Federal Court  Cour fédérale

Date: 20110309

Docket: T-1007-10

Citation: 2011 FC 275

Ottawa, Ontario, March 9, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

JUAN RAMON FERNANDEZ

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This case turns largely on whether the National Parole Board may question an offender about past conduct that could have, in theory at least, supported a prosecution for a criminal organization offence for which he was not charged. In the circumstances of this case, I conclude that such questioning is open to the Board. The Board ordered the applicant to be detained past his statutory release date until the expiry of the committal warrant. The Board's Appeal Division

affirmed that order. The applicant seeks judicial review of the Appeal Division decision. For the reasons that follow, the application is dismissed.

BACKGROUND:

[2] The applicant is a citizen of Spain, born on December 23, 1956. He came to Canada as a child and has since had a long history of conflicts with the law, beginning in adolescence. His adult criminal record starts in 1975 and has many entries including a conviction for manslaughter. As a result, he has spent much of his life in prison and has an extensive institutional record. The portions of that record entered as exhibits to the respondent's affidavit evidence indicate that the applicant has long been considered by the police and correctional authorities to be affiliated with organized crime.

[3] The applicant has been deported from this country twice and re-entered unlawfully. In September of 1995, while serving a sentence for the manslaughter offence and a subsequent conviction for possession of narcotics for the purpose of trafficking, he was ordered detained by the Board until warrant expiry on the ground that he was likely to commit another serious offence. In September 1998, he was convicted of conspiring, while in custody, with another inmate to import a narcotic.

[4] On July 8, 2004, the applicant pleaded guilty to a variety of offences that included: counselling an indictable offence (murder), conspiracy to commit an indictable offence (import cocaine), possession of a forged passport, possession of a stolen credit card, fraud over $5000 and illegal entry into Canada. He received a sentence of 12 years for the major offence; with the

sentences for the other offences to be served concurrently. Other charges were withdrawn. With credit for pre-sentence custody, he was committed to the penitentiary to serve 7 years, 8 months and 14 days. His statutory release date, calculated in accordance with s.127 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("CCRA"), was determined to be August 27, 2009. As of that date, while still serving the remainder of this sentence, he would have been entitled to be released and to remain at large under supervision subject to the suspension, cancellation or revocation of his release: CCRA ss.127 (7) and s.128.

[5] On December 2, 2008, and pursuant to CCRA para. 129 (2) (b) and ss.129 (3), the Correctional Service of Canada ("CSC" or "the Service") made a referral to the Board for a detention review on the ground that the Service was of the opinion that the applicant would commit a serious drug offence before the warrant expiry date. At the hearing on May 22, 2009, the Board dealt with both the detention review and the applicant's application for full parole so he could be deported to Spain. CSC recommended the applicant's detention and opposed parole on the ground that there was no viable plan for supervision as he could not be supervised if he were deported to Spain.

[6] The applicant had the assistance of a lawyer who made submissions at the conclusion of the hearing. A decision was rendered the same day ordering detention to warrant expiry and denying the application for parole.

[7] The applicant appealed the detention review decision to the Appeal Division. His lawyer submitted written representations on August 4, 2009. On August 19, 2009 the Appeal Division

affirmed the Board's decision. This application for judicial review was filed on June 24, 2010 following the unopposed grant of an extension of time.

[8] For the purposes of this application, the parties agreed that the decisions of the Board and the Appeal Division should be treated effectively as one decision. But, it is the decision of the Appeal Division that is before this Court for review.

DECISIONS UNDER REVIEW:

The Board's Decision – May 22 2009

[9] The Board focused on the likelihood of the commission of a serious drug offence before the expiration of the sentence. The following excerpt captures the essence of its decision:

> Having reviewed in detail the extent and nature of your offending involving a persistent pattern of drug offending over an extended period even while in custody, the sophistication of your entrenchment in the drug underworld and your continued ties with criminal associates and possible organized crime members, your chronic pattern of non-compliance even after being deported twice to your home country, your lack of insight and motivation for change and the absence of viable supervision programs to safely manage the high public safety concerns that you currently pose in the community, the Board has concluded that there are reasonable grounds to believe that you are likely to commit a serious drug offence before the expiration of your sentence according to law. As a result, the Board is ordering that you be detained until sentence expiry.

The Appeal Division Decision – August 19, 2009

[10] The Appeal Division considered the following issues: (1) the Board's duty to act fairly: reasonable apprehension of bias; (2) erroneous and incomplete information; and (3) the reasonableness of the decision. The Appeal Division found the applicant was treated fairly by the Board and found nothing in the decision which gave rise to a reasonable apprehension of bias. With respect to the grounds of erroneous and incomplete information and overall reasonableness, the

Appeal Division held that the Board's reasons were well supported and consistent with the criteria in the CCRA.

ISSUES:

[11] The grounds set out in the Notice of Application to this Court are that the Board erred in failing to observe natural justice by repeatedly questioning the applicant about his involvement in criminal organizations and erred in relying on inaccurate information provided by the CSC regarding the likelihood that the applicant would commit a serious drug offence prior to warrant expiry.

[12] In his affidavit evidence, the applicant also contends that the Board failed to comply with statutory time-limits in scheduling the hearing and rendering a decision. That issue was not raised in the applicant's Notice of Application and was not argued by his counsel at the hearing. Accordingly, I will not deal with that question here. In any case, having reviewed the respondent's evidence with respect to the steps taken and the statutory provisions I am satisfied that there was no breach of the time-lines for conducting the detention review.

[13] In my view, the issues are as follows:

i. Did the Board breach its duty of fairness to the applicant and did the Appeal Division err in finding there was no unfairness in the detention review hearing?

ii. Was the decision reasonable on all of the evidence?

