Date: 20080922

Docket: T-76-08

Citation: 2008 FC 1063

Ottawa, Ontario, September 22, 2008

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

LOUIS DUFOUR

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision dated November 19, 2007, by the delegate of the Chief of the Defence Staff of the Canadian Armed Forces, dismissing the applicant's request to amend the reason for his release from the Armed Forces on March 7, 2000. He had been released because he was "unsuitable for further service" even though information received since his release showed, in his opinion, that he should have been released "on medical grounds".

[2] After considering the evidence on the record, as well as the written and oral submissions made by the parties, I find that this application for judicial review must be granted. The reasons for this finding are given in the following paragraphs.

I. Facts

[3] The applicant was a member of the Canadian Armed Forces from September 6, 1988, to March 7, 2000. During that time he participated in peace missions in Croatia and Haiti.

[4] In 1998 and in 1999, the applicant had problems with his superiors after having reported the theft, at the canteen of which he was in charge, of a minor item by a higher-ranking member. His repeated attempts with superiors to have the guilty person punished were not taken seriously and were eventually considered as being a type of harassment.

[5] The bad relations between the applicant and his superiors subsequently degenerated to such an extent that formal charges were brought against the applicant on February 24, 1999, for death threats and resisting a peace officer.

[6] While these charges were pending before the Court of Québec (Criminal Division), the applicant was released from the Armed Forces on March 7, 2000, on the grounds that he was unsuitable for further service. No written explanation was given to the applicant of the reasons why

he was released on this ground. The applicant did not contest this decision, believing that it was based on the criminal charges he was facing.

[7] On June 14, 2000, the Court of Québec acquitted the applicant of the charges brought against him.

[8] In March 2002, the applicant requested his reinstatement in the Armed Forces. However, in a letter dated February 7, 2003, he was notified that he could not be reinstated in the Armed Forces because of medical restrictions.

[9] When called on to conduct an assessment of the applicant, a psychiatrist and a psychologist at the Institut Pinel diagnosed post-traumatic stress syndrome. In the report of their assessment dated September 20, 2005, they wrote the following:

> [TRANSLATION]
>
> > In fact, in our opinion, what we have here is displacement and a return of the repressed, whereby all of the distress (anger and guilt) that was contained as best as possible from 92 to 98 crystallized on an insignificant incident (tube of cream), then on the hierarchy of his unit, then on the Armed Forces in general and eventually on all government branches, including the judicial system, judges and police officers.

[10] On May 19, 2006, Veterans Affairs Canada awarded disability benefits to the applicant under subsection 21(1) of the *Pension Act*, R.S., 1985, c. P-5. It was acknowledged that the applicant had three different disorders: a paranoid delusional disorder, a post-traumatic stress disorder, and a major depression. Because the effects of these disorders could not be separated, his

disability was assessed at eighty per cent by combining their overall effect. A letter notifying the applicant of this decision specified the following:

> [TRANSLATION]
>
> According to the psychiatric reports dated September 20 and November 22, 2005, the medical evidence shows that you are suffering from a paranoid delusional disorder, a post-traumatic stress disorder and a major depression caused by your service in the Croatian zone in 1992.

[11] On or about August 17, 2006, the applicant applied for a review of the decision dated March 7, 2000, in order to have the reason for his release changed. Relying on his acquittal from the criminal charges brought against him, the psychiatric assessment report and the decision of Veterans Affairs Canada, the applicant alleged that he should have been released under paragraph 3(*b*) rather than paragraph 5*(f)* of the Table to section 15.01 of the *Queen's Regulations and Orders for the Canadian Forces*. Paragraphs 3(*b*) and 5(*f*) of this Table read as follows:

3. **Medical** (b) On medical grounds, being disabled and unfit to perform his duties in his present trade or employment, and not otherwise advantageously employable under existing service policy	**3. Raison de santé** b) Lorsque de point de vus médical le sujet est invalide et inapte à remplir les fonctions de sa présente spécialité ou de son présent emploi, et qu'il ne peut pas être employé à profit de quelque façon que ce soit en vertu des présentes politiques des forces armées.
5. Service Completed (f) Unsuitable for Further Service Applies to the release of an officer or non-commissioned member who, either wholly or chiefly because of factors within his control, develops	**5. Service terminé** f) Inapte à continuer son service militaire. S'applique à la libération d'un officier ou militaire du rang qui, soit entièrement soit principalement à cause de facteurs en son pouvoir,

personal weakness or behaviour or has domestic or other personal problems that seriously impair his usefulness to or impose an excessive administrative burden on the Canadian Forces.	manifeste des faiblesses personnelles ou un comportement ou a des problèmes de famille ou personnels qui compromettent grandement son utilité ou imposent un fardeau excessif à l'administration des Forces canadiennes.

[12] On November 19, 2007, the application for the review of the reason for release was dismissed by Colonel F. Bariteau, Director Military Careers Administration and Resource Management. The relevant excerpt of the letter by which the applicant was notified of this decision reads as follows:

> [TRANSLATION]
>
> . . .
>
> Following your application presented in reference A, we have reviewed your file and consulted the Director Medical Policy (Dir Med Pol) on this matter. Based on the available information as well as on the information submitted by you, it appears that nothing warranted acknowledging employment restrictions for medical reasons when you were released because at that time you met the minimum medical standards for your trade.
>
> When a decision to release is made by the Canadian Forces, the precise reason for the release as well as the corresponding item (number and letter) are specified so that all offices of responsibility are aware of the circumstances applicable to the case in question. However, if during the process leading up to the release of the member a specific condition is noted and considered to be sufficient to acknowledge another reason for the release, the authority delegated by the Chief of the Defence Staff will review the file once again, will determine the main reason for release and will modify it as needed. In your case, a detailed review of your file, together with the new information you submitted in reference A, has not allowed us to determine that another reason for release would have been more appropriate at that time.

> Accordingly, pursuant to the provisions of reference B, I am obliged to close your file and advise you that reason for release 5*(f)* must be maintained.
>
> . . .

[13] The applicant is seeking judicial review of this decision.

II. Issues

[14] In his written and oral submissions, the applicant raised several issues that may be summarized as follows:

(a) Did the delegate of the Chief of the Defence Staff commit a reviewable error in the assessment of the evidence submitted by the applicant?

(b) Did the delegate of the Chief of the Defence Staff breach procedural fairness by failing to give the reasons for his decision?

III. Analysis

(a) Preliminary issues

[15] The respondent submitted that the application for judicial review filed by the applicant was not in compliance with the *Federal Courts Act* in that it was directed against the National Defence Headquarters. According to the respondent, this is not a “federal board, commission or other tribunal” or “any body, person or persons” and it does not exercise “jurisdiction or powers conferred

by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown . . .".

[16] At the hearing, the applicant did not contest this argument and acknowledged his mistake. Counsel for the respondent accepted that the proceedings be amended so that they would be in compliance with the *Federal Courts Act*. Considering the respondent's consent and the lack of any possible confusion about the decision concerned, I therefore allowed the applicant to file an amended application for judicial review. This amendment appears in the style of cause.

[17] In his application for judicial review, the applicant submitted that there was a conflict of interest on the part of the Director Medical Policy. In fact, it was alleged that he had recommended the decision made on November 19, 2007, even though he had also recommended the release of the applicant because of unsuitability for further service in 2000. However, the applicant did not repeat this argument in his written submissions.

[18] In reply, the respondent filed an affidavit of Lieutenant-Colonel Michel Deilgat, a physician with the Armed Forces, who stated that he had never been Director Medical Policy, that he had left this branch on May 24, 2004, and that he had never made any recommendation or given any medical opinion about the applicant between the date of his application for review of the reason for his release on August 17, 2006, and the date of the decision rendered in regard to this application for review, that is, November 19, 2007.

[19] At the hearing, the applicant noted this evidence and did not reiterate his argument. Because Dr. Michel Deilgat was not cross-examined on his affidavit and the applicant did not submit any rebuttal evidence, the facts mentioned in this affidavit must be accepted as proven. Accordingly, the applicant's argument cannot be accepted because it is not based on any facts.

(b) Standard of review

[20] Both parties agree, and rightfully so it seems to me, on the applicability of the standard of reasonableness in this case. In what is now referred to as the "standard of review analysis", four factors must be considered to determine the appropriate standard of review. In its most recent judgment on this point, the Supreme Court summarized them as follows:

> [64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.
>
> *Dunsmuir* v. *New Brunswick*, 2008 SCC 9

[21] Although the *National Defence Act*, R.S., 1985, c. N-5, does not protect decisions of the Chief of the Defence Staff through a privative clause, it nevertheless entrusts the Chief of the Defence Staff with the control and administration of the Canadian Forces (section 18). However, the issues in question basically concern the assessment of facts within the specific context of the operation of the Canadian Forces, taking into consideration service requirements, applicable

aptitudes and physical and mental restrictions, military discipline, rules applicable to the release of Canadian Forces members and the operation of the armed forces:

a. *Queen's Regulations and Orders for the Canadian Forces* (Q.R.O.), Chapter 15, Release;
b. *Queen's Regulations and Orders for the Canadian Forces* (Q.R.O.), Chapter 1, Introduction and Definitions;
c. *Canadian Forces Administrative Orders* (C.F.A.O.), Chapter 15-2, Release - Regular Force.

[22] Finally, the expertise of the Chief of the Defence Staff in the control and administration of the Canadian Forces was acknowledged by this Court in *McManus* v. *Canada (Attorney General)*, 2005 FC 1281, 279 F.T.R. 286. In this decision, my colleague, Mr. Justice Hughes, found that the Court must show deference in regard to the decisions of the Chief of the Defence Staff, considering this person's expertise, and accordingly decided to apply the standard of reasonableness *simpliciter*. On the basis of this precedent and the application of the criteria developed by the Supreme Court in its standard of review analysis, I am also of the opinion that the standard of reasonableness must apply here.

[23] Accordingly, the role of this Court is not to determine if the right decision was made. Therefore, the fact that the judge who hears an application for judicial review may have a different opinion and would have rendered a different decision if he or she had had to rule on the matter initially should not influence the judge. Rather, it is sufficient for the impugned decision to be intelligible and that it be based on the law and the facts adduced in evidence. As the Supreme Court Court stated in *Dunsmuir*:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous

> standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

It is therefore on the basis of these principles that I will now examine the reasonableness of the decision dated November 19, 2007.

(c) Reasonableness of the decision dated November 19, 2007

[24] In his application for judicial review, the applicant alleged that the decision-maker did not wait for the decision of the Court of Québec concerning the charges brought against him to be rendered before releasing him on March 7, 2000. In his memorandum, he alleged that by not giving the reasons for his release, the delegate of the Chief of the Defence Staff breached the principles of procedural fairness and misled him concerning the real reasons for his dismissal.

[25] To dispose of these two arguments, it is sufficient to note that the applicant is out of time to seek judicial review of the decision rendered on March 7, 2000. Accordingly, the applicant cannot use his application for judicial review in connection with the decision dated November 19, 2007, to challenge the initial decision concerning his release. It is well established that only one decision may be attacked by means of judicial review and what cannot be directly done may not be indirectly

done: see *Danyluk* v. *Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 at paragraph 20; *Federal Courts Rules*, rule 302.

[26] The main ground relied on by the applicant to challenge the decision dated November 19, 2007, was the fact that the decision-maker had allegedly not taken into consideration the evidence submitted in support of his application for review. In his opinion, his acquittal by the Court of Québec, the decision of the Armed Forces to refuse his re-enrolment for medical reasons on February 7, 2003, the report of the psychiatric assessment dated September 20, 2005, and the decision of Veterans Affairs Canada on May 19, 2006, to award a pension to the applicant, should have led the respondent to revise the reason for his release in March 2000 and to acknowledge that he should have been released for medical reasons.

[27] As far as he was concerned, the respondent submitted that none of the facts raised by the applicant made it possible to determine his state of health at the time of his release. Therefore, according to the respondent, the Court should not substitute its discretion for that of the decision-maker because his decision not to change the reason for his release was not made in a perverse or capricious manner or without regard for the material before him.

[28] I am quite willing to admit that the acquittal of the applicant on June 14, 2000, does not prove anything about his state of health, because it was rendered on the basis of the rules and burden of proof specific to criminal law.

[29] Likewise, the respondent is right to insist on the fact that the decision of Veterans Affairs Canada was rendered under the *Pension Act*, which specifically mentions in subsection 5(3) that the Minister must draw every reasonable inference in favour of the applicant, accept any uncontradicted evidence that the Minister considers to be credible and resolve in favour of the applicant any doubt, in the weighing of evidence, as to whether the applicant has established a case.

[30] However, the respondent cannot make on argument on the basis of the fact that this decision of Veterans Affairs Canada is retroactive only to October 19, 2005. In fact, under subsection 39(1) of the *Pension Act*, a pension can be retroactive only to the date on which the application therefor was first made.

[31] That being said, the respondent is correct to assert that no evidence specifically establishes that the applicant suffered from a post-traumatic stress disorder when he was released. However, is that the only logical conclusion that can be reached on the basis of the evidence submitted by the applicant? Even if this illness had not yet been diagnosed in 2000 and the symptoms of this illness could have gotten worse over time, could it be reasonably argued that the events the applicant went through during the peace missions in which he participated in 1992 and 1996-97 had no impact on his behaviour in the following years and only began to affect his mental health after he left the Armed Forces?

[32] Although the psychiatrist and the psychologist who assessed the applicant in 2005 did not mention at what specific moment he began to suffer from post-traumatic stress (that was not their

assignment), they nevertheless acknowledged a connection between the incident that triggered a bad relationship between the applicant and his superiors with the repression of distress (anger and guilt) that he had tried as best as possible to repress from 1992 to 1998. This tends to support the applicant's theory to the effect that he already had this illness even if he did not realize it at that time.

[33] The respondent tried to establish that the applicant's condition could have gotten worse over time, that his condition could have crystallized several years after his missions abroad and that the evidence did not show that his erratic behaviour in the months preceding his release could be caused by his mental condition. However, this argument, which is counter-intuitive, is not supported by any medical evidence. It is a fact that the applicant has the burden of proof. However, when a logical conclusion may be drawn from the evidence submitted, it may be necessary to explain the reasons for reaching a contrary conclusion.

[34] In fact, it is precisely on this point that the decision of November 19, 2007, appears to have a shortcoming. At the hearing, counsel for the respondent tried to explain the decision rendered by the delegate of the Chief of the Defence Staff, but as he acknowledged, the written reasons disclosed to the applicant were at best [TRANSLATION] “succinct” and do not in any way reflect the explanations given by counsel. Accordingly, I will deal with the applicant's last argument.

(d) Does the lack of reasons constitute a breach of procedural fairness?

[35] As mentioned above, the reasonableness of a decision is assessed by taking into consideration the result as well as the justification therefor. In other words, it is not sufficient for the

result obtained by the initial decision-maker to be considered an acceptable solution in view of the facts and law; the decision-making process by which that decision was made must be intelligible, consistent and transparent. From this point of view, it is obvious that this Court, like any other reviewing court, has an additional challenge to meet when the initial decision-maker does not mention any reason in support of the decision-maker's decision. As Mr. Justice Pelletier of the Federal Court of Appeal mentioned when writing for a unanimous bench in *Gardner* v. *Attorney General of Canada*, 2005 FCA 284:

> [23] It is true that the reasons given for the Commission's decision to dismiss Ms. Gardner's complaint are laconic and are more in the nature of a conclusion than reasons. Where the Commission's decision gives effect to the investigator's report, a complainant can reasonably assume that the Commission adopted the investigator's reasoning. But where, as here, the Commission departs from the investigator's recommendation, the basis for the Commission's decision may be less clear.
>
> [24] If the complainant challenges the decision, the reviewing court is left to assess the Commission's conclusion without having the benefit of its reasoning in coming to that conclusion. Since the reasonableness of a decision is the extent to which the reasons given for it support the decision (see *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at paragraph 47), a tribunal leaves a reviewing court at a marked disadvantage when it does not provide reasons for its decision.

[36] Of course, care must be taken not to impose obligations that are too onerous on administrative tribunals in these matters, especially when Parliament itself did not consider it necessary to do so. This would have the effect of unduly increasing the already very heavy burden on them if in addition they were to have the obligation of giving reasons for any decision whatsoever. Even if the drafting of reasons has the tremendous advantage of fostering a more detailed analysis and allows for a better statement of the issues and the reasoning used to solve

them, the resulting consequences of doing so on the efficiency of administrative justice cannot be ignored.

[37] Faced with this predicament, the Supreme Court of Canada, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, proposed a middle course on this point when it becomes necessary to determine the limits of procedural fairness. Rather than requiring reasons every time a decision is to be rendered and making this into an essential component of procedural fairness without taking the nature of the decision in question into consideration, the Court decided on modulating this requirement on the basis of certain factors and by taking into consideration the circumstances of each case. This is what Madam Justice L'Heureux-Dubé wrote on this point:

> [43] In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required.

[38] The circumstances in the present case seem to me to correspond to the situations considered by the Supreme Court in which a decision-maker must give "some form of reasons". Not only is the decision dated November 19, 2007, subject to judicial review and places this Court in an impossible situation when called on to assess its reasonableness, as mentioned above, but it is also undeniable that it is of tremendous importance for the applicant. Not only is it a question of the benefits of which the applicant was deprived because of his release due to unsuitability for further service, but

it is also a question of his reputation, the perception persons in his environment may have of him, as well as the consequences this decision may have on his own self-esteem.

[39] In such a context, I am of the opinion that the applicant was entitled to expect that the delegate of the Chief of the Defence Staff give him some basic explanations about why he refused to amend the reasons for his release from the Armed Forces. This does not mean that such decisions must have extensive reasons in which all the evidence submitted by an applicant is analyzed in detail. For the requirements of procedural fairness to be met in the specific context of this type of decision, a short explanation allowing the applicant to understand why his application was dismissed would be sufficient most of the time.

[40] For these reasons, I therefore find that the application for judicial review must be allowed. The *ex post facto* reasoning suggested by counsel for the respondent cannot be a substitute for reasons and cannot remedy the deficiencies in the initial decision. Accordingly, the applicant's record must be returned to the Chief of the Defence Staff to be re-heard and decided on the basis of this order.

JUDGMENT

THIS COURT ORDERS that the application for judicial review is granted and that the applicant's file is referred back to the respondent for a fresh determination on the basis of these reasons. With costs.

"Yves de Montigny"
Judge

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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