Federal Court  Cour fédérale

Date: 20140619

Docket: T-1377-13

Citation: 2014 FC 590

Ottawa, Ontario, June 19, 2014

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

JEFFREY KORN

Applicant

and

ATTORNEY GENERAL OF CANADA

Defendant

JUDGMENT AND REASONS

[1] This is a judicial review of a decision of the Appeal Division of the Parole Board of Canada (Appeal Division) which affirmed a decision of the Parole Board of Canada (PBC) to confirm the revocation of the applicant's full parole.

I. BACKGROUND

[2] The facts of this case are somewhat unusual because of the age of the original offence for which the applicant, Jeffrey Korn, is currently incarcerated. Mr. Korn was arrested in October 1971 and later convicted of importing/exporting 88 pounds of hashish. He was sentenced to seven years' imprisonment. In September 1972, he escaped and went unlawfully at large (UAL). He was not apprehended until September 1991, some 19 years later.

[3] Upon being apprehended, he was re-incarcerated, and another 4 months added to his sentence, to be served consecutively, for being UAL.

[4] It is at this point that it is relevant to mention that Mr. Korn is not a citizen of Canada. He is an American citizen. As a result of his criminal offence, there was an order for his deportation. When Mr. Korn was released on full parole on April 2, 1994, it was with the condition that he "reside at the CRC St-Léonard until the Deportation Order has been executed".

[5] To this point, the facts are not in dispute. However, going forward, the story becomes murky. For reasons that he has not explained, Mr. Korn did not wait to be deported by a Canadian immigration official. He went UAL again on the day of his release. He claims that, on that day, he left Canada in a car driven by his then girlfriend, Wendy Roberts. He claims that he did not stop to advise Canadian border officials when he left because "it was a dismal rainy day and [he] had the flu". He also claims that he mailed documents concerning his deportation to Canadian authorities.

[6] CRC St-Léonard did receive a telephone call that day from a man identifying himself as Mr. Korn advising that he was calling from Vermont. Correctional Service Canada (CSC) agents obtained an address and telephone number at a hotel in Stowe, Vermont (the Gable Inn) where Mr. Korn was apparently staying. CSC agents called the hotel in an attempt to reach Mr. Korn. Though they were not successful in speaking with him, those persons answering the telephone at the hotel did confirm that he was a resident there. Further, in May 1994, police in Montpelier, Vermont advised that Mr. Korn had been arrested for impaired driving and that he was a resident in Vermont.

[7] These indications were sufficient to satisfy CSC that Mr. Korn had in fact moved to Vermont. They decided that it was not necessary to follow up with an arrest warrant for Mr. Korn in Vermont, and on June 2, 1994, reported that Mr. Korn's deportation had been confirmed. CSC withdrew the warrant for the suspension of Mr. Korn's full parole which had been issued following Mr. Korn's disappearance.

[8] Despite CSC's withdrawal of the suspension of Mr. Korn's full parole, the PBC (under its former name, National Parole Board) decided on June 28, 1994 to revoke his full parole. This resulted in the issuance of an arrest warrant on June 30, 1994.

[9] The next major development in this case was the arrest of Mr. Korn in December 2012 (more than 18 years after his second disappearance) in Westmount, Quebec where he had been living with his common law spouse and two daughters, born in 2001 and 2003. Mr. Korn claims that he returned to Canada in 1998.

[10] A post-suspension assessment dated December 31, 2012 found Mr. Korn to be a low risk to reoffend and recommended the cancellation of the decision to revoke his parole "so that his deportation from Canada can be officially implemented".

[11] The PBC noted this recommendation but was concerned with a number of issues, including:

a) Serious doubt as to whether Mr. Korn ever left Canada in 1994 as he claimed;

b) Mr. Korn's disrespect for Canadian laws, and minimization of his previous offences;

c) The lack of information concerning Mr. Korn's activities and means of supporting himself since 1994; and

d) The deferral of Mr. Korn's deportation such that he would not be immediately deported upon being granted full parole, and would spend at least part of his time on parole in Canada.

[12] The PBC was highly concerned that, if given full parole, Mr. Korn would once again go UAL. Therefore, the PBC decided on March 21, 2013 to confirm the revocation of his parole. This decision was affirmed by the Appeal Division on July 10, 2013.

II. STANDARD OF REVIEW

[13] Although, in theory, this is a judicial review of the decision of the Appeal Division, since that decision affirmed the decision of the PBC, I am actually required ultimately to ensure that

the PBC's decision is lawful (*Cartier v Canada (Attorney General)*, (CA) [2003] 2 FC 317 at para 10, [2002] FCJ No 1386 (QL); *Aney v Canada (Attorney General)*, 2005 FC 182 at para 29, [2005] FCJ No 228 (QL) [*Aney*]).

[14] I understand that, in light of the expertise of the PBC and the Appeal Division, I owe them a degree of deference (*Sychuk v Canada (Attorney General)*, 2009 FC 105 at para 45). In a case where parole is involved, the PBC's "decision must not be interfered with by this Court failing clear and unequivocal evidence that the decision is quite unfair and works a serious injustice on the inmate. **…**" (*Desjardins v Canada (National Parole Board)*, [1989] FCJ No. 910 (QL), 29 FCR 38 (FCTD), cited in *Aney*, above at para 31

[15] Pursuant to paragraph 107(1)(*b*) of the *Corrections and Conditional Release Act*, SC 1992, c 20 (CCRA), the PBC has absolute discretion to revoke the parole of an offender. Parole is a privilege and not a right. Of course, the PBC's discretion must be exercised reasonably and in accordance with the law.

[16] As stated by the Supreme Court of Canada in Mooring v Canada (National Parole Board), [1996] 1 SCR 75,

> 25 The [PBC] acts in neither a judicial nor a quasi-judicial manner …
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> 26 … [It] does not hear and assess evidence, but instead acts on information. [It] acts in an inquisitorial capacity without contending parties. …
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> 27 In the risk assessment function of the [PBC], the factors which predominate are those which concern the protection of society. …

> 36 In the parole context, the [PBC] must ensure that the information upon which it acts is reliable and persuasive. …

[17] The parties are in agreement that the standard of review in this case is reasonableness. As stated in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47-48, [2008] 1 SCR 190 [*Dunsmuir*]:

> [47] …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.
>
> [48] …What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" … We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision". …

[18] The Supreme Court of Canada also discussed the standard against which administrative decisions should be read in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*]. That case was an appeal by a union from a decision overturning a chambers judge's decision to set aside an

arbitrator's decision on the basis of insufficient reasons. The chambers' judge had set the arbitrator's decision aside on the basis that the reasons were insufficient, regardless of whether or not the outcome fell within a range of possible outcomes.

[19] Recapping the *Dunsmuir* decision, Justice Abella wrote:

> 12 It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:
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> > "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added]
> >
> > (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)
>
> See also David Mullan, "*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008), 21 C.J.A.L.P. 117, at p. 136; David Phillip Jones, Q.C., and Anne S. de Villars, Q.C., *Principles of Administrative Law* (5th ed. 2004), at p. 380; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para. 63.
>
> 13 This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility". To me, it represents a respectful

> appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist. That was the basis for this Court's new direction in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 SCR 227 where Dickson J. urged restraint in assessing the decisions of specialized administrative tribunals. This decision oriented the Court towards granting greater deference to tribunals, shown in *Dunsmuir's* conclusion that tribunals should "have a margin of appreciation within the range of acceptable and rational solutions" (para. 47).
>
> …
>
> 15 In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
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> 16 Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 SCR 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

III. ANALYSIS

[20] I understand that Mr. Korn's parole revocation is based on subsection 135(7) of the CCRA, which contemplates "an undue risk to society by reason of the offender reoffending before the expiration of the sentence". However, I have been shown no authority that breaching a

condition of parole, including going UAL, constitutes an offence. In fact, the various provisions of section 135 of the CCRA draw a clear distinction between the requirements for *suspending* parole and those for revoking or terminating parole. Revocation or termination of parole consistently requires at least a risk of reoffending, whereas parole can be suspended for simply breaching parole conditions. Moreover, the consequences of revocation of parole are considerably more serious than those for suspension of parole, especially for serious offenders. I conclude that the requirement of a risk of reoffending to justify parole revocation requires more than just a risk of breaching parole conditions. The revocation of Mr. Korn's parole cannot be based solely on a risk that he will go UAL again. The risk must concern an offence.

[21] Though the PBC was clearly concerned with the risk that Mr. Korn, if granted full parole, will go UAL once again, there is support for a related concern that Mr. Korn might go on to commit further offences. He was able to support himself through several decades of being UAL (much of that time under an assumed name) but was vague and inconsistent about his activities and financial resources during those periods. It seems clear that he lied about the death of his father, indicating in 1992 that his parents were deceased, and then in 2012 that his father died in 2011 leaving him an inheritance. It is difficult to imagine that one could make an honest mistake about the death of one's father. Mr. Korn has also repeatedly demonstrated disrespect for Canada's laws and rules imposed on him, and he has minimized his past offences.

[22] Though the PBC's reasons might have been clearer, I am satisfied that, applying the guidance of the Supreme Court of Canada in *Newfoundland Nurses*, I should not interfere with the PBC's decision.

[23] The PBC also referred to allegations from 1992 that, during his first stint being UAL, Mr. Korn was involved at a high level in a conspiracy to import 70 tons of hashish into Canada by boat. Mr. Korn's counsel points out that these allegations were put before the PBC back in 1993. The PBC did not take those allegations into account at the time on the basis that no charges had been filed in Canada. However, in its 2013 decision under review here, the PBC mentioned the allegations.

[24] Mr. Korn argues that these are old allegations and that it was arbitrary and unreasonable for the PBC to consider them all these years later. However, because of the inquisitorial nature of the PBC, and again in light of the teachings of *Newfoundland Nurses*, I defer to the view of the PBC that it was relevant to consider the allegations from 1992.

[25] In my view, the PBC is well-placed to determine the adequacy of information put before it, and it was reasonable for the PBC to make mention of these allegations in the context of concerns about Mr. Korn going UAL again, and the vague and inconsistent information provided by Mr. Korn concerning his activities and financial resources over the years.

[26] Mr. Korn criticizes the "speculation" by the PBC that he might never have left Canada in 1994 and might have gone UAL (the second time) in order to avoid being handed over to American authorities. The PBC discussed this as a possible explanation for Mr. Korn disappearing as he did. It should be noted that, though Mr. Korn provided an explanation as to why he did not stop in to see Canadian border authorities when he left Canada in 1994 (it was raining and he had the flu), he provided absolutely no explanation as to why he felt the need to

leave Canada without accompaniment by Canadian authorities in the first place. The PBC was drawing an inference from the facts before it. Whether or not this inference can be characterized as speculation, I find it to be reasonable.

[27] Mr. Korn argues that it was confirmed in 1994 after his second disappearance that he had in fact left Canada and was resident in Vermont, and that it is inappropriate to revisit that issue before the PBC in 2013. Indeed, CSC was clearly satisfied at the time that he had left Canada. However, subsequent information, including the fact that Mr. Korn was apprehended living in Canada, throw reasonable doubt on the whole story of Mr. Korn's departure. I do not accept that the PBC in 2013 was obliged to adopt the conclusion of the PBC in 1994. It is not inconceivable that Mr. Korn never left Canada.

[28] Mr. Korn also criticizes the PBC's refusal to consider his family status as a factor in his favour. He complains that the PBC "actually seems to acknowledge that 'having a spouse and children would normally be a protecting factor'", but gives no explanation for refusing to apply this principle in his favour. Again, I am of the view that, from a consideration of the facts put before it, it was open to the PBC to conclude that Mr. Korn's family status was no proof against his going UAL and reoffending.

IV. JUNE 28, 1994 DECISION REVOKING PAROLE

[29] Mr. Korn devotes some of his argument to challenging the fairness and reasonableness of the June 28, 1994 decision to revoke parole in the first place. There are at least two reasons that this argument cannot be successful.

[30] Firstly, that decision is not before this Court for review. Following the PBC's March 21, 2013 decision, Mr. Korn appealed both that decision and the June 28, 1994 decision. By letter dated May 10, 2013, the PBC advised Mr. Korn that it had received and accepted the appeal of the March 21, 2013 decision, but would not accept the appeal of the June 28, 1994 decision. The appeal was out of time because Mr. Korn had been aware of the revocation of his parole for quite some time: see Mr. Korn's submission on appeal of review decision, April 13, 2013, p. 7. The present application does not seek judicial review of the decision not to consider the appeal of the June 28, 1994 decision.

[31] The second reason that I need not consider a separate review of the June 28, 1994 revocation decision is that the March 21, 2013 decision currently under review was itself already a review of the revocation of parole. Mr. Korn has been heard on the relevant issues.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed with costs.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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