LEGISLATIVE FRAMEWORK:

[14] I think it useful to review the legislation governing detention review proceedings prior to discussing the issues. As noted above, the applicant in this matter was entitled to statutory release in August 2009. "Statutory release" is defined in CCRA section 99 as release from imprisonment subject to supervision before the expiration of an offender's sentence to which an offender is entitled under section 127. Pursuant to subsection 127 (1), and subject to any other provision of the Act, an offender is entitled to be released on the date determined in accordance with the section and to remain at large until the expiration of the sentence. Until sentence expiry, the offender is subject to supervision and, pursuant to s. 133, any conditions prescribed by the regulations or imposed by the releasing authority, which, for the purpose of statutory release, is the Board.

[15] These provisions are contained in Part II of the CCRA which deals with Conditional Release, Detention and Long-Term Supervision. Sections 100 and 101 of the Act set out the purpose and principles of conditional release. The purpose is to contribute to the maintenance of a just, peaceful and safe society by decisions that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens. The paramount consideration in the determination of any case is the protection of society. Among other principles, the Board is to take into consideration all available and relevant information including the sentencing reasons and that provided by the correctional authorities and the offender.

[16] Sections 129 and 130 of the CCRA outline the procedure for a detention referral by the Service and review by the Board. The relevant provisions read as follows:

129. (1) Before the statutory	129. (1) Le commissaire fait

release date of an offender who is serving a sentence of two years or more that includes a sentence imposed for an offence set out in Schedule I or II or an offence set out in Schedule I or II that is punishable under section 130 of the *National Defence Act*, the Commissioner shall cause the offender's case to be reviewed by the Service.

étudier par le Service, préalablement à la date prévue pour la libération d'office, le cas de tout délinquant dont la peine d'emprisonnement d'au moins deux ans comprend une peine infligée pour une infraction visée à l'annexe I ou II ou mentionnée à l'une ou l'autre de celles-ci et qui est punissable en vertu de l'article 130 de la *Loi sur la défense nationale*.

(2) After the review of the case of an offender pursuant to subsection (1), and not later than six months before the statutory release date, the Service shall refer the case to the Board together with all the information that, in its opinion, is relevant to it, where the Service is of the opinion

(2) Au plus tard six mois avant la date prévue pour la libération d'office, le Service défère le cas à la Commission — et lui transmet tous les renseignements en sa possession et qui, à son avis, sont pertinents — s'il estime que :

[…]

(*b*) in the case of an offender serving a sentence that includes a sentence for an offence set out in Schedule II, that there are reasonable grounds to believe that the offender is likely to commit a serious drug offence before the expiration of the offender's sentence according to law.

[…]

b) dans le cas où l'infraction commise relève de l'annexe II, il y a des motifs raisonnables de croire que le délinquant commettra, avant l'expiration légale de sa peine, une infraction grave en matière de drogue.

[…]

130. (1) Where the case of an offender is referred to the Board by the Service pursuant to subsection 129(2) or referred to the Chairperson of the Board by the Commissioner pursuant to

130. (1) Sous réserve des paragraphes 129(5), (6) et (7), la Commission informe le détenu du renvoi et du prochain examen de son cas — déféré en application des paragraphes 129(2), (3) ou (3.1) — et

subsection 129(3) or (3.1), the Board shall, subject to subsections 129(5), (6) and (7), at the times and in the manner prescribed by the regulations, (*a*) inform the offender of the referral and review, and (*b*) review the case, and the Board shall cause all such inquiries to be conducted in connection with the review as it considers necessary.

procède, selon les modalités réglementaires, à cet examen ainsi qu'à toutes les enquêtes qu'elle juge nécessaires à cet égard.

[…]

[…]

(3) On completion of the review of the case of an offender referred to in subsection (1), the Board may order that the offender not be released from imprisonment before the expiration of the offender's sentence according to law, except as provided by subsection (5), where the Board is satisfied

(3) Au terme de l'examen, la Commission peut, par ordonnance, interdire la mise en liberté du délinquant avant l'expiration légale de sa peine autrement qu'en conformité avec le paragraphe (5) si elle est convaincue :

[…]

[…]

(*b*) in the case of an offender serving a sentence that includes a sentence for an offence set out in Schedule II, or for an offence set out in Schedule II that is punishable under section 130 of the *National Defence Act*, that the offender is likely, if released, to commit a serious drug offence before the expiration of the offender's sentence according to law,

b) dans le cas où la peine comprend une peine infligée pour une infraction visée à l'annexe II, ou qui y est mentionnée et qui est punissable en vertu de l'article 130 de la Loi sur la défense nationale, qu'il commettra, s'il est mis en liberté avant l'expiration légale de sa peine, une infraction désignée en matière de drogue;

(*c*) in the case of an offender whose case was referred to the

c) en cas de renvoi au titre du paragraphe 129(3) ou (3.1),

Chairperson of the Board pursuant to subsection 129(3) or (3.1), that the offender is likely, if released, to commit […] a serious drug offence before the expiration of the offender's sentence according to law.	qu'il commettra, s'il est mis en liberté avant l'expiration légale de sa peine, l'une ou l'autre de ces infractions.
[…]	[…]

[17] Section 131 of the CCRA provides for annual reviews of a decision to detain an offender during the period of statutory release. Section 132 sets out a non-exhaustive list of factors to be considered in recommending, determining or reviewing detention. These include a number of elements that would be relevant in assessing the likelihood of the commission of an offence causing the death of or serious harm to another person before the expiration of the offender's sentence or the commission of a sexual offence.

[18] Factors expressly relevant to the determination of whether it is likely that a serious drug offence would be committed by the offender if released are set out in subsection 132 (2):

(2) For the purposes of the review and determination of the case of an offender pursuant to section 129, 130 or 131, the Service, the Commissioner or the Board, as the case may be, shall take into consideration any factor that is relevant in determining the likelihood of the commission of a serious drug offence before the expiration of the offender's sentence according to law, including	(2) Le Service et le commissaire, dans le cadre des examens et renvois prévus à l'article 129, ainsi que la Commission, pour décider de l'ordonnance à rendre en vertu de l'article 130 ou 131, prennent en compte tous les facteurs utiles pour évaluer le risque que le délinquant commette, s'il est mis en liberté avant l'expiration légale de sa peine, une infraction grave en matière de drogue, notamment :

(*a*) a pattern of persistent involvement in drug-related crime established on the basis of any evidence, in particular,
(i) the number of drug-related offences committed by the offender,
(ii) the seriousness of the offence for which the sentence is being served,
(iii) the type and quantity of drugs involved in any offence committed by the offender,
(iv) reliable information demonstrating that the offender remains involved in drug-related activities, and
(v) a substantial degree of indifference on the part of the offender as to the consequences to other persons of the offender's behaviour;

a) une implication persistante dans des activités criminelles liées à la drogue, attestée par divers éléments, en particulier :
(i) le nombre de condamnations infligées au délinquant en relation avec la drogue,
(ii) la gravité de l'infraction pour laquelle il purge une peine d'emprisonnement,
(iii) les type et quantité de drogue en cause dans la perpétration de l'infraction pour laquelle le délinquant purge une peine d'emprisonnement ou de toute autre infraction antérieure,
(iv) l'existence de renseignements sûrs établissant que le délinquant est toujours impliqué dans des activités liées à la drogue,
(v) un degré élevé d'indifférence quant aux conséquences de ses actes pour autrui;

(*b*) medical, psychiatric or psychological evidence of such likelihood owing to a physical or mental illness or disorder of the offender;

b) les rapports de médecins, de psychiatres ou de psychologues indiquant que, par suite de maladie physique ou mentale ou de troubles mentaux, il présente un tel risque;

(*c*) reliable information compelling the conclusion that the offender is planning to commit a serious drug offence before the expiration of the offender's sentence according to law; and

c) l'existence de renseignements sûrs obligeant à conclure que le délinquant projette de commettre, avant l'expiration légale de sa peine, une infraction grave en matière de drogue

(*d*) the availability of supervision programs that would offer adequate protection

d) l'existence de programmes de surveillance qui protégeraient suffisamment le

to the public from the risk the offender might otherwise present until the expiration of the offender's sentence according to law.	public contre le risque que présenterait le délinquant jusqu'à l'expiration légale de sa peine.

ANALYSIS:

Standard of Review

[19] A standard of review analysis is not required where procedural fairness is in question. As discussed by Mr. David Philip Jones Q.C. in *Recent Developments in Administrative Law*, Canadian Bar Association, Ottawa, November 26, 2010, the proper approach is to ask whether the requirements of procedural fairness and natural justice in the particular circumstances have been met. The question is not whether the decision was "correct" but whether the procedure used was fair. Deference to the decision-maker is not at issue. See: *Ontario (Commissioner Provincial Police) v. MacDonald*, 2009 ONCA 805, 3 Admin L.R. (5th) 278 at para. 37 and *Bowater Mersey Paper Co. v. Communications, Energy and Paperworkers Union of Canada, Local 141*, 2010 NSCA 19, 3 Admin L.R. (5th) 261 at paras. 30-32.

[20] The parties agree that in so far as the issues in this case may concern questions of law, the standard should be correctness: *Tehrankari v. Canada (Correctional Service)* (2000), 188 F.T.R. 206, 38 C.R. (5th) 43; *Brown v. Canada (Attorney General)*, 2006 FC 463, 290 F.T.R. 143; *Russell v. Canada (Attorney General)*, 2006 FC 1209, 301 F.T.R. 95. I do not need to decide that question in this case. The courts have recognized that the Board and its Appeal Division have expertise in conditional release-related decisions. Hence, considerable deference should be given to their fact-finding and to their application of the governing statutes and regulations to those facts. The

reasonableness standard thus applies: *Cartier v. Canada (Attorney General)*, 2002 FCA 384, 300 N.R. 362; *Latham v. Canada*, 2006 FC 284, 288 F.T.R. 37 at paras. 6-8.

Did the Board breach its duty of fairness to the applicant?

[21] I think it useful to recall at the outset of discussing this issue that the hearing in this case had two purposes. One was to consider the CSC recommendation that the applicant be detained until warrant expiry and the other was to determine whether the applicant should be granted full parole for the purpose of deporting him back to his native Spain.

[22] Both of these purposes concerned the application of the Board's conditional release mandate and were subject to the broad statement of purpose and principles set out in sections 100 and 101 of the CCRA. Thus, the protection of society was the paramount consideration to be taken into account by the Board: *Cartier*, above, at paragraph 12. This was recognized by the Supreme Court of Canada in *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75, 132 D.L.R. (4th) 56, a case which dealt with a constitutional issue arising from a parole revocation decision. At paragraph 27, Justice Sopinka observed that in the risk assessment function of the Board, the factors that predominate are those that concern the protection of society.

[23] I do not accept the applicant's contention that the Board is not engaged in a risk assessment in the detention review context. There is no language in the CCRA to indicate that Parliament intended to exclude these considerations in giving the Board this mandate. By authorizing the Board to override statutory remission and order an offender's detention until the full expiry of the sentence

for a number of serious crimes, Parliament clearly intended the Board to assess the risk to society that may result from an offender's release: s.132 (2) (d).

[24] In carrying out its risk assessment function, the Board may take into account all available and relevant information, provided it has not been obtained improperly: s. 101; *Mooring*, above, at para. 27. It must act fairly and ensure that the information upon which it acts is reliable and persuasive. Should the institutional record contain erroneous information, it is open to the offender to challenge the accuracy of the information with the CSC, pursuant to the grievance procedure: *Latham*, above, at paras. 42, 43 and 53, or to challenge it before the Board.

[25] The Board may choose not to rely on information contained in the CSC files if it considers that it is inaccurate or unreliable. As the Federal Court of Appeal observed in *Zarzour v. Canada* (2000), 196 F.T.R. 320, 268 N.R. 235 at paragraph 38, "confronting the person primarily affected with the allegations made in his regard, and enabling him to comment on them and rebut them, is also a significant method of verification".

[26] The information the Board relies upon may include information about criminal charges that have not resulted in convictions: *Mooring*, above, at para. 26; *Prasad v. Canada (National Parole Board)* (1991), 51 F.T.R. 300, 5 Admin. L.R. (2d) 251; *Yussuf v. Canada (Attorney General)*, 2004 FC 907; *Lepage v. Canada (Attorney General)*, 2007 QCCA 567; *R. v. Antoine*, 2008 SKCA 25, 310 Sask. R. 246; *Normand v. Canada (National Parole Board)* (1996), 124 F.T.R. 114, 34 W.C.B. (2d) 173, citing at paragraph 24 several decisions denying *habeas corpus* applications on this ground, approved by the Supreme Court of Canada in *Martin v. Beaudry*, [1996] 1 S.C.R. 898.

[27] In this case, the applicant submits that the Board erred in directly questioning him with respect to conduct that did not result in criminal charges. In particular, he argues that the Board was in breach of the direction given by the Federal Court of Appeal in *Canada (Attorney General) v. Coscia*, 2005 FCA 132, [2006] 1 F.C.R. 430, in that it questioned him about actions that could support a charge of participation in the activities of a criminal organization contrary to section 467.11 of the *Criminal Code*, R.S., 1985, c. C-46.

[28] In support of this contention, the applicant points to a number of passages in the transcript of the hearing which refer to his involvement in criminal activities and association with members of organized crime groups. These are at pages 31, 32, 39, 40, 61, 68 and 69 where the applicant was closely questioned about events in his criminal history.

[29] At the opening of the hearing, a CSC representative advised the Board that the Service recommended that a detention order be issued as there was:

> [A]a pattern of drug offending in this case, coupled with traditional organized crime affiliation. Community supervision possibilities were investigated as an alternative to detention. However, from a supervision perspective, the offender's case would not be manageable in the community…all indications would suggest that the offender will return to the community and involve himself in further organized gang activity despite any level of supervision or structure imposed…Mr. Fernandez's association with criminal organizations is a significant factor elevating the danger and threats he possesses to the safety of the public… It is the position of the C.S.C. that Mr. Fernandez remains an unrepentant offender who has persistently returned to jurious [sic] drug offences, and in view of the total absence of any change in his criminal values, he meets the legal criteria to be detained...

[30] During the hearing, the applicant repeatedly denied being part of any criminal organization but acknowledged having sold drugs to members of biker gangs such as the Hells' Angels and having associated with recognized members of traditional organized crime in Montreal.

[31] The applicant was asked directly (at pages 34-35 of the transcript) whether he had ever hired someone to "eliminate someone else". He denied that and provided a convoluted explanation as to how he came to plead guilty to counselling the commission of a murder. The applicant had provided a loaded handgun to an undercover police informant to collect a debt. The informant turned the gun over to the police. At pages 39-40 of the transcript, the applicant explains to the Board that he provided the handgun to collect some $700,000 that "belonged to two friends of ours".

> Q. who is the victim of the murder investigation?
> A. Um, Constantin Alevizos? Constantin Alevizos.
> …
> Q. Yes. So he's the same person that you are alleged to have wanted to have killed?
> A. Yes, Miss.
> Q. So, and, and you're denying any, anything…
> A. I'll explain how it led to this situation.
> Q. Okay, mm-hmm.
> A. So Mr. Santos came to Toronto and this, and asked me for work….So I says do you want to collect? He says, well, yeah, but give me a gun and this and that. Gave him a gun and that. He was supposed to collect.
> …
> Q. who had the money?
> A. Was Alvarez.
> Q. Alevivos. Constantin?
> A. Yes.
> Q. And he owed that money to whom?
> A. He owed that money to certain people for the poker machines.
> Q. Without names, were they organized crime?
> A. The persons?
> Q. Yeah.
> A. Yes, Miss.

[32] It was reasonable for the Board to explore the circumstances in which the applicant had become involved in the commission of a serious crime in order to assess whether he would be likely to commit another serious crime prior to warrant expiry. The linkage of the prior offence to organized crime was relevant to that assessment as it provided information about the applicant's criminal associations. That information would assist the Board in determining whether he would be likely to re-associate with those persons. The applicant's involvement was not peripheral. He had supplied a handgun to collect a debt owing to persons involved in organized crime. That conduct was relevant to the Board's mandate. Indeed the Board is directed to consider the seriousness of the offence for which the sentence is being served: para. 132 (2) (a) (ii).

[33] In several other passages, Board members quote directly from certified transcripts of the reasons for the sentence that Mr. Justice Joseph F. Kenkel imposed on the applicant, on June 29, 2004, and from the transcript of the hearing on July 8, 2004 where orders for the forfeiture of offence-related property seized from the applicant were imposed. The Board is required to consider such reasons: s.101 (b). In my view, Justice Kenkel's comments amply justified the Board's inquiry into the applicant's involvement in organized crime.

[34] At pages 31 and 32 of the Board hearing transcript, the Chair quotes from Justice Kenkel's oral reasons at the July 8, 2004 hearing:

> Q. Okay. So you came illegally undetected once. Then when you came back in June '01, it says that you were under constant surveillance from the time you….
> A. It's possible, yes, Miss.
> Q. …crossed into Canada. This when you were caught with a number of very expensive jewellery, and it says, "There is extensive evidence of his participation in organized crime, including large-scale fraud schemes," and referencing your calls during the course of that

> fraudulent scheme to jewellery stores and luxury brand names. And they give such names as Versace. So did, did you – is that all, is any of this true? [Emphasis added]
> …
>
> Q…and the court was satisfied that you were extensively involved, and later on, it talks about high level involvement in fraud and organized crimes activities?

[35] The underlined passage appears at pages 1 and 3 of the certified transcript of Justice Kenkel's reasons. At pages 7 and 8 of that transcript can be found the following comment from Justice Kenkel:

> The Crown points to a substantial body of evidence showing that the accused, as he was illegally at the time in Canada and subject to round the clock surveillance during the period of the offences, deriving his income from no legal source but was deriving substantial income through his participation in organized crime, in particular drug trafficking and large scale credit card fraud schemes…

[36] In the transcript of the sentencing hearing, Justice Kenkel notes that the accused admitted the facts as submitted by the Crown. He observes that the charges arose from a police investigation into organized crime and states:

> With respect to the offenses before this court, I take into account the circumstances of the offenses, as set out in the agreed statement of facts and supplementary materials referred to in court and admitted by the accused. I agree with the Federal Crown that the facts show that Mr. Fernandes [sic] was involved with organized criminal activity at a high level. He also dealt with organizations found to be criminal organizations in this contexts [sic] such as the Hells Angels for the purposes of drug trafficking. Even though the alleged importing conspiracy is a "dry conspiracy" in that no drugs were seized, it is plain that Mr. Fernandes' efforts were towards the importation of large amounts of cocaine for the purpose of trafficking, at a high level. His ability to illegally enter Canada, obtain numerous fraudulent identification documents to commit fraud on the scale indicated here again shows a level of marked sophistication in his criminal activity. I also agree with the Federal Crown that all of the evidence with respect to counseling to commit murder, the evidence of intimidation, as well as access to firearms, and the extensive involvement of Mr. Fernandes is [sic] organized crime plainly makes him a danger and a threat to the safety of the public. [Emphasis added]

[37] The underlined passages were quoted to the applicant in questions which appear at page 68 of the transcript:

> A. I'm not in organized crime.
> Q. I'll read you something from the courts. "I agree with the federal crown that" – this is the judge – "the facts show that Mr. Fernandez was involved in organized crime, criminal activity at a high level. He also dealt with organizations found to be criminal organizations of this context such as the Hells Angels for the purpose of drug trafficking, even though the alleged import…" and it goes on.
>
> …
>
> Q. And he went on to say that he also agreed that "The evidence with respect to counseling to commit murder, the evidence of intimidation as well as access to firearms and the extensive involvement in organized crime plainly makes you a danger and a threat to the safety of the public." So this is, this is not the police. This is not a social worker. This is the judge when he sentenced you.

[38] I note that in closing submissions at the Board hearing, the applicant's assistant, a lawyer, suggested that the applicant's links to organized crime went back to the '70s and '80s and that now, "all of the players are in custody", implying that the applicant could no longer associate with them. Justice Kenkel found that the applicant continued his involvement with organized crime following his return to this country in 2001. This was clearly relevant territory for the Board to explore. The applicant's criminal history covered a wide range of offences. In assessing whether the applicant was likely to commit a serious drug offence if released, it was not unfair for the Board to consider his entire history.

[39] The applicant submits that the Board was also in breach of the direction given in *Coscia* by raising allegations of crimes for which he had not been charged or convicted: drug importation and jury tampering.

[40] The applicant was questioned closely about his involvement in drug crimes. He admitted his involvement in the purchase and sale of illicit drugs but vehemently denied being directly involved in their importation. This was splitting hairs. He had entered a plea of guilty to the charge of conspiring to import cocaine in 2004. The applicant conceded that drugs he admitted selling, such as cocaine, were imported. When pressed at the hearing, he also acknowledged having been convicted of conspiring during an earlier incarceration to have a fellow inmate's grandmother import hash oil from Jamaica. I see no unfairness in the Board's questioning of the applicant about these matters.

[41] Counsel submits that the applicant was also unfairly questioned about jury tampering. This was, I believe, a reference to a brief exchange that appears at page 67 of the transcript. The applicant was questioned regarding allegations of witness tampering:

> Q. Just one quick question. Did you tamper with the witnesses while…
> A. No, there was no tampering.
> Q. So, I know that there was a charge at one point, and it was…
>
> A. No, I never. I don't even know that char – they never even gave me disclosure on that.
> Q. So you didn't do that?
> A. No.

[42] The appraisal prepared by CSC officials to support the recommendation for detention indicates that the applicant was detained in provincial custody for a prolonged period following his sentencing by Justice Kenkel. This was to deal with obstruction of justice charges before he was transferred to the penitentiary. The Crown Attorney's office advised CSC that the charges were ultimately withdrawn because the applicant had already been sentenced to a significant period of

time and would likely have only received an additional term of imprisonment to run concurrently with the twelve years he received for the counselling offence.

[43] As these charges had been withdrawn prior to the hearing, the applicant was no longer in jeopardy of prosecution for the alleged offences when he was asked about them. Nor could the Crown have reinstituted the charges without facing an abuse of process argument. In any event, as I will discuss below, any information given by the applicant to the Board about these matters could not have been used against him as evidence in any subsequent trial for these or other offences. But the information that such charges had been laid against the applicant, and the circumstances in which they arose, was relevant to the Board's mandate to protect the public interest. In my view, there was no breach of fairness in asking him about them.

Is Coscia determinative of this proceeding?

[44] *Coscia*, above, arose out of a decision of the Board denying the respondent parole pursuant to s. 102 of the CCRA. The respondent had been released on day parole, but this parole was suspended as a result of a charge of uttering death threats for which he was subsequently convicted. At the hearing of his application for parole, the Board pursued a line of questions regarding the respondent's ties with organized crime. The respondent acknowledged having been involved with others in criminality, but disputed participation in traditional organized crime, i.e., the "Mafia". In its decision, the Board commented on the respondent's evasive answers regarding that involvement.

[45] On judicial review, the application judge found that the respondent was denied parole because of his involvement with traditional organized crime. He held that the Board and its Appeal Division had effectively found the respondent to be in fact, if not in law, a member of organized crime. This was a conclusion he considered could not be reached in the absence of a conviction for that offence under the *Criminal Code*. For this and other reasons, the decision of the Appeal Division was quashed and a new parole hearing was ordered to be held before a differently constituted Board.

[46] The Attorney General of Canada appealed the decision on the grounds that the applications judge applied the wrong standard of review and misconstrued the basis upon which early parole was denied by the Board. The majority in the Federal Court of Appeal agreed, at paragraph 28 of their reasons, that the judge had applied the wrong standard of review and misconstrued the reasons invoked by the board in support of this decision. However, the majority concluded, at paragraph 33 that "the Board committed a breach of procedural fairness by insisting on questions that had a double meaning, without appreciating or understanding the difficult position in which they put the respondent."

[47] The applicant in this matter relies on three paragraphs in which the majority in *Coscia* elaborated upon its concerns with respect to the Board's questioning of the respondent in that case:

> 34. In this respect, it is no justification for the Board to say that he was not concerned with the respondent being a member of organized crime in the legal sense. Accepting that the Board had no such concerns, **it remains that if one admits to being a member of or participating in a criminal organization, one is exposed both to a criminal code conviction and to being found to be a member of a criminal organization pursuant to the Directive. The Board had no power to grant immunity in this regard and did not purport to do so.**

> 35. Assuming that the applicant was or is a member of a criminal organization, as the Board believed, and recognizing that he has never been so found, under the criminal code nor pursuant to the Directive, **the Board's line of questions placed him in the very difficult position of responding to the satisfaction of the Board without providing a recorded commission that he was or is a member of or a participant in a criminal organization**. Both the respondent and his counsel attempted to draw this difficulty to the attention of the Board, but to no avail. The Board went on to find that the respondent's evasiveness in answering these questions was attributable to his failure to assume responsibility for his criminal behaviour.
>
> 36. While it is open to the Board to inquire into the respondent's relationships with (criminal) others who conspired with him to commit the offenses of which he was convicted (and indeed to inquire into any ongoing relation with like minded persons) **it should avoid the use of terms which, if acknowledged, can give rise to an admission that a criminal offense has been committed with respect to which no conviction has been obtained**, or at least be mindful of the difficulty which its choice of words can pose. [Emphasis added]

[48] From these and other portions of the reasons for judgment it is apparent that the Court of Appeal was concerned that the line of questioning placed the offender in some difficulty as the language used by the Board respecting organized crime was ambiguous. The Court of Appeal found that this difficulty was compounded by the Board when it went on to draw a negative inference from the respondent's denial of his involvement with the "Mafia" and criminal others.

[49] The Directive to which the Court of Appeal referred in these paragraphs is Commissioner's Directive 568-3. This Directive sets out the procedures for identifying an inmate as a member of a "criminal organization", defined as a group or association that is involved in ongoing illegal activities. In paragraph 20 of the version modified on July 11, 2008, it is stated that "[m]embership and Association with a criminal organization shall be considered a significant risk factor when

making any decision related to the offender." This is, as the respondent submits, a directive applicable to CSC and not to the Board.

[50] The applicant in this case had long been identified by the correctional authorities as an associate of persons who are or were members of criminal organizations. Indeed, the thrust of closing submissions by his lawyer at the Board hearing was to the effect that this factor should be discounted because those persons were all in jail. These associations have long had negative consequences for the applicant in his institutional career and have contributed to decisions affecting him by federal and provincial correctional officials regarding transfers and security levels. In any event, the applicant could not have been in any jeopardy of such a determination by reason of the questions put to him by the Board in 2009 because it had already been made many years before.

[51] The applicant submits that he was not prepared to deal with such matters at the hearing. However, as noted, his affiliations had been entered into his institutional record on many prior occasions and he was well acquainted with the effect they have had on his life in jail. At the Board hearing he disputed involvement in organized crime but acknowledged closely associating with persons who are members of such groups and having bought and sold drugs with some of them. It is clear that the applicant thinks that this line of questioning was unfair as he does not see himself as being a member of these organizations. During the hearing, he had the opportunity to contest the reliability of the information to which the Board referred. The fact that the result of the Board's assessment of all of the information before it was unfavourable to him does not make the procedure unfair: *Lepage*, above, at para. 40.

[52] In these proceedings, the respondent has asked the Court to consider the applicable law with respect to self-incrimination as well as the Board's legislative powers and legal duties. The respondent argues that there is no unfairness for the Board to question an offender about other criminal behaviour that has not resulted in convictions.

[53] It does not appear from the reasons for judgment in *Coscia* that the protections afforded against self-incrimination by the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act,* 1982, Being Schedule B to the Canada Act, 1982 (U.K.), 1982, c.11 (the "*Charter*") were cited by either party in their submissions to the Court of Appeal. They were in this case. These protections are set out in sections 11 (c) and 13 of the *Charter*.

[54] Section 11 (c) provides that any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence. Its application is limited to persons charged with public offences involving punitive sanctions, that is, criminal, quasi-criminal and regulatory offences: *Martineau v. Canada (Minister of National Revenue)*, 2004 SCC 81, [2004] 3 S.C.R. 737 at paras. 19 and 67. Proceedings of an administrative nature, such as those before the Board, are not penal in nature: *Martineau,* at paras. 22 – 23. In this case, the applicant could not have claimed the protection of section 11 (c) and refused to answer questions about his criminal activity which were not supported by a conviction: *Prasad,* above; *Giroux v. Canada (National Parole Board)* (1994), 89 F.T.R. 307, 51 A.C.W.S. (3d) 1057; *R. v. Davis* [1996] B.C.J. No. 2119 (B.C.S.C.) (QL). This is because, as Justice Donna McGillis discussed at paragraph 20 of *Giroux*, the applicant was not in any jeopardy with respect to potential criminal charges in the detention review before the Board.

[55] These proceedings are administrative in nature and, in conducting the review, the Board is required to consider any factor relevant to the determination of the likelihood of the commission of a serious drug offence. As in *Giroux*, the information respecting criminal offences alleged to have been committed by the applicant was a highly relevant factor to be considered by the Board regardless of whether he had been convicted of those offences: see also *Mooring, Prasad, Yussuf, Lepage, Antoine* and *Normand* cited above.

[56] To the extent that an offender requires protection against the use of any potentially incriminating evidence he may provide during a Board hearing in subsequent criminal proceedings that protection is afforded by section 13 of the *Charter*. Section 13 compels the testimony of all witnesses, generally, except an accused charged before a criminal court. It provides the witness with "subsequent use immunity" at other proceedings. It states:

> A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

[57] It is well-settled that section 13 of the *Charter* prevents the use of any testimony obtained at an administrative hearing or other civil proceeding as evidence in subsequent penal proceedings against offenders, except for perjury or for giving contradictory evidence: *R. v. Carlson* (1984), 47 C.R. (3d) 46 (B.C.S.C.); *R. v. Tyhurst*, [1993] B.C.J. No. 2615 (B.C.S.C) (QL); *R. v. Sicurella* (1997), 120 C.C.C. (3d) 403, 47 C.R.R. (2d) 317 at paras.47-49 (O.C.J.); *Donald v. Law Society of British Columbia* (1984), 48 B.C.L.R. 210, 2 D.L.R. (4th) 385 (B.C.C.A.); *Gillis v. Eagleson* (1995), 23 O.R. (3d) 164 at p. 167, 37 C.P.C. (3d) 252 (Gen. Div.); *Royal Trust Corp. of Canada v.*

Fisherman (2000), 49 O.R. (3d) 187 (S.C.J.). The applicant could not be prosecuted for perjury or for giving contradictory evidence as the information he provided was not under oath before a court.

[58] In addition to the express protection afforded by s. 13, section 7 of the *Charter* has been held to provide witnesses with "derivative use immunity". Derivative use immunity protects against the use of any evidence obtained as a result of compelled testimony. This is part of the right against self-incrimination: *R .v S. (R.J.)*, [1995] 1 S.C.R. 451; *British Columbia (Securities Commission) v. Branch*, [1995] 2 S.C.R. 3 at p. 14, 123 D.L.R. (4th) 462. While the applicant was not under oath at the hearing and was not before a court, the circumstances under which the hearing was conducted effectively compelled him to answer the Board's questions. The information he provided was not volunteered and, in my view, could not be used by the authorities to uncover other inculpatory evidence to be used against him in a subsequent criminal proceeding.

[59] In other words, any admission that the applicant may have made in these proceedings about his involvement in criminal organizations could not have been used against him as evidence in any prosecution for the offence of participation in a criminal organization or any other substantive offence of which he may be suspected.

[60] The decision whether or not to charge the applicant with the offence of participation in a criminal organization rested with the police and Crown Attorneys. They had that opportunity when the applicant was arrested in 2003 and chose not to exercise it for reasons that are unknown to this Court and are not, in any case, material. The enforcement authorities could not now revisit that decision on the basis of anything learned from the offender during his detention review hearing. As

discussed above, they could not re-open the plea arrangements that were entered into between the Crown and the applicant, and approved by the Ontario Superior Court, that led to the withdrawal of charges at the time of his plea. No unfairness relating to possible jeopardy resulted from asking the offender about these matters in 2009.

[61] In reaching this conclusion, I am mindful that the principle of *stare decisis* dictates that a court is normally bound to follow any case decided by a court above it in the hierarchy. This is to ensure certainty, predictability and consistency in the law: *Segnitz v. Royal & Sun Alliance Co. of Canada* (2005), 76 O.R. (3d) 161, 255 D.L.R. (4^{th}) 633 (O.C.A.). However, *stare decisis* is no longer as rigid as it formerly was: *Lefebvre c. Québec (Commission des Affaires Sociales)* [1991] R.J.Q. 1864, 39 Q.A.C. 206 (Q.C.A.). Inferior courts are not bound by propositions of law incorporated into the *ratio decidendi* of a higher court's decision which had merely been assumed to be correct without argument. This also applies to expressions of opinion that do not form part of the *ratio*: *Baker v. The Queen*, [1975] A.C. 774, [1975] 3 All ER 55; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609 at para. 57.

