

Federal Court



Cour fédérale

Date: 20151222

Docket: T-2595-14

Citation: 2015 FC 1411

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, December 22, 2015

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

AHMED NAJAR

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant, Ahmed Najjar, is seeking judicial review of a decision of the Appeal Division of the Parole Board of Canada [Appeal Division] dated November 6, 2014, upholding the decision of the Parole Board of Canada [PBC] to revoke the applicant’s full parole. The applicant alleges that the PBC did not apply the case law concerning “reliable and persuasive” information and that it failed to consider all the information in his file.

[2] For the following reasons, I conclude that intervention by the Court is not warranted and that the application for judicial review should be dismissed.

I. Background

[3] Since May 8, 2008, the applicant has been serving a sentence of imprisonment of twelve years and eight months for manslaughter using a firearm, committed in 2007. The applicant was eligible for day parole on January 28, 2012, and full parole on July 28, 2012.

[4] On July 6, 2012, upon recommendation of his case management team [CMT], the applicant was granted day parole by the PBC subject to his complying with certain conditions, including (1) seeking or maintaining a job or continuing his education; (2) not consuming, purchasing or possessing drugs; and (3) not to associate with anyone he knows or has reason to believe is involved in criminal activity, or with a criminal record. The purpose of these special conditions was to control the causes of the applicant's criminal behaviour.

[5] The applicant started living in a half-way house on July 11, 2012. On November 23, 2012, a stay report was produced, indicating that the applicant was ready for full parole.

[6] The applicant therefore applied for full parole with the support of the Correctional Service of Canada [CSC]. His CMT's report on its assessment for decision for full parole found that the applicant presented a minimal risk as long as he did not consume narcotics and did not spend any time with questionable individuals.

[7] On March 4, 2013, the applicant appeared before the PBC concerning his application for full parole. Being of the opinion that the applicant would not, by reoffending before the expiration of his sentence according to law, present an undue risk to society and that his release would facilitate his reintegration into the community, the PBC granted the applicant full parole under the same conditions as those imposed for his day parole.

[8] On May 7, 2013, a warrant of apprehension and suspension of full parole was issued against the applicant on the basis of information received from the Service de police de la Ville de Montréal [SPVM]. According to this information, the applicant was the lead actor in a hip-hop video posted on YouTube on March 31, 2013, in which he appeared wearing a hood and identified himself as a street gang member; the video advocated violence, weapons, revenge and drugs. The video also included several photographs of the applicant in the presence of individuals with a criminal record.

[9] On May 16, 2013, the CMT conducted a post-suspension telephone interview with the applicant. He was informed of the nature of the information received from the police. The applicant denied any contact with criminals and stated that the lead actor in the video was his brother, who made hip-hop music. He further noted that the photographs in which he appeared in the video seemed to have been taken at his sister's wedding in June 2012, for which he had been granted an escorted temporary absence. He stated that he did not know the individuals photographed next to him; they were his brother's friends. He also stated that he spent all his time on his surveying studies and that he did not have time for such things.

[10] The CSC then met with the applicant's brother and sister. The brother confirmed, among other things, that he was the person wearing the hood in the video. The CSC therefore recontacted the SPVM, which maintained its conviction that the video showed the applicant and not his brother. The SPVM also stated that it was unable to link the applicant to any crime since his return to the community.

[11] The CSC assessed the applicant's file in light of this information. It determined that the applicant required a high level of intervention, that his accountability and motivation were low, that he was no longer receptive to or engaged in his correctional plan and that his reintegration potential was low. The CSC therefore recommended that the PBC revoke the applicant's full parole.

[12] On July 19, 2013, the PBC reviewed the applicant's file in his absence and issued a decision revoking his full parole. On April 10, 2014, the Appeal Division ordered a reconsideration on the ground that the PBC had not acted fairly or in accordance with the requirements of paragraph 101(a) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA], by not respecting the applicant's right to be heard and by making a written decision based on contradictions.

[13] Following that decision, the PBC ordered a hearing with the applicant present. A post-suspension hearing took place by videoconference on May 13, 2014, with the applicant and his assistant present. At that hearing, the PBC heard and questioned both the applicant and his parole

officer [PO] at the time of the suspension. It also allowed the applicant's assistant to make representations on behalf of his client.

II. The PBC decision

[14] In its decision dated May 15, 2014, and amended on May 16, 2014, the PBC first noted that the applicant had agreed to proceed despite the new information submitted at the beginning of the hearing by the PO assigned to supervising him in the community. This new information concerned the photographs taken at the wedding of the applicant's sister and showing him in the presence of a number of individuals linked to crime. The PBC also noted the applicant's explanation that he had attended this wedding under the escorted temporary absence program.

[15] The PBC reviewed the applicant's file, including the following factors: (1) the facts surrounding his conviction for manslaughter; (2) his juvenile and adult criminal history; (3) the main factors related to his criminal behaviour, including his association with delinquent peers, his [TRANSLATION] "influenceability", low self-esteem, substance abuse and idleness; (4) his 2008 and 2012 psychological assessments; (5) the applicant's compliance in prison, leading to his full parole in March 2013; (6) his cooperativeness and openness, and his commitment to his full-time studies in surveying and topography during his release; (7) the information provided by the SPVM to the applicant's CMT on May 7, 2013; (8) the applicant's denial of his participation in the video; (9) the statement by the applicant's brother that he was the lead actor in and director of the video; and (10) the steps taken to reconcile the representations and written statement submitted by the applicant with the contradictory statements obtained from the police and the applicant's CMT.

[16] The PBC noted that the applicant's case workers found that the information surrounding the applicant's suspension had considerably undermined the relationship of trust that had been established and that, had it not been for the intervention of the police, they would not have heard about the situation. In light of the police information it found to be credible, the applicant's CMT felt that it was possible that the applicant was concealing things and lacking transparency.

[17] The PBC also noted that, at the hearing, the applicant's PO stated that four SPVM officers had met with members of the street gang in question, who had confirmed that the singer in the video was the applicant, despite the fact that the singer in the video was wearing a hood.

[18] The PBC pointed out that as a result of the information obtained from the police, the applicant's CMT strongly suspected that the applicant was leading a double life. The applicant's CMT reiterated that, in the past, the applicant's association with criminals had substantially contributed to his criminal behaviour. The applicant's CMT was sufficiently concerned by the information provided by the police that it found that the risk presented by the applicant in the community had increased and was unacceptably high, leading it to recommend that the full parole previously granted to the applicant be revoked.

[19] Based on its analysis, the PBC concluded that the applicant's full parole should be revoked on the grounds that (1) the information obtained from reliable resources and according to which the applicant had participated in the video was [TRANSLATION] "reliable and persuasive"; (2) the applicant's participation in the video had resulted in a breach of the condition not to associate with criminals; (3) the applicant's lack of transparency cast doubt on

his compliance; and (4) the applicant needed a structured environment. The PBC found that the applicant's reoffending before the expiration of his sentence presented an undue risk to society.

[20] It did, however, set a date within four months of its decision in order to reassess the risk posed by the applicant under a suitable release measure given that there was no indication that the applicant had reoffended since his return to custody.

[21] On July 12, 2014, the applicant appealed the PBC's decision arguing that the PBC had not respected the Appeal Division's previous decision and that it had breached procedural fairness, and thus made an unreasonable decision.

III. Appeal Division's decision

[22] On November 6, 2014, the Appeal Division dismissed the applicant's appeal, thus confirming the PBC's decision.

[23] The Appeal Division began by reminding that its role was to ensure that the PBC complied with the CCRA and its policies, that it adhered to the rules of fundamental justice and that its decisions were based on relevant, reliable and persuasive information. It explained that it had jurisdiction to re-assess the issue of risk to reoffend and to substitute its discretion for that of the PBC, but only where it found that the decision was unreasonable and unsupported by the information available at the time the decision was made.

[24] Following this initial caution, it stated that it had examined the file and listened to the recording of the applicant's hearing. It further stated that it had considered the written grounds for appeal raised by counsel for the applicant.

[25] In its analysis of the grounds raised by the appellant, the Appeal Division pointed out that under subsection 135(5) of the CCRA, the PCB must determine whether it is satisfied that the offender will, by reoffending before the expiration of his or her sentence according to law, present an undue risk to society. The Appeal Division explained that the post-suspension decision-making process involves the consideration of relevant factors, such as the grounds for the suspension, the applicant's conduct since his last release, any comparison that could be drawn with previous patterns of criminal behaviour and the applicant's contributive risk factors.

[26] The Appeal Division gave an overview of the PBC's analysis and of its conclusions. It found that, contrary to the applicant's submissions, the PBC had based its decision on reliable and persuasive information. In this regard, the Appeal Division wrote as follows:

[TRANSLATION]

In its final analysis, the Board concluded that the information provided by the police was reliable and persuasive. The Board has discretion to determine the appropriate manner for verifying the reliability and persuasiveness of information supplied to it. In *Zarzour*, the Federal Court of Appeal stated that confronting the offender affected by the allegations made in his or her regard, and enabling the offender to comment on them and rebut them, is also a significant method of verification of the reliability and persuasiveness of the information. In your case, we find that the Board had enough information to do this. The information regarding your participation in a video and your contact with the street gang world comes from the police. The Board's reasons reveal that, after it obtained your version of the facts, the police

officer remained satisfied that you were the singer in the video and that you had reconnected with the street gang world. In addition, the Board noted that information that, according to you, could have validated your version of the facts was never submitted to your PO even though you insisted at the hearing that there is another version of the video that shows the hooded individual as being your brother and not you. It is our opinion that the Board's reasons reveal its analysis of the contradictory versions and the reason the Board found the information submitted by the police to be more credible. We therefore do not feel that it was unreasonable for the Board to conclude that you participated in the video, and find that this conclusion was based on reliable and persuasive information.

[27] The Appeal Division also determined that the conclusion to revoke full parole and the reasons to review the applicant's file for a risk assessment within four months were not inconsistent. In the Appeal Division's opinion, it was not unreasonable for the PBC to conclude that the risk of reoffending was undue even though the applicant had shown signs of measurable and observable change before his reoffending.

[28] Noting that its role was not to reassess the risk presented by the applicant unless the decision was unreasonable and well supported, the Appeal Division concluded that the PBC's decision in this instance was reasonable, was based on relevant, reliable and persuasive information, and complied with the CCRA and PBC policies.

IV. Issues

[29] Having analyzed the parties' submissions, I find that the application raises the following issues:

- A. Is the application for judicial review moot, and if so, should the Court nonetheless exercise its discretion to dispose of the matter?

- B. What is the appropriate standard of review?

- C. Did the PBC's decision respect the principles of procedural fairness with respect to the applicant?

- D. Were the PBC's and the Appeal Division's decisions reasonable?

V. Legislative framework

[30] Conditional release is governed by Part II of the CCRA.

[31] Section 100 of the CCRA states that the purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens. In accordance with section 100.1, the protection of society is the paramount consideration for the PBC.

[32] In achieving the purpose of conditional release, the PBC is guided by the principles set out in section 101 of the CCRA. Among other things, the PBC takes into consideration all relevant available information, including the stated reasons and recommendations of the sentencing judge, the nature and gravity of the offence, the degree of responsibility of the

offender, information from the trial or sentencing process and information obtained from victims, offenders and other components of the criminal justice system, including assessments provided by correctional authorities. It must also make decisions that are consistent with the protection of society and that are limited to only what is necessary and proportionate to the purpose of conditional release. Furthermore, offenders are provided with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release process.

[33] Pursuant to paragraph 107(1)(b) of the CCRA, the PBC has exclusive jurisdiction and absolute discretion to terminate or to revoke the parole of an offender. In accordance with subsection 135(1) of the CCRA, parole may be suspended “when an offender breaches a condition of parole” or when a member of the PBC “is satisfied that it is necessary and reasonable to suspend the parole . . . in order to prevent a breach of any condition thereof or to protect society”.

[34] The PBC then reviews the case and, within the period prescribed by the regulations, it may, in accordance with subsection 135(5) of the CCRA, cancel the suspension or revoke it in the event that it is satisfied that the offender will, by reoffending before the expiration of their sentence according to law, present an undue risk to society and if the undue risk is not due to circumstances beyond the offender’s control.

[35] Under subsection 147(1) an offender may appeal a decision of the PBC to the Appeal Division on the grounds listed there. The decisions that may be rendered by the Appeal Division are set out in subsection 147(4) of the CCRA.

VI. Analysis

A. *Mootness of the application for judicial review*

[36] The respondent established that, as previously mentioned, the applicant's case was reconsidered by the PBC within four months of the May 15, 2014, decision. On September 4, 2014, the applicant was denied the right to full or day parole. The PBC concluded that the risk of the applicant's reoffending before the expiration of his sentence according to law would present an undue risk to society, specifically because, since his recommitment to custody, the applicant (1) [TRANSLATION] "had maintained ties with inmate street gang members"; (2) [TRANSLATION] "had delayed the head count on two occasions in the company of other inmates identified as being linked to street gangs"; (3) [TRANSLATION] "had had to be met with to correct his work attitude"; (4) [TRANSLATION] "had tested positive for THC"; and (5) was still considered to be a street gang member.

[37] On March 6, 2015, the Appeal Division dismissed the appeal of this decision, and the applicant did not apply for judicial review of the Appeal Division's decision.

[38] Being of the opinion that no present live controversy exists which affects the rights of the parties because of the PBC's later decision to uphold the revocation, the respondent argued that the issue of whether the previous revocation was reasonable had become moot. The respondent further alleged that the application for judicial review would not have practical side effects on the rights of the parties and that it did not raise an issue of public importance to be disposed of. The respondent therefore invited the Court to consider the application for judicial review to be moot and not to exercise its discretion to dispose of the matter nonetheless, in accordance with the approach developed by the Supreme Court of Canada in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, at pp 353-354.

[39] I cannot agree with the respondent's argument. Even though the application for judicial review could be considered to be moot because of the later decision, I would nonetheless exercise my discretion to rule on the application. The initial revocation of full parole and the information underlying it will remain in the applicant's file. This information could be used by the CSC and the PBC in future assessments. In this respect, I agree with Justice de Montigny, in *Rootenberg v Canada (Attorney General)*, 2012 FC 1289, at para 25, [2012] FCJ No 1378 [*Rootenberg*], and I therefore find it appropriate for this Court to exercise its discretion to dispose of the matter.

B. *Applicable standard of review*

[40] In *Cartier v Canada (Attorney General of Canada)*, 2002 FCA 384, [2002] FCJ No 1386 [*Cartier*], the Federal Court of Appeal characterized the Appeal Division as a "hybrid", having both the characteristics of an appellate board and those of a reviewing tribunal. While the powers

exercised by the Appeal Division are closely associated with the jurisdiction exercised on appeal, the grounds for appeal, as enumerated in subsection 147(1) of the CCRA, are limited and more akin to those for judicial review.

[41] The case law of the Federal Court of Appeal and this Court has established that when sitting in judicial review of a decision of the Appeal Division confirming a decision of the PBC, the Court is ultimately required to ensure that the PBC's decision was lawful. The applicable standard of review is that of reasonableness, whether the Appeal Division sets aside or upholds the PBC's decision (*Cartier*, above, at paras 6 to 10; *Christie v Canada (Attorney General)*, 2013 FC 38 at para 31, [2013] FCJ No 163; *Rootenberg*, above, at paras 28 and 29). In accordance with the principles set out in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*], the review of whether a decision is reasonable 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.

[42] As for matters relating to procedural fairness, it is by now well established that they must be reviewed on a standard of correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502).

C. *Did the PBC's decision respect the principles of procedural fairness with respect to the applicant?*

[43] The applicant alleges that the PBC breached procedural fairness because it did not apply the case law concerning reliable and persuasive information, contrary to CCRA requirements. Generally speaking, he criticizes the PBC for not analyzing all the relevant information in the applicant's file, including the information obtained from the applicant and his family. He submits that the PBC should have provided reasons for its preference for one version over another and indicated how it intended to resolve the contradictory versions provided by the SPVM and the applicant. Regarding the Appeal Division's decision, the applicant alleges that the Appeal Division did not shed any light on the grounds for appeal raised, but merely stated that the PBC did not err.

[44] I do not find that the breaches the applicant alleges are issues that are reviewable by any other standard than that of reasonableness. The review and determination of the issues raised by the applicant raise questions of mixed fact and law, and consequently, I will examine these issues against the standard of reasonableness.

D. *Reasonableness of the decisions of the PBC and the Appeal Division*

[45] The PBC concluded, under subsection 135(5) of the CCRA, that the applicant's parole should be revoked on the ground that his reoffending before the expiration of his sentence according to law presents an undue risk to society.

[46] To arrive at this conclusion, the PBC considered a range of information, including information presented by the applicant, members of his circle, the applicant's PO and CMT, and SPVM officers.

[47] The PBC stated that, in his post-suspension interview, the applicant had denied the allegations against him. It also noted the applicant's statement that the video showed his brother and that he did not know the people in the photographs taken at his sister's wedding. It pointed out that several members of the applicant's family had come to formally confirm the applicant's statements, including his brother, who had stated in his written representations that he was the creator or director of the video.

[48] The PBC recognized that the written submissions made by the applicant and letters from certain members of the applicant's circle contradicted the statements obtained from the police and some of the statements made by the applicant's CMT.

[49] It pointed out, however, that the SPVM had been contacted again in response to information obtained by the applicant and that the SPVM remained convinced of the applicant's participation in the video and his ties to street gangs.

[50] The PBC also noted that, despite the applicant's statement that the video still existed, it was never shared, even though it could have exonerated the applicant.

[51] The applicant's lack of transparency, which the applicant admitted to his CMT by not informing his PO of the video's existence, was also noted by the PBC.

[52] At the end of its analysis of the case and the hearing, the PBC found that the information revealing that the applicant had participated in the video came from reliable sources, specifically police officers specialized in street gangs.

[53] It found that, in light of all these factors, there was reason to revoke the applicant's parole since his reoffending before the expiration of his sentence according to law presented an undue risk to society.

[54] The PBC was required to examine all the relevant information available and to ensure that the information on which it relied was reliable and persuasive. To assess the reliability of this information, it was open to the PBC to confront the applicant with the allegations made in his regard and to enable him to rebut them (*Zarzour v Canada*, [2000] FCJ No 2070 at para 38). It could also assess the testimony given by the applicant at the hearing.

[55] In the matter at bar, the applicant was informed of the allegations against him and was provided in advance with the relevant information on which the PBC relied in making its decision. He also had an opportunity to rebut this information, be it at the post-suspension interview, in his written submissions made prior to the hearing or at the hearing itself.

[56] Upon review of the case, I find that what the appellant is actually criticizing the PBC for is preferring the SPVM's version of the facts over his own. It is trite law, however, that, in judicial review, this Court cannot substitute its own assessment of the evidence for that of the lower tribunal (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339). In this case, it was the PBC's role to assess the evidence. The PBC considered the entire file and heard the applicant. It decided to give more weight to the information coming from the SPVM than to the applicant's version of the facts. It was open to the PBC to consider the information from the SPVM to be relevant, "reliable and persuasive". I do not believe that the PBC erred in its application of the "reliable and persuasive" test in its consideration of the information.

[57] The applicant alleged that the PBC's conclusion that his reoffending presented an undue risk to society was inconsistent with its decision to reassess the applicant's case within four months. I do not agree with this argument. The PBC noted in its decision that the applicant had been compliant during his time in prison and that he had made considerable and measurable progress before being granted parole. It further found that there was no indication that the applicant had reoffended and that he had been incarcerated for a year. In my opinion, its decision to review the applicant's case was not necessarily made to assess his risk of reoffending in order to grant him full parole, but rather to assess the risk the applicant presented under an [TRANSLATION] "appropriate release measure".

[58] Regarding the applicant's argument concerning the adequacy of the reasons, it is important to recall that the Supreme Court of Canada has clearly established that the adequacy of reasons is not an independent ground of review and that reasons must be read together with the outcome and "serve the purpose of showing whether the result falls within a range of possible outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14, [2011] 3 SCR 708).

[59] I find that the PBC's reasons were sufficiently detailed and intelligible. They allow me to understand why the PBC ruled as it did and to determine that its conclusion falls within the range of acceptable outcomes which are defensible in respect of the facts and the law, according to the *Dunsmuir* criteria.

[60] As for the Appeal Division's decision, the Appeal Division found that the applicant did not raise any reasons that could lead it to interfere and to amend the PBC's decision to revoke the applicant's full parole. Like the decision of the PBC, the decision of the Appeal Decision is understandable, contains sufficient reasons and falls within the range of acceptable outcomes which are defensible in respect of the facts and the law.

[61] For all these reasons, this application for judicial review is dismissed with costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed with costs.

“Sylvie E. Roussel”

Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT
SOLICITORS OF RECORD

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