

ALL free of charge.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1158-16
STYLE OF CAUSE:	JEAN-BAPTISTE BLACKSMITH v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	MARCH 27, 2017
JUDGMENT AND REASONS:	MARTINEAU J.
DATED:	JUNE 19, 2017

APPEARANCES:

Nadia Golmier	FOR THE APPLICANT
Marc Ribeiro Virginie Harvey	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Surprenant, Magloé, Golmier Avocats Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT