Federal Court Cour fédérale

Date: 20230411

Docket: T-1078-20

Citation: 2023 FC 507

Ottawa, Ontario, April 11, 2023

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

CLINTON MAHONEY

Applicant

and

HIS MAJESTY THE KING AND PAROLE BOARD OF CANADA (APPEAL DIVISION) AND CORRECTIONAL SERVICE CANADA

Respondents

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Clinton Mahoney [Applicant], self-represented, seeks judicial review of the Parole Board of Canada [PBC] Appeal Division [AD] decision dated August 17, 2020 [Decision]. The AD affirmed the PBC's May 8, 2020 decision denying the Applicant both full and day parole.

[2] The Applicant requested many remedies, most of which are not available on judicial review. What does fall within this Court's jurisdiction is the Applicant's request that the underlying decision be set aside and sent back for redetermination.

[3] The application for judicial review is allowed. The AD unreasonably adopted a "2-year policy" as well as erroneous information about his manslaughter conviction in upholding the PBC's decision.

II. Preliminary Matter

[4] The Applicant has been aggressively seeking redress for various matters that are the subject of this judicial review application. Such conduct resulted in Justice Grammond's declaration that the Applicant is a vexatious litigant (*Mahoney v Canada*, 2020 FC 975 at para 45). However, this designation does not affect the present application. The Applicant also attempted to bring a mirror application before the Alberta Court of King's Bench (*R v Mahoney*, 2021 ABQB 118 at para 4). Finally, the Applicant brought a number of motions leading up to this matter, one of which sought to convert this proceeding to an action. That motion was denied.

III. Background

[5] The Applicant is a 30-year-old federal inmate serving a life sentence. He has a twin brother, two half-brothers, and a half-sister. The Applicant states that his childhood was normal and he maintains a close relationship with his mother and brothers. After his parents separated in the mid-1990s, the Applicant's mother was granted custody of him and his twin brother. He

spent much of his childhood in Brampton, Ontario, later moving to Edmonton, Alberta to live with his half-brother. The Applicant has a daughter and maintains regular communication with the child's mother. The Applicant hopes to be involved in his daughter's life.

[6] The Applicant's behavioural concerns surfaced at a young age. As a child, he was suspended numerous times for disrupting classrooms and assaulting students, teachers, and school administrators. As an adolescent, the Applicant struggled to maintain employment. The Applicant was diagnosed with some mental health issues but has done little to formally acknowledge or manage his mental health.

[7] The Applicant also spent time in youth facilities for various convictions, including "violent and acquisitive offences." Namely, the Applicant was convicted for assault involving a drug transaction. The Applicant attempted to leave without paying, resulting in a fight where the Applicant stabbed one of the individuals.

[8] In 2010, at just shy of 18 years of age, the Applicant committed two index offences within the span of a few days. The Applicant was arrested in November 2010 and has been in custody ever since. In March 2013, the Applicant was convicted of manslaughter and sentenced to 8 years and 10 months imprisonment. In February 2015, the Applicant was convicted of first-degree murder and sentenced to life. He became eligible for day parole in November 2018 and full parole in November 2020. Both index offences involved violence resulting in death.

[9] The manslaughter conviction was committed with an accomplice, where both parties entered the victim's vehicle under the guise of a drug transaction. A robbery commenced, a struggle ensued, the Applicant restrained the victim upon their attempt to leave the car, and the accomplice shot the victim in the head. The victim later died of their injuries. As for the murder conviction, the Applicant was one of six men who were enforcing a drug debt. The group broke into the victim's home and brought them to a rural area, where the victim suffered extensive violence. The Applicant strangled the victim, drove the group back to his home, and left the victim for dead. The coroner noted that strangulation was one of the five possible causes of death.

[10] The Statistical Information on Recidivism states that "two out of every three like offenders with similar characteristics will not commit an indictable offence within three years of release." However, the Applicant's Case Management Team [CMT] disagreed with this result, arguing for a higher risk of recidivism given the Applicant's violent indicators exhibited while in custody.

[11] The Applicant's CMT explained that he was able to maintain "periods of more compliant stability," demonstrating the Applicant's ability to stay away from violence and criminality. The Applicant's behaviour towards staff has also remained polite and appropriate.

[12] The Applicant's 2013 correctional plan describes him as exhibiting low "accountability", which "refers to the offender's ability to accept responsibility for past offending, to show empathy or remorse and to take the initiative to work toward change." The rating reflected the

Applicant's reluctance to discuss his level of responsibility for past offences. This is raised repeatedly over the years in the Applicant's correctional plans, psychological assessments, and in the underlying decisions. Based on the latest correctional plan, the Applicant's CMT found that the Applicant demonstrated little consideration of victim empathy and remorse. Throughout his custodial period, the Applicant continually refused counselling or mental health supports.

[13] In March 2020, the Applicant completed a psychological assessment. The results indicated a "MEDIUM risk of violent recidivism in correctional institutions and a MEDIUM-HIGH risk in the community." The main predisposing and precipitating factors behind the Applicant's criminality are his association with negative peers, difficulty in managing emotions, and crime for gain. The psychologist diagnosed the Applicant with antisocial personality disorder, which includes a "lack of compliance with ethical and law-abiding behaviour, egocentrism, a lack of consideration for others, along with dishonestly, irresponsibility, a tendency to be manipulative, or risk-taking."

[14] The Applicant completed some programming while in custody, hoping to better his life and prepare for a career. During his first year in custody in 2013, the Applicant completed the Violence Prevention Program – moderate intensity level with adequate participation. The Program Report noted that some of the Applicant's work was superficial in nature, and he did not identify any protective factors to assist him in making significant changes in his life.

[15] The Applicant submitted a parole application in November 2019. The Applicant applied for day parole with the hope that he would open a restaurant and build a brand promoting healthy

living habits in Edmonton. Should this plan be unsuccessful, the Applicant was confident in his ability to find a job.

[16] The PBC denied the Applicant both full and day parole. The PBC reasoned that, by reoffending, the Applicant would present an undue risk to society and his release would not contribute to the protection of society. The Applicant appealed the PBC decision to the AD.

IV. The Decision

[17] The AD rendered their decision on August 17, 2020, affirming the PBC's denial of both full and day parole. The AD described their role as follows:

> The role of the Appeal Division is to ensure that the law and the Board policies are respected, that the rules of fundamental justice are adhered to and that the Board's decisions are based upon relevant, reliable and persuasive information.
>
> The Appeal Division reviews the decision-making process to confirm that it was fair and that the procedural safeguards were respected.
>
> The Appeal Division has jurisdiction to re-assess the issue of risk to reoffend and to substitute its discretion for that of the original decision makers, but only where it finds that the decision was unfounded and unsupported by the information available at the time the decision was made.
>
> [Emphasis added.]

[18] In his application to the AD, the Applicant checked every ground of appeal available to him. The Applicant also raised a number of issues that were outside the AD's jurisdiction, particularly regarding the conduct of Correctional Service Canada [CSC].

[19] The Applicant's arguments, summarized by the AD, were as follows:

1. He never applied or intended to have a full parole hearing and asked that it be withdrawn;
2. He explained why he deserved parole;
    a. His penitentiary placement increased his potential risk to confrontations and negatively impacted his parole potential;
    b. The PBC falsely adopted the notion that he shot the victim during the robbery in regard to his manslaughter conviction;
    c. The PBC used his refusal to participate in counselling to demonstrate low accountability, remorse, and victim empathy; and
    d. The PBC deprived him of liberty and disregarded his rights; and
3. The AD should either withdraw the PBC's decision on full parole and grant day parole or order a new hearing, among further declarations and orders.

[20] The AD found that the Applicant did not raise any grounds that would cause it to intervene in the PBC's decision to deny the Applicant's day and full parole. Regarding the Applicant's first argument, the AD concluded that the hearing was scheduled in accordance with the *Corrections and Conditional Release Act,* SC 1992, c 20 [*CCRA*] and the *Corrections and Conditional Release Regulations*, SOR/92-620, and that the Applicant failed to withdraw his application in accordance with the relevant provisions.

[21] The AD acknowledged that paragraph 102(b) of the *CCRA* provides that the PBC may grant parole to an offender "if, in its opinion, the offender will not, by reoffending, present an

undue risk to society before the expiration of their sentence, and the release of the offender will contribute to the protection of society as a law-abiding citizen." The PBC also has their own policy manual, the Decision-Making Policy Manual for Board Members [Policy Manual], which guides Board members on reviewing and assessing relevant information for pre-release decision-making.

[22] The AD noted the Criminal Profile locked on May 14, 2015, relied on by the PBC, which indicated that the Applicant was the one who shot the victim in the head. The PBC also relied on additional file information concerning his negative behaviours as a young person and a young offender. The AD noted that the traditional rules of evidence do not apply given that the PBC is an administrative tribunal. Accordingly, the PBC was entitled to rely on this relevant, reliable, and persuasive information.

[23] The AD contended that the PBC properly explained the importance of working on risk factors and that the PBC's assessment was not based on the Applicant's penitentiary placement. However, the AD reiterated the PBC's explanation that the Applicant's file speaks to a number of institutional incidents and inappropriate and violent behaviours. The AD highlighted various factors considered in the PBC's risk assessment, including the Applicant's release plan, which was unstructured and insufficient to address the level support and intervention required. Ultimately, the AD found that the PBC conducted an adequate and fair risk assessment based on relevant, reliable, and persuasive information in accordance with the CCRA and the Policy Manual.

V. Issues and Standard of Review

[24] After considering the submissions of the parties and taking into account this Court's jurisdiction, the sole issue is whether the Decision is reasonable. The sub-issues are best characterized as:

1. Did the AD err in relying on erroneous findings of fact, namely:
    a. The "2-year policy"; and
    b. The notion that the Applicant was the shooter in regard to his manslaughter conviction?

[25] The Applicant initially advanced a procedural fairness argument in his Notice of Application, but failed to provide additional submissions in his Memorandum or during the hearing. The Court will not address this argument as it finds the Decision is unreasonable.

[26] The Applicant does not make submissions on the appropriate standard of review. The Respondent argues that the standard of review is that of reasonableness, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. I agree with the Respondent (*Vavilov* at paras 23, 25, 99; *Adams v Canada (Parole Board)*, 2022 FC 273).

[27] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). An administrative decision-maker's exercise of public power must be "justified, intelligible and transparent" (*Vavilov* at para 95).

VI. Analysis

(1) Applicant's Position

[28] In essence, the PBC's and the AD's reliance on erroneous information effectively tainted the parole process altogether. Namely, it tainted the view on the Applicant's risk to re-offend, his prospects to reintegrate into society, and the evidence in his favour.

(a) *The "2-year policy"*

[29] Following the Applicant's murder conviction in 2015, the CSC erroneously invoked and enforced a "2-year policy" or "lifer policy" [Two-Year Policy] despite its non-existence. The Two-Year Policy provided that offenders serving a life sentence required a structured environment and were therefore subject to a mandatory two-year placement in a maximum-security institution. The Two-Year Policy had detrimental effects on the Applicant. Most importantly, the Applicant was ineligible to apply for a lower security institution within these first two years. After this period, the burden was placed on him to justify a reduction in security reclassification. Under the guise of the Policy, the Applicant unlawfully remained entrapped in a hostile and volatile environment until May 2019. He was constantly placed in units with multiple gangs, which put him at a greater risk of conflict, The Two-Year Policy also resulted in involuntary transfers, placing the Applicant increasingly further away from his family in Edmonton. Lastly, the Policy contributed to the loss of potential employment, education, and the prospect of rejoining society in any capacity. In effect, it was counterintuitive to the Applicant's rehabilitative and re-integrative interests. Yet, the PBC used the Two-Year Policy to find that the

Applicant does not trust the CSC, externalizes blame, and has a tendency to minimize and rationalize criminal behaviours, which the AD accepted.

(b) *The manslaughter conviction*

[30] The Applicant was not found to have shot the victim in the head. This was an erroneous finding by the PBC, yet it was accepted by the AD. The PBC and the AD could have easily accessed the findings of fact made at trial in order to verify this information. The AD cannot, in good faith, find false information to be “reliable, relevant or persuasive.”

[31] It is a reviewable error for the AD to fail to mention material that is inconsistent with its conclusions (*Ali v Canada (Citizenship and Immigration)*, 2008 FC 448 at paras 33-34; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC 53 at para 17, [1998] FCJ No 1425).

(2) Respondent’s Position

[32] The PBC’s and AD’s decisions were reasonable, statutorily compliant, and procedurally fair.

[33] Sections 100 and 101 of the *CCRA* outline the purpose and principles guiding the PBC and the AD’s decision-making. The relevant principles for the present matter are as follows: parole boards consider all relevant and available information (s 101(a)); parole boards make the least restrictive determinations consistent with societal protection (s 101(c)); parole boards adopt

and are guided by policies (s 101(d)); and offenders are provided with relevant information, reasons, and access to the review of decisions to ensure fairness (s 101(e)).

[34] In light of these provisions, the PBC's decision is reasonable. The PBC took into account all of the relevant information and recommendations bearing on its decision. The PBC assessed the Applicant's history of violence and oppositional behaviour as a child, as an adolescent, as a young offender, and as a federal inmate. The PBC considered the Applicant's programming, including the corresponding Program Report, his psychological assessment, the circumstances of his convictions, his continued difficulty in dealing with highly emotional situations, and his CMT's recommendations. The PBC also found that the Applicant's risk of reoffending if released was not mitigated because he failed to sufficiently engage in his correctional plan. Based on the foregoing, the Decision was reasonable.

[35] It is conceded that the PBC accepted two pieces of erroneous information, being the Two-Year Policy and the circumstances surrounding the Applicant's manslaughter conviction. The Policy does not exist, and the trial judge found that the Applicant restrained the victim while his accomplice shot the victim in the head. However, this information was not determinative and the PBC's reliance on it does not render the decisions unfair. The PBC plays an inquisitorial role; its role is not to hear and assess evidence (*Mooring v Canada (National Parole Board),* [1996] 1 SCR 75 at paras 25-26, 132 DLR (4th) 56). In this regard, the PBC appropriately considered the Applicant's criminal history as well as the CSC's documents.

[36] Ultimately, the PBC was not required to go beyond the relevant information. Both the PBC's and the AD's decisions were fair, reasonable, and justified. While the PBC accepted two pieces of incorrect information, this was not central or significant to render the decisions unreasonable.

(3) Conclusion

[37] Although I do not accept most of the Applicant's submissions, I agree that the AD relied on erroneous information that is sufficiently serious to warrant granting this judicial review (*Vavilov* at paras 100, 125-26).

[38] Policy 2.1 of the Policy Manual states that Board members are to assess all relevant aspects of the case in accordance with Policy 1.1 to determine "whether or not the release of the offender will constitute an undue risk to society and contribute to the protection of society by facilitating the offender's reintegration into society as a law-abiding citizen." Here, there were two pieces of information that, if accurate, would have helped both the PBC and the AD assess the Applicant's case. As noted above, the Respondent concedes that both the PBC and the AD erred by relying on the Policy and the circumstances surrounding the Applicant's manslaughter conviction.

[39] First, there is no Policy. Beyond the Respondent's concession, the Applicant clearly establishes this with a grievance process with the CSC enclosed in his Applicant Record. In response to the Applicant's grievance, the CSC plainly identifies this error and its responsibility in rectifying it. The CSC states:

> In light of the above information, it has been determined that a second assessment for a penitentiary placement was inappropriately completed, that the timeframes, procedures and safeguards outlined in GL 710-2-3- were not followed when you were transferred to Saskatchewan Penitentiary in 2015, and that inaccurate information is recorded in the A4D… and accompanying decision… As such, this portion of your grievance is upheld.

[40] Both the PBC and the AD relied on the non-existent Policy in arriving at their respective decisions. The AD failed to thoroughly investigate the Applicant's concerns on appeal. Had it done so, the AD could have then considered the Applicant's submissions concerning the Two-Year Policy's impact on his negative behaviours.

[41] Similarly, the PBC and the AD erred in relying on the incorrect fact that the Applicant shot the victim in the head in his manslaughter conviction. Despite the Applicant's insistence that the information was incorrect, the AD failed to investigate the Applicant's submissions or remedy this erroneous fact. This is a disservice to the Applicant.

VII. Conclusion

[42] Given the seriousness of the erroneous findings of fact relied upon by the AD, the Decision is unreasonable. The application for judicial review is allowed.

JUDGMENT in T-1078-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The matter is remitted for redetermination in accordance with these reasons.
2. The Applicant is granted costs in accordance with the Court's tariff.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1078-20
STYLE OF CAUSE:	CLINTON MAHONEY v HIS MAJESTY THE KING, AND PAROLE BOARD OF CANADA (APPEAL DIVISION), AND CORRECTIONAL SERVICE CANADA
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