Federal Court  Cour fédérale

Date: 20120313

Docket: T-60-11

Citation: 2012 FC 302

Ottawa, Ontario, March 13, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

JASON COTTERELL

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Accelerated parole pursuant to section 126 of the *Corrections and Conditional Release Act*, SC 1992, c 20 (the CCRA), was denied to Mr. Cotterell by both the National Parole Board (the NPB) and the Appeal Division of the NPB. Both were of the view that there were reasonable grounds to believe that if Mr. Cotterell was released he was likely to commit an offence involving violence before the expiry of his sentence.

[2] *Constantineau v Canada (Attorney General)*, 2005 FC 1610 at para 18 held that although the matter before the Court is a judicial review of the Appeal Division's decision, where it "has affirmed the decision of the NPB, the Court is ultimately required to ensure that the decision of the NPB was lawful." Accordingly, the decision examined by this Court is the decision of the NPB which, for ease of reference, will be referred to as the decision of the Board.

[3] Two matters complicate this application for judicial review.

[4] First, accelerated parole is no longer available to federal inmates due to the repeal of section 126 of the CCRA by the *Abolition of Early Parole Act*, SC 2011, c 11, s 5. As a result, the usual remedy of referring the application back for redetermination if the application for judicial review is granted, is not available to Mr. Cotterell. He seeks, in addition to an order setting aside the Board's decision, an order that "Correctional Services Canada and the Board be directed to treat him as a non violent offender for the purposes of all future risk assessments." Given the disposition of this application, there is no requirement to determine whether the Court has jurisdiction to grant that relief.

[5] Second, Mr. Cotterell is no longer incarcerated. After this application was filed he was granted statutory release on June 22, 2011.

[6] This application came on for hearing at Toronto, on December 6, 2011. On December 5, 2011, the Crown filed a motion, returnable at the hearing seeking an order dismissing the application on the basis that it was moot because of the statutory release of Mr. Cotterell.

[7] The applicant opposed the Crown's motion on the basis of short service. After hearing the submissions of the parties, the Court indicated that the Crown's motion would be accepted and ruled upon, in spite of the short notice. The applicant was granted leave to file written submission on the motion no later than December 30, 2011, and the Crown given the right to reply in writing by January 7, 2012.

[8] For the reasons that follow, I find that the application is moot; however, I will exercise my discretion and judge the merits of the application. I have also determined, for the reasons that follow, that the application must be dismissed on its merits.

Background

[9] Mr. Cotterell is a first time federal offender serving two years and six months for possession of a controlled substance for the purpose of trafficking, possession of a restricted firearm with ammunition, and careless storage of a firearm.

[10] In January of 2009, the Organized Crime Enforcement Unit, through intercepted communications for an operation called Project Fusion, learned that Mr. Cotterell was trafficking drugs and possessed a loaded firearm. Project Fusion was a lengthy criminal investigation that

commenced in August 2008 and targeted two criminal organizations known as the “Markham and Eglinton Crew” and the “400 McCowan Crew.” On January 26, 2009, police officers conducted surveillance on the applicant’s premises and arrested him for possession of 340 grams of marijuana. After obtaining a search warrant, police entered his apartment and found a gun with 10 rounds of 40 calibre hollow point bullets, and 40 rounds of assault rifle ammunition under a mattress.

[11] On October 23, 2009, Mr. Cotterell pled guilty and was sentenced to 30 months for the conviction for possession of a restricted weapon, six months concurrent for careless storage and six months concurrent for possession of marijuana for the purpose of trafficking. He was also subject to a lifetime firearms prohibition.

[12] As a first time federal offender, Mr. Cotterell was considered for accelerated parole; however, it was denied.

[13] The Board stated that its finding was based on the nature of the applicant’s offences and his reported strong ties to a street gang known for drug trafficking and violence.

[14] The Board noted the facts surrounding his arrest and stated “[o]f paramount concern, the handgun was loaded with 10 rounds of hallow point ammunition while stored in a careless manner and readily accessible.” It found the combination of drugs and weapons of grave concern, and an indication of potential violence.

[15] Additionally, the Board questioned Mr. Cotterell's credibility on three issues. It noted that he claimed that he fell into the drug world almost accidentally after losing his job around the time of his conviction, whereas the record showed that he had a previous drug related offence in 2006. This led the Board to believe that the applicant had been involved in the violent drug subculture for quite some time. Mr. Cotterell stated that he began trafficking to support his drug habit and accepted to hold the firearm and ammunition because his judgment was clouded by alcohol. The Board found this explanation was contrary to his assertion that he did not have a substance abuse problem. The Board also noted that Mr. Cotterell stated that he was not part of a criminal organization even though two police officers had clearly identified him as being involved with members of such an organization. The Board noted that charges in this regard had previously been laid, although they were removed presumably because of his high level of cooperation with police.

[16] The Board found no reason to doubt the information of two police departments which confirmed that Mr. Cotterell was a "primary" in a street gang renowned for violence and a history of drug and gun violence. It found that his association with criminals who condone the use of weapons, threats and intimidation in achieving their goals, and possession of a loaded handgun while trafficking drugs from his residence, demonstrated an inclination to a potentially violent lifestyle.

[17] The Board considered contributing factors, which it listed as being Mr. Cotterell's thirst for quick and easy money, his criminal sentiments leading him to gravitate towards negative associates, and his substance abuse issues. It was noted that Mr. Cotterell admitted to having difficulty saying no to people and was easily led by his peers. It found the status of his affiliation to the criminal organization to be uncertain given his assistance in the investigation. Even though Mr. Cotterell did not expect any potential repercussions for his cooperation, the Board noted that he was labelled a "snitch" by one individual who had a lot of influence among the criminal element. The Board found that the applicant's dismissive responses in this regard very much resembled his cavalier attitude about his criminal lifestyle.

[18] For these reasons, the Board's decision was to deny accelerated parole. It stated:

> The Board is satisfied that there are reasonable grounds to believe that, if released, you are likely to commit an offence involving violence before the expiration of your sentence and therefore, directs that you not be released.

[19] The Appeal Division focused its reasons on its concerns that Mr. Cotterell was a primary member of a well known street gang whose activities are linked to violent criminal behaviour. Although it acknowledged that there was no evidence of threats or violence in the commission of the offences for which he had been convicted, it stated that it was "satisfied that there are reasonable grounds to believe you are likely to commit an offence involving violence prior to the expiration of your sentence in April 2012."

Is this application moot?

[20] The Crown submits that the application is moot as there is no live controversy between the parties because Mr. Cotterell has been released from incarceration on parole. Mr. Cotterell submits that notwithstanding his release, there remains a live controversy because he has only "one opportunity to dispute the Board's violence-related finding," the Board's "violence-related finding must be used by the Board in future assessments of risk," that finding "will be maintained in perpetuity," the "finding may be provided to provincial authorities," and as a consequence, the "remedy sought remains very relevant to the applicant."

[21] I accept the Crown's submission that the application before the Court is moot. The real dispute between the parties was whether or not Mr. Cotterell was improperly denied parole. Shortly after the decision at issue was rendered, he was granted parole. To that extent, he has obtained the remedy he sought in the application. However, I also accept the submissions of the applicant that the finding of the Board that Mr. Cotterell was likely to commit an offence involving violence, is a finding that may have a negative impact on him in the future, particularly if he resumes his criminal behaviour. For that reason, I find that it is appropriate to consider whether the decision that Mr. Cotterell was likely to commit an offence involving violence before his sentence expired was reasonable or whether that decision must be quashed.

The finding that the applicant was likely to commit an offence involving violence

[22] Subsection 126(2) of the CCRA obligated the Board to release an offender if it was satisfied that there were no reasonable grounds to believe that the released offender was likely to commit an offence involving violence before the end of his or her sentence.

[23] Mr. Cotterell submits that the decision that he was likely to commit a violent offence was unreasonable because the Board made an unreasonable finding of fact relating to his credibility, the nature of the offence, and his ties to a criminal organization. Further, and more generally, he submits that the finding that he was likely to commit an offence was unreasonable.

Credibility

[24] The Board found that Mr. Cotterell's evidence was not credible as it related to why and when he joined the drug world, and whether he had a substance abuse problem. I am unable to accept the submissions of the applicant that these findings were unreasonable based on the evidence before the Board.

[25] The Board noted that Mr. Cotterell stated that he fell into the drug underworld only after losing his job, which from the record was close to when he was arrested in September 2009. The Board noted that Mr. Cotterell had been convicted of a drug related offence in 2006. This led the Board to the conclusion that he had been immersed in the inherently violent drug subculture for some time, and not only after losing his job. I accept the submission of the Crown that it was open to the Board to base an adverse credibility finding on this inconsistency.

[26] Mr. Cotterell described his weekly consumption of $20 to $40 of marijuana in addition to drinking on the weekends to relax as a "habit." The Board described it as a substance abuse problem. The Board also noted that the applicant admitted to being under the influence of

alcohol when he accepted to hold the gun for his neighbour. I accept the submission of the Crown that it was open to the Board to find that the applicant had a substance abuse problem based on this evidence, notwithstanding Mr. Cotterell's statement to the contrary.

[27] Further, for the reasons set out below, I find that it was open to the Board to find that Mr. Cotterell's statement that he was not involved in a criminal organization was not credible given his identification through Project Fusion and two police reports stating he was associated with members of the Markham and Eglinton Crews.

[28] The Board's findings on credibility are entitled to a high level of deference. Its finding was based on the evidence before it and falls within the range of acceptable outcomes.

Nature of the Offence

[29] Mr. Cotterell submits that the intercepted communications before his arrest comprise the only available information regarding whether the gun in his possession was loaded. The police report of his arrest states that the police located a gun "with" ammunition and that the Criminal Profile Report states that the gun was located "along with" ammunition. He says that the same information presented to the sentencing judge was presented to the Board, namely that he agreed to hold the gun for a person he knew days before he was arrested and he hid the gun in a paper bag under his mattress; the gun was broken and unloaded. Accordingly, he submits that the Board relied on unreliable and non-persuasive information in finding that the gun was loaded.

[30] I agree with the Crown that the Board's finding that the gun was loaded is reasonable. The intercepted communication was not the only source of information as to whether the gun was loaded. At the sentencing hearing the Crown Attorney stated:

> As a result of the subsequent search that was conducted, a .40 calibre Taurus semi-automatic handgun, a pistol, was located in his bedroom under his mattress. It contained a - - a clip with ten rounds of .40 calibre hallow - - hallow point ammunition. In addition to that, forty rounds of assault rifle ammunition, 6.72 mm was found as well. Needless to say that a loaded firearm was - - was stored in a careless manner [emphasis added].

The applicant's counsel at the sentencing hearing did not contest this characterization and based on this, it was reasonable for the Board to find that the gun was loaded when it characterized the offence.

Ties to a Criminal Organization

[31] Mr. Cotterell submits that the finding of his "strong ties" to a criminal organization is not reasonable. He says that although Project Fusion targeted two alleged organizations, there are no reported convictions to support the allegation of criminality. He also points out that his criminal organization charges were withdrawn at the request of the Crown. He submits that the Board's presumption that the criminal organization charges were withdrawn because of his good cooperation is less plausible than them being withdrawn because there was no information to support a conviction. He points out that he did not know most of the people charged in connection with Project Fusion and that he did not associate with them.

[32] Even though the charge relating to membership in a criminal organization had been withdrawn, there was other evidence that supported Mr. Cotterell's ties to the Markham and Eglinton Crew. Specifically, Detective Sergeant Janice McLeod of the Durham Police and the Toronto Police's Guns and Task Force both reported that Mr. Cotterell had confirmed ties to a street gang known as the Markham and Eglinton Crew. It was open to the Board to weigh that information against Mr. Cotterell's statement that he was not part of a criminal organization and it was open to the Board to prefer the evidence of the police officers. Its decision was reasonable.

Was the applicant "likely to commit" an offence involving violence?

[33] Where the Board is satisfied that there are no reasonable grounds to believe that an offender, if released is likely to commit an offence involving violence before sentence expiry, the Board must direct the offender's release. Mr. Cotterell submits that the Appeal Division has previously defined "likely" as "probable." He cites a decision of the NPB dated January 8, 2003, in which the Board wrote:

> By use of the word "*likely*", the statute indicates clearly that the Board must be satisfied, based on reasonable grounds, that it is probable a violent crime will be committed by the offender."

[34] I agree with the submission of the Crown that contrary to the applicant's submission, the word "likely" is not to be interpreted to mean "probable" in this context. The Federal Court of Appeal in *Cartier v Canada (Attorney General)*, 2002 FCA 384 at paras 21, 25-26, held that the French wording of the CCRA meaning "probably, in all probability," is broader and inconsistent

when compared to the English wording of “likely to commit.” The Court of Appeal held that the English version, which encompassed the French version, was the correct one to apply.

[35] The Board viewed “the combination of drugs and weapons” as “an indication of potential violence;” however, Mr. Cotterell submits absent information that he demonstrated aggressive or violent tendencies, the nature of his offences do not support the decision that he is likely to offend violently.

[36] Again, I agree with the submission of the Crown that the proposition that Mr. Cotterell must be personally linked to acts of violence is incorrect. When, as here, an offender is convicted of a weapons related offence, and drug trafficking, and has associations with criminally minded individuals, there are sufficient factors to support a finding that he is likely to commit a violent offence if released. It is appropriate for the Board to explore the circumstances in which the offender became involved in the commission of the offence when assessing whether he is likely to commit a violent offence if released. In this case, the Board considered that:

(i) Mr. Cotterell was convicted of a weapons related offence after the police located a loaded 40 calibre semi automatic pistol with the serial number removed under his mattress at his residence;

(ii) Mr. Cotterell was convicted of drug trafficking from his residence where the gun was found, and where he lived with his common law partner and his daughter;

(iii) Two police departments confirmed that Mr. Cotterell was a primary member of a street gang renowned for violence with a history of drugs and guns involvement; and

(iv) Mr. Cotterell associated with like-minded criminals.

[37] Further, the Board considered the behaviour of Mr. Cotterell when considering whether he was likely to commit a violent offence. It noted that:

(i) Mr. Cotterell had accepted the weapon when under the influence of intoxicants;

(ii) Mr. Cotterell's substance abuse issues remained unaddressed;

(iii) Mr. Cotterell had a thirst for quick and easy money;

(iv) Mr. Cotterell had a tendency to be led easily by his peers and had difficulty with saying no; and

(v) Mr. Cotterell affiliated with criminally minded individuals.

[40] I accept that all the facts listed above had to be weighted against Mr. Cotterell's assertion that he would not be violent; the Board did so. It is not this Court's role to reweigh the evidence. In my view, based upon the record on which it was made, the decision falls within the range of reasonable outcomes and this application must be dismissed.

[41] In light of the outcome and the lateness of the Crown's motion, it is appropriate that each party bears its own costs.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed without costs.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-60-11
STYLE OF CAUSE:	JASON COTTERELL v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
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