Federal Court  Cour fédérale

Date: 20190404

Docket: T-1452-17

Citation: 2019 FC 403

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, April 4, 2019

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

GILLES DUNN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application for judicial review of a decision by the Appeal Division of the Parole Board of Canada (Appeal Division) dated February 9, 2017, dismissing Mr. Dunn's appeal and upholding the refusal of the Parole Board of Canada (Board) to grant him day parole or full parole.

[2] For the reasons stated below, the Court will allow Mr. Dunn's application. In short, the Court is satisfied that the Appeal Division's conclusion that the information related to the disappearance of an individual [TRANSLATION] "is not among the determinative factors" for the Board's decision is unreasonable. Given the facts of this case, this error is fatal, and the Court does not need to review the other grounds raised by Mr. Dunn.

II. BACKGROUND

[3] On January 30, 1981, Mr. Dunn was sentenced to life in prison with eligibility for parole set at 10 years after being convicted of second-degree murder. On May 16, 1990, he was granted full parole, but on September 20, 2007, his parole was suspended, and on February 13, 2008, it was revoked. Since 2008, the Board has been denying Mr. Dunn's day parole and full parole applications.

[4] On August 24, 2016, an Assessment for Decision (A4D) was drafted, which (1) noted that Mr. Dunn's refusal to cooperate remained very concerning and that Mr. Dunn had adopted the same conduct regarding the murder of which he had been convicted, which requires a great deal of caution and raises significant concern; (2) estimated the risk of violent re-offending to be moderate to high; and (3) accordingly, did not recommend any kind of release into the community.

[5] On October 6, 2016, the Board denied Mr. Dunn's application for day parole or full parole. The Board noted, among other things, Mr. Dunn's refusal to cooperate with a police investigation regarding the disappearance of a man (page 3 at para 7; page 5 at para 4; page 6 at

para 1). It assessed Mr. Dunn's risk of violent re-offending as being [TRANSLATION] "moderate to high" based on all the recognized actuarial scales and tools.

[6] On December 15, 2016, Mr. Dunn appealed the Board's decision to the Appeal Division. Mr. Dunn argued generally that the Board had relied on several erroneous facts, that it had not respected the principles of fundamental justice and that it had erred in law.

[7] More specifically, Mr. Dunn argued that, in mentioning his refusal to cooperate, the Board (1) had not ensured that the information it was relying on was reliable and persuasive, as required by *Mooring v Canada (National Parole Board),* [1996] 1 SCR 75; (2) had failed in its duty to act fairly; and (3) had completely infringed on his rights. In addition, he argued that he had always denied his involvement in the individual's disappearance, that he had no legal obligation to cooperate with the investigation and that he did not know the answers to the questions the authorities asked him on the subject.

[8] On February 9, 2017, the Appeal Division dismissed Mr. Dunn's appeal and upheld the Board's decision. That decision is the subject of this application.

[9] In relation to the weight that the Board attributed to the refusal to cooperate, the Appeal Division first stated that the Board had noted the concerns of the Case Management Team (CMT) regarding Mr. Dunn's refusal to answer questions about the disappearance of an individual and noted that this information was included in the Board's decision, but that it was not [TRANSLATION] "among the determinative factors". The Appeal Division noted that the

Board's written reasons indicated that the determinative factors were rather that (1) Mr. Dunn insisted on denying, minimizing and/or rationalizing his guilt, on fighting any intervention and any introspective work and on remaining closedminded; (2) he did not demonstrate sufficient observable and measurable change to reduce his risk of violent re-offending set at moderate to high; (3) his release plan was premature and did not take into account the required needs for improvement; and (4) he refused to cooperate with his CMT.

[10] Regarding the risk of re-offending, the Appeal Division determined that it was not unreasonable for the Board to conclude that Mr. Dunn had not demonstrated any change to reduce his risk of violent re-offending from moderate to high since he had not completed any programs and had not benefited from any interventions since his incarceration in 2008 (page 4 at last paragraph).

III. POSITION OF THE PARTIES

A. *Applicant's position*

[11] In support of his application, Mr. Dunn filed his own affidavit, signed on November 8, 2017, together with 15 exhibits.

[12] With respect to the standard of review, Mr. Dunn confirmed at the hearing that the Appeal Division's decision must be reviewed based on the reasonableness standard (*Dunsmuir v New-Brunswick*, 2008 SCC 9 at para 47).

[13] Mr. Dunn argues that the Appeal Division's decision to uphold the Board's decision is unreasonable given the weight attributed by the Board to his refusal to cooperate and the erroneous assessment of his risk of re-offending.

[14] Regarding his first argument, Mr. Dunn submits that the Appeal Division erred since his refusal to cooperate was a determinative factor in the Board's decision, given that (1) his full parole was revoked on that ground; (2) the Board referred to it in its 2009, 2011, 2012, 2014 and 2016 decisions; (3) he was questioned about it at the hearing before the Board; and (4) he is asked about it at every personal counselling session with workers. He adds that the Board cannot infer his involvement in the individual's disappearance from his refusal to cooperate with the investigation (*R v Noble*, [1997] 1 SCR 874 at paras 53, 72, 76, 84–85). The board wrote: [TRANSLATION] "you are considered the main witness in the disappearance of a person . . . . However, you are still refusing to cooperate with the police" (page 3 at para 7); [TRANSLATION] "you continue to deny your *involvement* in . . . the disappearance of an individual" (page 5 at para 4); [TRANSLATION] "your CMT is concerned about the fact that that you are still considered an important witness in the disappearance of an individual and about your refusal to cooperate with law enforcement" (page 6 at para 1).

[15] Mr. Dunn submits that, in attributing undue significance to this information, the Board infringes on his right to silence protected by section 7 of the Charter (*R v Hebert*, [1990] 2 SCR 151) and, since he remains in custody because of that information, he is subjected to cruel and unusual punishment in breach of section 12 of the Charter (*Steele v Mountain Institution*, [1990] 2 SCR 1385 at pp 1397 and 1416).

[16] Regarding his second argument, Mr. Dunn submits that the Board assessed his risk of re-offending incorrectly and that the Appeal Division erred in not concluding that that assessment was unreasonable. Mr. Dunn argues that the Board must take into account the five criteria from the *Decision-Making Policy Manual for Board Members*, section 2.1 [Policy Manual] in assessing the risk, namely, (1) actuarial measures of the risk to re-offend, (2) criminal, social and conditional release history, (3) factors affecting self-control, (4) responsivity to programming and interventions and (5) institutional and community behaviour.

B. *Respondent's position*

[17] The respondent is relying on the documents forwarded by the Board as evidence.

[18] The respondent argues that both the Appeal Division's and the Board's decisions are reasonable and that the Court should not intervene.

[19] With respect to the standard of review, the respondent submits that, in parole matters, although the decision under review is that of the Appeal Division, the Court must also assess the legality of the Board's decision (*Cartier v Canada (Attorney General)*, 2002 FCA 384 at para 10 [*Cartier*]; *Collins v Canada (Attorney General)*, 2014 FC 439 at para 36). The respondent argues that the reasonableness standard applies to issues relating to parole (*Prevost v Canada (Attorney General)*, 2015 FC 702 at para 36 [*Prevost*]).

[20] With respect to applicable law, the respondent notes that the protection of society is the paramount consideration in granting parole (section 100.1 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [the Act]; *Prevost* at paras 43–44).

[21] In response to the argument that the Board attributed disproportional importance to the police information that Mr. Dunn is a witness in the disappearance of an individual and that he refuses to cooperate, the respondent submits that there is no merit in that argument. In fact, it is reasonable for the Appeal Division to determine that that information is only one of many factors on which the Board based its decision. In addition, the presumption of innocence does not apply and it is for the applicant to prove his innocence (*Jaser v Canada (Attorney General)*, 2015 CF 4 at paras 50–53). Moreover, it is open to the Board to consider the refusal to cooperate since the applicant adopted the same behaviour regarding the murder of which he was convicted in 1981 (*Rudnicki v Canada (Attorney General)*, 2001 FCT 1321 at para 37). Thus, there is no breach of section 7 of the Charter. The respondent did not respond to the argument based on section 12.

[22] The respondent argues that the Board has taken into account many factors since the events that caused the revocation of Mr. Dunn's parole. Furthermore, the Court has previously determined that it was reasonable to find that an undue risk of re-offending existed in light of events dating more than 50 years back (*Fairfield v Canada (Parole Board)*, 2017 FC 836 at paras 53–57).

[23] In response to the applicant's other arguments regarding the assessment of the risk of re-offending, the respondent submits that that is a request for the Court to reassess the probative

value of each item, which is not its role (*Collins v Canada (Attorney General)*, 2014 FC 439, at para 48; *Larrivée v Canada (Attorney General)*, 2018 FC 539 at para 26). In addition, the Court must determine the reasonableness of the decision as a whole, and not waste time on [TRANSLATION] "micro-analyzing the words used" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708 at para 12; *Barrett v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1030 at para 54 [*Barrett*]).

IV. DISCUSSION

A. *Standard of review*

[24] In parole matters, the expertise of the Board and the Appeal Division warrants the use of the reasonableness standard to review their decisions (*Elliott v Canada (Attorney General)*, 2018 FC 673 at paras 13–15; *Barrett* at para 24). Accordingly, their decisions require the Court's deference (*Elliott* at para 14).

[25] Thus, the Court will need to determine whether the decision is justified, transparent and intelligible and whether it falls within a range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

B. *Issues*

[26] Based on the parties' representations and the facts at issue, the Court must determine (1) whether it is reasonable for the Appeal Division to conclude that the refusal to cooperate is not among the determinative factors for the Board's decision; (2) whether it may rule on the Charter

arguments; and (3) whether the conclusion on Mr. Dunn's risk of re-offending before the expiration of his sentence is reasonable.

[27] However, this matter may be disposed of on a single ground.

C. *The Appeal Division's conclusion is unreasonable*

[28] Indeed, it seems clear that Mr. Dunn's refusal to answer questions concerning an individual who has disappeared is one of the determinative factors in the Board's decision to deny parole. It is not the only factor, but it is a determinative factor.

[29] In fact, as stated by Mr. Dunn, (1) his full parole was revoked for that reason; (2) the Board refers to it in its 2009, 2011, 2012 and 2014 decisions; (3) he was questioned about it at the hearing before the Board; (4) he is asked about it at each personal counselling session with workers; (5) the August 2016 A4D mentions it in the second paragraph on page 3 and third paragraph on page 9; and (6) the Board's decision dated October 6, 2016, also deals with it (page 3 at para 7; page 5 at para 4; page 6 at para 1).

[30] Thus, in erroneously concluding that this factor was not among the determinative factors for the Board, the Appeal Division erred and also avoided analyzing its impact and analyzing Mr. Dunn's argument related to it. In light of the facts, the Court is satisfied that the Appeal Division's conclusion is unreasonable because it does not fall within the range of possible outcomes.

[31] The file will be referred back to the Appeal Division for redetermination in light of these reasons.

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THE COURT'S JUDGMENT is that:

1. The application is allowed;

2. The file is referred back to the Appeal Division for redetermination;

3. Costs are awarded to the applicant.

"Martine St-Louis"
Judge

Certified true translation
This 15th day of April 2019

Margarita Gorbounova, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1452-17
STYLE OF CAUSE:	GILLES DUNN V. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	MARCH 25, 2019
JUDGMENT AND REASONS:	ST-LOUIS J.
DATED:	APRIL 4, 2019

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