[62] In my view, the comments of the majority of the Federal Court of Appeal at paragraphs 34-36 of *Coscia* were not intended to set down a binding proposition of law but were rather offered as words of guidance to the Board to assist it to avoid entering into confusing ambiguity that would deny an applicant the right to a fair hearing. Those remarks were intended to be helpful but do not form part of the *ratio decidendi* of the decision. The *ratio* in *Coscia* turned on the particular facts of that case.

[63] The offender in *Coscia* was attempting to regain conditional release. In doing so, he denied the implication that he was in some way associated with traditional organized crime. The Board, in attempting to elicit answers from him about his criminal behaviour, did not allow him to explain the distinction he wished to make. At paragraph 35, the Court of Appeal notes that counsel attempted to draw the Board's attention to this without success. In the result, the majority found that the respondent was denied a fair hearing. In the instant case, the applicant was given several opportunities to deny any association with organized crime and explain his criminal history.

[64] There appears to have been no submissions to the Federal Court of Appeal in *Coscia* similar to those which have been presented to this Court with respect to the application of the protections against self-incrimination or discussion of the principles respecting plea negotiations and abuse of process that would prevent an offender being placed in jeopardy by reason of the Board's questions. Accordingly, I do not consider the views expressed in paragraphs 34-36 of *Coscia* to be dispositive of this case.

[65] I note that in *Allaire v. Canada (Attorney General)* 2010 FC 132, my colleague Justice Michel Shore observed that *Coscia* placed the Board in a very difficult position with respect to the nature and scope of questioning available to it. Nonetheless, he considered himself bound by the cited passages. Having read my colleague's reasons closely, it does not appear that the considerations I have discussed above were argued before him. For that reason, judicial comity does not compel me to reach a similar conclusion. I agree, however, with his observations about the difficulties that would flow from a too rigid interpretation of *Coscia*. In this case, for example, it might have prevented the Board from inquiring into matters that go directly to the heart of the

offender's criminal history and the risk he presents to society. That cannot have been the Court of Appeal's intention.

Was the decision to detain until warrant expiry reasonable?

[66] The applicant submits that the decision to order his continued detention is unreasonable because it was made without evidence. This assertion is based largely on a notation in the Assessment for Decision prepared by CSC officials which reads as follows:

> There is no concrete information compelling the conclusion that the offender is planning to commit a serious drug offense before the expiration of the offender's sentence according to law.

[67] This statement appears at page 9 of a 10 page appraisal and analysis of detention criteria. The document goes on to say:

> The subject's preventive security file continues to grow and contains a number of volumes. There is ongoing intelligence information implicating the subject in drug subculture activity, however, all of the information remains unsubstantiated to date.
>
> However, as already stated, there is no evidence that Fernandez has severed his association with Traditional Organized Crime. As serious drug offending characterized Fernandez's TOC involvement in the past, there is every likelihood that it will continue to flavour his activity in the future.

[68] The conclusion reached in this document was that there were reasonable grounds to believe that the offender was likely to commit a serious drug offence before the expiration of his sentence. As I read the assessment as a whole, while CSC officials may have lacked concrete evidence of a plan to commit a crime, they were convinced that the applicant would return to the serious drug offending that had characterized his behaviour following previous releases. This was, in part,

because of his continuing association with organized crime figures. That was relevant information for the Board to take into consideration.

[69] In argument, the respondent drew particular attention to the role illicit drugs played in the applicant's criminal history from 1978 to 2004, to the seriousness of his drug convictions, including: (i) possession for the purpose of trafficking (3kg of cocaine), (ii) conspiracy to import 8kg of hash oil into Canada, and (iii) conspiracy to import 1000kg of cocaine into Canada. His manslaughter conviction was related to drug trafficking. The respondent noted other relevant information such as: the applicant's acquittal in 1988 of charges of conspiracy to traffic in drugs; marijuana charges that were withdrawn in 2004; his reported indifference as to the consequences to others as a result of his criminal behaviour; the psychological evidence pointing to his "denial and minimization" of his conduct; and his criminal associations.

[70] Based on the evidence as a whole, and in light of the factors which the governing legislation requires to be taken into consideration, it cannot be said that the Board made an unreasonable finding in concluding that the applicant was likely to commit a serious drug offence prior to his warrant expiry date. The applicant's long history of criminality, much of which has involved trafficking in drugs, amply supported that conclusion.

[71] In the result, I am satisfied that the decision of the Appeal Division to uphold the Board's decision was reasonable and that the applicant was not denied procedural fairness by the manner in which he was questioned. This application will be dismissed. While the respondent has been

entirely successful, I do not think it appropriate to award costs in a matter arising from a detention decision.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed. No costs are awarded.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1007-10
STYLE OF CAUSE:	JUAN RAMON FERNANDEZ and THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 31, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	March 9, 2011

APPEARANCES:

John L. Hill Carmine T. Iacono	FOR THE APPLICANT
Philippe Alma Dominique Guimond	FOR THE RESPONDENT

SOLICITORS OF RECORD:

JOHN L. HILL Barrister & Solicitor Cobourg, Ontario	FOR THE APPLICANT
MYLES J. KIRVAN Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT