Federal Court Cour fédérale

Date: 20191107

Docket: T-2164-18

Citation: 2019 FC 1393

Ottawa, Ontario, November 7, 2019

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

OLDIN MALDONADO

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the Parole Board of Canada Appeal Division's decision to confirm the detention of Oldin Maldonado ("the Applicant") until the expiration of his sentence.

[2] For the reasons that follow, I find that the decision to order the continued detention of the Applicant was reasonable, and therefore this application is dismissed.

Preliminary Issues

[3] The style of cause is amended to be "Attorney General of Canada".

[4] There is new information included in the Applicant's affidavit that does not fall within the exceptions where new evidence may be considered on judicial review (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22). As discussed at the hearing, I will not rely on any new evidence.

II. Background

[5] The Applicant is a 37-year-old who was born in Belize and moved to Edmonton with his family when he was one year old. In 2009, while employed as a real estate agent, he committed a series of violent crimes against three females. He was sentenced to 10 years for convictions for sexual assault, sexual assault causing bodily harm, unlawful confinement, and uttering threats. He began his sentence in Bowden Institution in February 2012, and was transferred to Edmonton Maximum Institution in June 2017 following allegations of "muscling" other inmates.

[6] The Applicant's sentence expires on February 9, 2022, but his statutory release date was October 11, 2018. As his statutory release date approached, and based on a February 28, 2018 assessment, the Correctional Service of Canada ("CSC") recommended the Applicant be

detained until the expiration of his sentence. This recommendation by the CSC triggered a detention review by the Parole Board of Canada ("the Board") under section 130(1) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("the Act"). The Applicant submitted handwritten letters to the Board, disputing some of the descriptions of his institutional behaviour.

[7] Following a videoconference on July 26, 2018, the Board decided to detain the Applicant until the end of his sentence.

[8] Prior to the Board's hearing, the Applicant was asked by CSC to attend a psychological assessment which he refused. Instead, he hired a private psychological named Dr. Pugh. Dr. Pugh met with him for 5 hours and administered a number of tests and then produced a report dated June 12, 2018.

[9] As well as this private report, the CSC's assessments from throughout his incarceration were placed before the Board. Those included:

- a Psychiatric Report by Dr. Darlington dated May 15, 2012 from a file review;
- a Psychological/Psychiatric Assessment Report by psychologist Megan Ferronato dated December 2, 2015 after a clinical interview with the Applicant and file review; and
- the most recent Psychological/Psychiatric Assessment Report of January 17, 2018 by psychologist Alison Lewis after a private interview as well as a second meeting when the Applicant declined to participate in the assessment because he had hired Dr. Pugh to instead complete an independent assessment. The Applicant was told that without his participation in the 2018 CSC assessment, the report would be prepared based on a file

review, the earlier interview, and results from risk measurement tools that rely on static factors without an interview.

[10] In its decision, dated July 26, 2018, the Board considered these reports and the other evidence and found the Applicant was likely to commit an offence causing death or serious harm if released for several reasons listed below. This decision to continue to detain the Applicant meant the Board would next review the case no later than July 26, 2020.

[11] The Applicant appealed to the Appeal Division. He raised several grounds of appeal, including unfairness towards the Applicant's assistant, an inappropriate weighing of the psychological assessments, an error in finding the Applicant had not completed all recommended programming, and an error in finding persistent violence.

[12] On November 26, 2018, the Appeal Division issued a decision denying the Applicant's appeal and upholding the decision to detain the Applicant until his warrant expiry date. The Appeal Division found that the Board properly considered the relevant factors under the Act including the pattern of persistent violence and the Applicant's risk of re-offending.

[13] It is the Appeal Division's decision dated November 26, 2018 that is being judicially reviewed. The Applicant says the decision to detain was unreasonable, and he raises three specific errors discussed below.

III. Issues

[14] The issues are as follows:

A. Did the Board err in finding the Applicant had not completed his recommended programming?

B. Did the Board err in preferring conclusions of the CSC's psychological assessment over the Applicant's own assessment?

C. Did the Board err in treating the Applicant's institutional charges as an aggravating factor when the Applicant was not convicted on any of the charges?

IV. The Law

[15] Before considering the three alleged errors, it is helpful to explain the framework for the Act's statutory release decisions. Once the CSC decides that there are reasonable grounds to believe that an offender who was sentenced for an offence causing serious harm to another person "is likely to commit an offence causing death or serious harm to another person before the expiration of the offender's sentence according to law," the CSC shall refer the case to the Board (section 129(2)(a)(i)).

[16] The Board then conducts a detention review. The Board is to consider several factors listed in section 132(1), including whether there is "a pattern of persistent violent behaviour established on the basis of any evidence." The Board is to consider "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" (section 101(a)).

A. *Standard of Review*

[17] The parties agree that the alleged errors are findings of fact or matters of discretion, for which the standard of review is reasonableness. For the decision to be reasonable it must be justified, transparent, and intelligible and it must fall within the range of possible outcomes that are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[18] Since the Appeal Division affirmed the Board's decision to detain, I am judicially reviewing the Appeal Division's decision but I should also look to the reasonableness of the Board's underlying decision in this context (*Cartier v Canada (Attorney General)*, 2002 FCA 384 at para 10). The Board and the Appeal Division are to receive "considerable deference" in their conclusions related to release from custody *(Fernandez v Canada (Attorney General)*, 2011 FC 275 at para 20 [*Fernandez*]).

B. *The decisions*

[19] The factors that the Board relied upon in reaching the conclusion to not release the Applicant until the expiration of his sentence were:

- The number of violent offences: in addition to the three underlying sexual assaults, the Applicant had a prior conviction from 2008 for punching and kicking a contractor who was working on his sister's home after discovering the contractor put a lien on the home;
- The aggravating factors involved in the underlying offences including vulnerability of the victims, lengthy confinement in a small space, the random picking of the three victims, the use of gratuitous violence, threats, and the injuries suffered;
- Dr. Darlington's May 15, 2012 psychiatric risk assessment found it was "very clear" that the Applicant was a serial rapist. The assessment noted that the behaviour would have continued to escalate had he not been caught;
- The Board told the Applicant "Your risk to reoffend sexually is assessed high and you have not completed recommended programming";
- His reintegration potential was assessed as low;
- Within days of completing a violence prevention program in August 2016, he got in a fight in the weight pit, which was caught on video;
- On February 17, 2017, he punched someone in the prison courtyard;
- In May and June 2017, pornography was found in his cell, including a "concerning" sexual photograph of the Applicant and his girlfriend, possibly taken during a Private Family Visit;
- He continued to rationalize his behaviour;

- He had been transferred to maximum security due to violent institutional behaviour;
- The January 17, 2018 psychological/psychiatric assessment by Alison Lewis found the only way to guarantee public safety is to continue incarceration (the Applicant refused to meet with the psychiatrist so this 2018 assessment relies on information in the Applicant's file, including the 2012 and 2015 assessments);
- The February 28, 2018 CSC recommendation concluded that there were reasonable grounds to believe he would likely commit an offence causing serious harm;
- He displayed "superficial and often less than compelling and accountable" demeanour before the Board during the videoconference;

[20] Throughout its decision, the Board weighed these factors against factors put forth by the Applicant including his:

- justification for the fights;
- positive privately-obtained psychological assessment;
- four letters of support; and
- written submissions.

[21] Based on the pattern of violence, however, the Board found that there was a likelihood of the Applicant causing death or serious harm to another person before his sentence expired.

[22] The Appeal Division set out the different grounds of review, then turned to analyze the Board's duty to act fairly. The Appeal Division found the Applicant was not denied his right to

an assistant and was given proper disclosure of information. The Applicant has not challenged these fairness findings on this judicial review.

[23] The Appeal Division found the Board's conclusion was reasonable. The Board's finding of a pattern of persistent violence and the overall assessment of risk were reasonable. The Board properly considered the many relevant factors under the Act. Finally, the Board did not inappropriately consider an old psychological report, and it did not err in favouring the January 17, 2018 CSC psychological assessment over the June 12, 2018 private psychological assessment. Overall, the Appeal Division held that the Board's decision was "consistent with the law, respects Board policy, and is grounded in reliable, relevant and persuasive information" and therefore the detention decision was reasonable.

[24] I find that the decision was reasonable as the evidence the Board relied upon was reliable and the decision to detain the Applicant was defensible in respect of the facts and law for the reasons that follow.

[25] The Applicant agreed that I am to look at this decision in a holistic way and by not do a line by line review. But the Applicant argued that in this case the following three points are central to the decision so that makes them significant and so I should review these three arguments in detail.

V. Analysis

A. *Did the Board err in finding the Applicant had not completed his recommended programming?*

[26] The Applicant claims there was a reviewable error when the Board found the Applicant had not completed the recommended programming. The Applicant is relying upon page 4 of the Board's decision which said "Your risk to reoffend sexually is assessed high and you have not completed recommended programming." He argued that it is the CSC's fault he did not take the high intensity sex offender courses rather than the moderate intensity programming that he took. The CSC told him to take the moderate courses, even though he asked to take high intensity courses. Because of this the Applicant argued that the Board cannot now find that it is a negative factor that he did not take the high intensity courses when he could not take them.

[27] The Applicant took the National Moderate Intensity Sex Offender program from April to July 2015. The Applicant then completed a class from May to August 2016 consisting of 33 sessions entitled "Violence Prevention Program Moderate Intensity." Between these courses and others, he says he completed all the programming that was recommended to him.

[28] But this is a clear case of having to examine the rest of the decision rather than focusing on this single statement. The Board goes on, at page 6, to clarify its finding: "You would benefit from further psychiatric assessment related to sexual deviancy and from further sex offender programming." At page 9, the Board says "file information speaks to the benefits of further

psychiatric assessment related to sexual deviancy and gains that may be made if you were to participate in high intensity sex offender programming."

[29] These comments are all references to the January 2018 psychological assessment, cited at page 12 of the CSC recommendation to detain, that says:

> In summary, results of the current psychological risk assessment strongly suggest that **Mr. Maldonado would benefit from further psychiatric assessment related to sexual deviancy (phallometric testing, visual reaction time) and if deemed appropriate, from completing further sex offender programming, specifically a high intensity sex offender program.** This type of assessment is beyond the scope of the current evaluation however it could possibly be completed at the Regional Psychiatric Centre (RPC). Mr. Maldonado's future options may be more clear following completion of the above recommended specialized assessment.
>
> [Emphasis added]

[30] This is the context in which the Board described the Applicant's need for further programming. As such, a complete reading of the Board's judgment reveals that the Board did not make an error. The Board at page 5 notes that the Applicant had "completed all recommended programming to mitigate you risk; however, it appears to have had little impact" (*sic*). This was based on the February 28, 2018 CSC recommendation to detain, which says "MALDONADO has completed all recommended programming in order to mitigate his risk; however, it appears to have had little impact."

[31] The reason the Applicant did not yet participate in High Intensity Sex Offender training seems to be that his initial categorization was "moderate," and that program planning went forward without embracing the 2012 file assessment by Dr. Darlington which rated the Applicant

as a “high-intensity” sex offender. Thus why the Applicant took moderate intensity and not high intensity programming.

[32] The sex offender programming in July 2015 was followed by continued denials of the underlying facts. The August 2016 violence prevention programming was followed by fights, and the Applicant continued to engage in violent behaviour. Putting the statement about more programming being needed into this context, it becomes clear that the Applicant completed all the programming recommended *to him*, but more programming is still needed to address the continued sexual deviancy and aggressive behaviour to mitigate his risk to the public when released.

[33] The reasons are justifiable, transparent and intelligible.

B. *Did the Board err in preferring conclusions of the CSC’s psychological assessment over the Applicant’s own assessment?*

[34] The Applicant suggests the private 2018 assessment should have been given more weight than the 2012, 2015 and 2018 CSC assessments. At the judicial review hearing, the Applicant’s counsel said they are not asking for a re-weighing of the evidence but asking the Court to say it is unreasonable for the Board to prefer one report over another. The Applicant argues it was unreasonable for the Board to do so without giving reasons of why they preferred the CSC assessments over the private one. The Applicant found this especially unreasonable given that the private doctor spent 5 hours with him and did a number of tests. The Applicant argued: how

could it possibly be reasonable for the file-review-only CSC reports to be preferred over a recent in-person one?

[35] In considering this argument, I note that the CSC reports were not only after a file review (see paragraph 8 above).

[36] I cannot agree with the Applicant and can only interpret this argument as a request for re-weighing of evidence before the decision-maker. That is not an appropriate way for the Federal Court to approach a decision supported by ample evidence (*Hughes v Canada*, 2016 FCA 271 at paras 6–8).

[37] The Applicant also challenges the conclusions of the 2018 file assessment because it had to rely upon information from the 2012 assessment. He claims his private assessment from Dr. Pugh should have been relied upon, and he claims he did not participate in the CSC assessment because he wanted to avoid "repetition bias" if another internal report was created.

[38] This argument cannot succeed. Many of the 23 pages of the private report contain background information that is not helpful for the key issue on a statutory release decision: whether the Applicant is likely to commit an offence causing death or serious harm to another person before the expiration of the offender's sentence. His appearance, personal and family history, abuse history, educational background, and free time activities are covered in the private assessment but they do not influence the key findings of the decision. Nor has the Applicant argued about the superiority of the methodology of the tests, as he mainly focuses on the reality

that the private assessment is both more recent and relied upon in-person interview. In his hand-written appeal, he says the things that made the private assessment better were “he actually interviewed me for 5 hours” and “he conducted psychological tests”.

[39] When I review the decision to determine if it is reasonable, it is of note that the Applicant refused to participate in the second CSC psychological assessment. Instead he hired the private psychologist as he is allowed to do. The private assessment paints him in a more favourable light than any of the CSC assessments do. But he cannot not now argue that the CSC assessment without his participation is somehow lesser than the private assessment he did participate in, when it was his own doing that he did not participate in the most recent CSC assessment.

[40] The 2012 and 2015 CSC assessments that underpinned the 2018 CSC assessment were not as specious as the Applicant would suggest. The May 15, 2012 report by Dr. Darlington was an extensive review of the file including the Edmonton Police report. Dr. Darlington found it was “very clear” that the Applicant was a serial rapist. The report also observed an increase in severity of the act from event-to-event in the underlying 2009 sexual assaults.

[41] The December 2, 2015 Psychological Risk Assessment had an in-person clinical assessment and was not a paper review only. The Applicant took a personality evaluation which showed he presents himself in an overly positive light. That psychologist found a continued minimization of problems and canvassed risk factors for violent recidivism and found that the Applicant fell within a high-risk category.

[42] Next, the January 2018 report re-evaluated the 2015 report's documented risk factors if the Applicant were released in the community. The January 2018 assessment cites continued high scores on the professional guideline called the Risk for Sexual Violence Protocol, as well as other actuarial tools. The report concludes that there is a risk of serious harm, given the unprovoked brutal attacks, the Applicant's poor behavioural control, and his use of violence as instrument such as to force debt repayment.

[43] It is poignant to consider when assessing whether it was reasonable to choose the CSC reports over the private report, that the CSC reports are an assessment of the Applicant since his incarceration. These reports are a picture of the Applicant after extensive consultation with CSC staff and the Applicant's CSC file that records his interactions and behaviour over a long period of time. These reports observe and record his behaviour over the course of his years of incarceration in contrast with the private report snapshot of 5 hours.

[44] Importantly, the Board did not ignore the private assessment – it was expressly noted as a mitigating factor, and it was one of many pieces of evidence to weigh within the Certified Tribunal Record. The Board only has to consider the private assessment and is not required to accept Dr. Pugh's recommendations:

> As an independent tribunal, the Board is not legally obliged to conform its decisions to favourable recommendations, but rather, only to consider them. It may properly find greater weight in other considerations properly before it, such as the applicant's institutional behaviour. This Court is not entitled to usurp the Board's function.
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> *MacDonald v Canada (National Parole Board)*, [1986] 3 FC 157 (FCTD)

[45] As the Appeal Division told the Applicant, "it was within the Board's discretion to assign more weight to the report completed January 17, 2018 than to the private one that you commissioned." Deference is owed to this decision.

[46] The Applicant's other criticism of the Board's decision – that the Board somehow misinterpreted the 2018 CSC assessment – is an attempt to split hairs. The Applicant attempts to distinguish the CSC's 2018 language of "real possibility" of an offence causing serious harm from the Board's finding that the Applicant was not "manageable" in the community.

[47] In reality, as the Appeal Division notes, a psychological assessment is just one factor to be considered by the Board under section 132(1) of the Act in reaching the conclusion about "likelihood" of committing an offence causing serious harm, along with:

- *The number of offences*: There were three violent sexual assaults, three violent incidents in prison, and a May 2017 discovery of pornographic photos including one depicting violent sexual behaviour;
- *Seriousness of the underlying offences*: The Applicant used his fists and knees to strike three victims in the face and ribs. The evidence before the Board showed the victims' physical and mental injuries were severe;
- *Explicit threats of violence*: The Applicant told one of his victims "Just go with it, and I won't kill you";
- *Behaviour of a brutal nature*: The original sentence was for violent, graphic incidents, and the CSC's February 28, 2018 recommendation to detain found the Applicant's recent

institutional behaviour shows that the Applicant still "has had difficulty controlling both his violent and sexual impulses"; and

- *Substantial indifference as to the consequences to other persons*: The CSC recommendation noted that the Applicant "tends to minimize and excessively rationalize his behaviour, blaming his victims." The Board made a similar finding on the Applicant's conduct being superficial. He continued to take a "victim-stance" at the hearing.

[48] These considerations are all items that "shall" be considered by the Board under section 132(1), and here they reasonably factored into the decision to detain finding that the Applicant was likely to reoffend if released, along with the various psychological assessments which were addressed and reasonably weighed by the Board. As the Appeal Division reasonably noted, the entire list of the factors listed in section 132(1) does not need to be met to detain. The Board did not err in viewing the institutional charges as an aggravating factor.

C. *Did the Board err in treating the Applicant's institutional charges as an aggravating factor when the Applicant was not convicted on any of the charges?*

[49] The Applicant indicates that he was found not guilty on the institutional charges. Because of this the Applicant indicated the Board erred when they considered the charges and the facts around the incidents when doing his assessment.

[50] I cannot agree that the Board was in error in their treatment of the institutional charges and the actual behaviour related to the charges. Being found guilty of an institutional charge is not a requirement for the Board to consider the Applicant's behaviour when assessing whether it

is safe to release him on his statutory release date. The Board does not hear and assess evidence as a court would with a criminal charge. The Board acted on information that was submitted, and that information has to be reliable and persuasive (*Mooring v Canada (National Parole Board),* [1996] 1 SCR 75). The information cannot be inaccurate or unreliable (*Fernandez*, above, at para 25).

[51] There was reliable information before the Board that supported the finding that the institutional charges were an aggravating factor. The CSC assessment dated January 17, 2018 acknowledges that the Applicant was not convicted of the five serious institutional charges involving violence and pornography. It notes, however, that the Applicant's "involvement in subculture activity and elevation in violent behaviour at Bowden Institution… resulted in a security reclassification to maximum" in 2017. There is extensive documentation from 2012 to 2018 about the Applicant's ups and downs within the institution. He admits to possessing pornography, though he disputes the characterization of it. He also disputes the characterization of who started the fights.

[52] The Applicant has not shown that the information about his institutional behaviour was unreliable or irrelevant. In a June 27, 2017 correctional plan, the CSC staff member notes that he had discussed the goal of earning statutory release with the Applicant in 2016. The Applicant was told he would need to perform well in programming and avoid the prison subculture if he wanted to be released, and yet he engaged in at least two fights shortly after. Furthermore, the Board found the Applicant was "superficial" and not "accountable" at the hearing, which suggests his justifications for the violent incidents were not believable.

[53] It was reasonable to view the institutional charges as an aggravating factor. The Applicant's poor institutional behaviour supported the decision to detain due to likelihood of committing another offence causing serious harm, along with many other proper considerations under section 132(1) of the Act set out above. In light of this finding and the deference owed to the Board, it is clear that the Board and the Appeal Division made reasonable decisions.

VI. Conclusion

[54] The decision fell within a range of acceptable outcomes that are defensible in respect of the facts and law, and I will dismiss this application.

VII. Costs

[55] The Applicant sought costs under column 1 of the Tariff B fees and disbursements of $1586.92. The Respondent acknowledged the Applicant's bill of costs but sought a reduced amount under item 7 as well as not awarding GST on the fees. The Respondent did not seek costs.

[56] Given that the application is dismissed, there will be no costs ordered.

JUDGMENT IN T-2164-18

THIS COURT'S JUDGMENT is that:

1. The Style of Cause is amended to be "Attorney General of Canada" as the only Respondent;

2. The application is dismissed;

3. No costs are awarded.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2164-18
STYLE OF CAUSE:	OLDIN MALDONADO v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	OCTOBER 18, 2019
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	NOVEMBER 7, 2019

APPEARANCES:

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