Federal Court Cour fédérale

Date: 20220802

Docket: T-1571-20

Citation: 2022 FC 1157

Ottawa, Ontario, August 2, 2022

PRESENT: Madam Justice Pallotta

BETWEEN:

JEANNETTE LOUISE PAUL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Jeannette Louise Paul (formerly Jeanette Louise Tossounian) seeks judicial review of a Parole Board of Canada decision (Decision) refusing her application, made pursuant to the *Criminal Records Act*, RSC 1985, c C-47 [*Act*], for a pardon of her criminal record for convictions in 2006.

[2] Based on information about Ms. Paul's post-2006 interactions with law enforcement, the Parole Board issued a "propose to deny pardon" letter in August 2020. The post-2006 incidents included three tickets for provincial offences, investigation for theft of gas, being named as a suspect in an incident of property damage, as well as criminal charges of arson with disregard for human life and possession of incendiary materials in 2017, and of assaulting, obstructing and resisting a peace officer in 2018, all of which were stayed.

[3] Ms. Paul was invited to address the Board's concerns prior to a final decision. She submitted a response in October 2020, addressing the post-2006 incidents by providing her own account of what happened. On November 23, 2020, the Board issued its final Decision. The Decision acknowledged Ms. Paul's additional submissions but concluded she had not met the legal requirements for a pardon as set out in the *Act*.

[4] Ms. Paul submits that the Parole Board failed to consider the evidence and submissions in her response, and thereby breached the duty of natural justice and procedural fairness. Furthermore, she submits the decision is unreasonable because the Parole Board: (i) based its Decision on erroneous findings of fact and on facts that it should not have considered; (ii) erroneously concluded that her post-conviction activities amounted to a "pattern of continued criminal behaviour", when Ms. Paul was not convicted of a crime after 2006; and (iii) confounded the criteria of good conduct and the absence of a conviction, as referred to in subsection 4.1(1) of the *Act*.

[5] For the reasons below, I find the Decision lacks the requisite justification and transparency because the Parole Board did not meaningfully address the central issues raised in

Ms. Paul's response to the propose to deny pardon letter. In my view, Ms. Paul mischaracterizes this error as a breach of the duty of natural justice and procedural fairness. Her allegation that the Board failed to adequately engage with the submissions made in her response goes to the merits of the Board's decision: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 127-128 [*Vavilov*].

[6] While I am not persuaded that the Board committed any of the other alleged reviewable errors, the failure to meaningfully address the central issues in Ms. Paul's response constitutes a sufficiently serious shortcoming that renders the Decision unreasonable. Accordingly, this application for judicial review is allowed.

II. **Issues and Standard of Review**

[7] Reasonableness is the appropriate standard of review for all issues in this application. While a procedural fairness issue would be reviewable on a standard that is akin to correctness, I agree with the respondent that no procedural fairness issues are at play in this application. Ms. Paul submits the Board breached procedural fairness by failing to consider her response; however, the Decision clearly acknowledges her response and refers to her arguments in a general way. As noted above, the allegation is more properly framed as question of whether the Board's reasons were sufficiently responsive. Ms. Paul also alleges that she had insufficient time to submit her response; however, this allegation lacks merit. It is clear from the record that Ms. Paul had 90 days to respond (not a few weeks, as stated during oral arguments), she did not request additional time, and she filed her response well in advance of the 90-day deadline.

[8] I note that, despite framing a procedural fairness issue, Ms. Paul's position is that the reasonableness standard of review is applicable to all issues on this application.

[9] The Supreme Court of Canada set out the guiding principles for reasonableness review in *Vavilov*. In applying the reasonableness standard of review, the reviewing court must ask whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility: *Vavilov* at para 99. A reasonable decision is based on an internally coherent and rational chain of analysis, and it is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

III. **Analysis**

A. *Preliminary Issue – Admissibility of Ms. Paul's Affidavit*

[10] The respondent objects to much of Ms. Paul's affidavit filed in support of this application, on the basis that it introduces new evidence and is argumentative. The respondent asks this Court to ignore exhibits 4, 5, 6 and 9 of Ms. Paul's affidavit, as well as the paragraphs of her memorandum of fact and law discussing their content, because these documents were not before the Parole Board. The respondent asks the Court to accord little to no weight to paragraphs 1-9, 13, 14, and 33-55 of Ms. Paul's affidavit, as well as the paragraphs of her memorandum discussing this evidence, on the basis that the affidavit is argumentative and improper according to Rule 81 of the *Federal Courts Rules*, SOR/98-106.

[11] As a general rule, the evidentiary record on judicial review is restricted to the evidentiary record that was before the decision maker: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 [*Access Copyright*] at para 19. Three exceptions to this rule relate to evidence that: (i) provides general background information to assist the Court in understanding the issues relevant to the judicial review, without providing evidence relevant to the merits of the administrative decision; (ii) explains procedural defects that cannot be found in the record, so that the Court can fulfill its role of reviewing for procedural unfairness; and (iii) highlights a complete absence of evidence before the administrative decision maker when it made a particular finding: *Access Copyright* at para 20. While the list of exceptions is not closed, the receipt of new evidence must not be inconsistent with the differing roles of the reviewing court and the administrative decision maker: *Ibid*.

[12] Ms. Paul argues that her affidavit and its exhibits fall within a recognized exception to the general rule because they are relevant to an issue of procedural fairness and/or they provide general background information to assist the Court. Ms. Paul states her affidavit relates to matters that were raised in her response to the propose to deny pardon letter.

[13] The affidavit and exhibits are not relevant to an issue of procedural fairness. For the reasons stated above, no issue of procedural fairness arises in this case.

[14] An affidavit is admissible under the general background exception noted in *Access Copyright* if it contains “non-argumentative orienting statements that assist the reviewing court

in understanding the history and nature of the case that was before the administrative decision-maker": *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 45 [*Delios*].

[15] Ms. Paul's affidavit consists of 56 paragraphs and 10 exhibits. In my opinion, significant parts of the affidavit go well beyond "non-argumentative orienting statements". Most paragraphs in the affidavit supplement the record at least to some degree, by introducing facts and arguments that were not presented to the Board. Such evidence is improper on judicial review. A reviewing court cannot allow itself to become a forum for fact-finding on the merits of the matter: *Delios* at para 41.

[16] General background evidence is unnecessary in this case. The Decision is not complex, and the record comprises a relatively small number of documents. The affidavit does not assist me to understand the history and nature of the case before the Parole Board—to the contrary, it presents a challenge to determine precisely which statements are admissible as background information, and which statements go further and provide evidence relevant to the merits of the matter that was not before the Board, invading the Board's role as the fact-finder and merits-decider: *Delios* at para 46.

[17] To the extent that the affidavit presents arguments and evidence that were before the Board, such arguments and evidence are part of the certified tribunal record (CTR). To the extent that the affidavit engages in advocacy, makes statements based on evidence that was not before the Board, or otherwise supplements the record before the Board, it would be improper for me to rely on that evidence under the "background information" exception. For these

reasons, and since my decision does not turn on any information in Ms. Paul's affidavit, I have relied on the CTR in rendering my decision.

[18] I will briefly address exhibits 4, 5, 6 and 9, all of which are documents that do not appear in the CTR.

[19] Exhibit 4 consists of selected pages from the transcript of a 2012 trial that led to Ms. Paul's conviction on arson charges. Exhibit 9 is a May 14, 2019 decision of the Criminal Injuries Compensation Board finding Ms. Paul compensable under subsection 5(a) of the *Compensation for Victims of Crime Act*, RSO 1990, c 24 and ordering that she be paid $17,000. Exhibits 4 and 9 do not fall within one of the recognized exceptions to the general rule. Ms. Paul states that the evidence relates to a matter that was raised in her response to the Board, but admitting the evidence on that basis would invite a *de novo* consideration of the issues based on a different record than the record that was before the Parole Board.

[20] Exhibit 5 is a July 2017 decision of the Ontario Court of Appeal and Exhibit 6 is a copy of two handwritten endorsements. Ms. Paul introduces these documents to show that the 2012 arson conviction was overturned and the charges against her were later stayed. It is clear from the Decision that the Parole Board knew the 2012 arson charges were stayed in 2017. These exhibits are not relevant.

B. *Parties' Submissions*

[21] As noted above, Ms. Paul submits that the Parole Board: (i) failed to adequately consider her submissions filed in response to the propose to deny pardon letter, relying heavily on the

information provided by the police without giving adequate attention to her evidence in response; (ii) based its Decision on erroneous findings of fact and on facts that it should not have considered; (iii) erroneously concluded that her post-conviction activities amounted to a "pattern of continued criminal behaviour", when Ms. Paul was not convicted of a crime after 2006; and (iv) confounded the criteria of good conduct and the absence of a conviction, as referred to in section 4.1 of the *Act*. At the hearing of this matter, Ms. Paul added that the Parole Board also erred by failing to consider whether a pardon would "provide a measurable benefit to the applicant [and] would sustain his or her rehabilitation in society as a law-abiding citizen" according to paragraph 4.1(1)(b) of the *Act* (as it currently reads).

[22] The respondent submits the decision to grant a pardon is highly discretionary. Offenders do not have a right to be pardoned for their criminal offences. In this case, the Parole Board applied the correct test and properly inquired into whether Ms. Paul "has been of good conduct" (section 4.1(1)(a) of the *Act*), which is considered to be behaviour that is consistent with a law-abiding lifestyle. In assessing good conduct, the Board was entitled to rely on the information in the police reports. The Board may consider information that resulted in a charge that was withdrawn, stayed, dismissed or resulted in an acquittal, especially where the charges are serious or related to the convictions for which a pardon is requested. The presumption of innocence does not apply: *Foster v Canada (Attorney General)*, 2013 FC 306 at para 27 [*Foster*].

[23] The respondent states Ms. Paul's memorandum of fact and law did not allege that the Board erred by failing to consider whether a pardon would provide a measurable benefit to her. In any event, that criterion was not part of section 4.1 as it read in 2006 (the time of Ms. Paul's

convictions) which is the applicable provision*: PH v Canada (Attorney General)*, 2020 FC 393 [*PH*] at paras 87-90, 97-98.

[24] The respondent submits the allegation that the Parole Board ignored Ms. Paul's evidence is not supported by the record. The Parole Board was alive to her evidence and submissions, but it was not satisfied they were sufficient to demonstrate good conduct. The respondent contends the Parole Board was not required to address Ms. Paul's arguments in detail. The Board was clearly concerned with two things: the number of post-2006 incidents, and the 2012 charge of arson, as this was related to a conviction for arson in 2006 for which Ms. Paul was seeking a pardon. When read in light of the record, the Decision allows the reviewing Court to understand the reasoning process and why the Board reached its determination.

C. *Analysis*

[25] As noted above, the Board referred to a number of post-2006 incidents that led to the proposal to deny a pardon, from traffic tickets to stayed criminal charges of arson and assaulting a peace officer. After describing these incidents, the Board concluded:

> The Board acknowledges that these incidents did not result in new convictions, however is concerned that you have continued to show disregard for Canadian law and for public safety. The number of incidents, and your prior conviction in 2006 for Arson, suggests to the Board that these were not 'one off' occurrences, but are a pattern of continued criminal behaviour.
>
> The Board is not satisfied that you have been of good conduct since your last conviction, and further that you meet the legal requirements to obtain a pardon as set out under the provisions of the Criminal Records Act.
>
> The Board proposes to deny your request for a pardon.

> This is not the final decision in your case. You or someone on your behalf can provide written representations explaining the circumstances surrounding the incidents that have led to concern regarding your conduct. Your representations will be taken into consideration before a final decision is made by the Board.

[26] Ms. Paul's response addressed each of the incidents. In its November 2020 Decision, the Board acknowledged the response but it did not, in my view, meaningfully engage with Ms. Paul's submissions. Instead, the first 11 paragraphs of the Decision simply repeat, almost verbatim, the content of the propose to deny pardon letter with the exception of the last paragraph, above. In place of that last paragraph, the Decision concludes:

> The Board sent you a letter and provided an opportunity to submit additional written representations prior making a final decision. In your additional written submission, you provide your version of the circumstances and you note your issues of victimization.
>
> When reassessing your case, the Board is of the opinion that you have not presented a persuasive version of the incidents, in particular the incident of Arson in which you were smelling of gasoline. Further, your behaviour demonstrates a pattern of aggression and disregard for the safety and well being of others. Overall, the Board concludes that it was provided with sufficient information to be persuaded that that you have not been of good conduct.
>
> For all those reasons, the Board concludes that you have not met the legal requirements for a pardon as set out under the provision of the Criminal Records Act. Accordingly, the Board denies a pardon of your record.

[27] Therefore, apart from the assertion that Ms. Paul had not presented a persuasive version of the incidents, the Decision does not substantively consider or address any aspect of Ms. Paul's response.

[28] I agree with the respondent that the Board was not required to address Ms. Paul's arguments in detail, nor was it required to address all of her arguments: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 at paras 16, 18 [*Newfoundland Nurses*]. However, the principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties: *Vavilov* at para 127. In my view, the Decision was not reasonably responsive to the central issues and concerns raised in Ms. Paul's submissions.

[29] As noted above, the Board was most concerned with the number of post-2006 incidents, and the 2012 charge of arson.

[30] However, the Board did not address Ms. Paul's submissions about any of the incidents, although this might have reduced the number of incidents that were of concern. For example, Ms. Paul questioned the validity of the 2008 property damage complaint, which was made by someone who expressed difficulty identifying a suspect but offered Ms. Paul's name because she had "romantic feelings" for him. Ms. Paul was "unsure how to reply to this" since she had no knowledge about the report and no idea who the complainant could be. She provided a letter from her life partner, who she had been seeing since 2008. As another example, Ms. Paul provided evidence and submissions about the stayed assault charges, including that the officer was sanctioned for misconduct. The Board, in its final Decision, simply reproduced the content from the propose to deny pardon letter, including the statement that the number of incidents suggest a "pattern of continued criminal behaviour", and dismissed Ms. Paul's submissions with the assertion that she had not presented a persuasive version of events.

[31] With respect to the 2012 arson charges, the respondent argues that Ms. Paul's submissions amounted to a general feeling of victimization, and a general denial without supporting documents. She simply asserted that the information leading to the charges was untrue and "contrary to court documents and transcripts" (which she did not provide to the Board). She also stated she was a "victim of arson" and should not be required to re-live the trauma or to comment on lies. When the Decision is read in view of her submissions, the respondent argues Ms. Paul has failed to establish a sufficiently serious shortcoming so as to render the Decision unreasonable.

[32] In my view, the respondent's arguments supply reasons that were not given by the Board. The Board's response to Ms. Paul's submissions about the 2012 charge of arson was, "you have not presented a persuasive version of the incidents, in particular the incident of Arson in which you were smelling of gasoline". I fail to see how this reasoning is in any way responsive to Ms. Paul's submissions.

[33] In *Vavilov*, the Supreme Court of Canada confirmed its earlier guidance from *Newfoundland Nurses* that a reviewing court may "connect the dots on the page where the lines, and the direction they are headed, may be readily drawn", but it must not speculate as to what the decision maker was thinking, supply the reasons that might have been given or make findings of fact that were not made: *Vavilov* at para 97. Based on the Board's reasons, I am unable to connect the dots without speculating as to what the Board was thinking.

[34] In summary, the Decision lacks the requisite justification and transparency because it does not adequately address and engage with Ms. Paul's submissions in response to the propose

to deny pardon letter. While this is a sufficient basis to set aside the Board's decision, I will briefly address the other issues that Ms. Paul has raised. On these other issues, I agree with the respondent's submissions and I am not persuaded of a reviewable error.

[35] I am not persuaded by Ms. Paul's arguments that the Board based its Decision on erroneous findings of fact or on facts that it should not have considered. I do not accept Ms. Paul's submission that the Board should not have considered the 2007 provincial offence tickets and 2008 property damage report because they were not sufficiently serious. Similarly, the Board did not err by concluding that Ms. Paul's post-conviction activities amounted to a "pattern of continued *criminal* behaviour" because she was not convicted of a crime after 2006. The Board reasonably interpreted good conduct as behaviour that is consistent with and demonstrates a law-abiding lifestyle, and it was entitled to consider any evidence that was reasonably relevant to its assessment of the "good conduct" criterion. The respondent correctly notes that a decision to grant or refuse a pardon is highly discretionary, and that the notion of good conduct hinges on the Board's assessment of the facts: *Saini v Canada (Attorney General)*, 2014 FC 375 at para 26. The Parole Board was clearly aware that Ms. Paul was not convicted of a crime after 2006, but it was nonetheless entitled to consider information about an incident that resulted in a charge, regardless of the outcome for the charge: *Foster* at para 27; see also *Jaser v Canada (Attorney General)*, 2015 FC 4 at para 48. As the respondent points out, serious charges or charges that are related to the convictions for which a pardon is requested may be particularly relevant. This does not mean, however, that other incidents should be disregarded.

[36] I disagree with Ms. Paul that the Board confounded the criteria of good conduct and the absence of a conviction, as referred to in section 4.1 of the *Act*. The Parole Board's conclusion

was clearly based on a finding that Ms. Paul had not satisfied the good conduct criterion, not the absence of a conviction criterion. The Decision does not demonstrate any confusion about these criteria. In my view, the Parole Board applied the correct test and properly inquired into whether Ms. Paul "has been of good conduct" according to paragraph 4.1(1)(a) as it read in 2006. In assessing good conduct, the Board was entitled to rely on the information in the police reports for the reasons noted above.

[37] Ms. Paul's memorandum of fact and law does not allege, and in my view she did not properly raise an allegation, that the Board erred by failing to consider whether a pardon would provide a measurable benefit to her. In any event, I agree with the respondent that the applicable provision is section 4.1 as it read in 2006*: PH* at paras 87-90, 97-98.

IV. **Conclusion**

[38] The application for judicial review is allowed and the Decision is set aside. While Ms. Paul's request for relief had included an order granting a pardon, she withdrew that request at the hearing. The matter shall be remitted for reconsideration by a differently-constituted panel.

[39] Ms. Paul asked for costs of this application but did not make any submissions as to costs. If the parties are unable to settle the issue of costs, Ms. Paul may serve and file brief submissions within 20 days of this Judgment, and within 15 days thereafter the respondent may serve and file responding submissions. Each parties' submissions shall not exceed two pages, not including any bill of costs.

JUDGMENT IN T-1571-20

THIS COURT'S JUDGMENT is that

1. The Decision is set aside.

2. The matter is remitted for redetermination by a differently-constituted panel.

3. In the event the parties are unable to settle the issue of costs, costs are to be determined.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1571-20
STYLE OF CAUSE:	JEANNETTE LOUISE PAUL v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
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DATED:	AUGUST 2, 2022

APPEARANCES:

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