

Federal Court



Cour fédérale

Date: 20120402

Docket: T-380-11

Citation: 2012 FC 380

Ottawa, Ontario, April 2, 2012

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

RAYMOND STEELE

Applicant

and

**ATTORNEY GENERAL
OF CANADA**

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Steele, who in 1991 pleaded guilty to a charge of murder in the second degree, applied to the National Parole Board for a full parole, or failing that for a day parole. His application was denied in June 2010. He appealed to the Appeal Division of the Board, which upheld the original decision. This is the judicial review of the decision of the National Parole Board, Appeal Division, dated 2 February 2011.

LEGISLATIVE BACKGROUND

[2] The purpose and principles of conditional release (parole) are set out at sections 100 and following of the *Corrections and Conditional Release Act*. The primary consideration is the protection of society. Parole Boards are to take into account all available relevant information and are to make the least restrictive determination consistent with the protection of society. The Board may grant parole if, in its opinion, the prisoner will not, by re-offending, present an undue risk to society before the expiration of his sentence, and if the release will contribute to society's protection by facilitating reintegration of the offender as a law abiding citizen.

[3] A prisoner whose parole application has been denied may appeal to the Appeal Division. Section 147 of the Act limits the grounds of appeal to a failure of the Board to observe a principle of fundamental justice, errors of law, a breach or failure to apply a policy, or if the decision was based on erroneous or incomplete information, or if it acted beyond its jurisdiction or failed to exercise its jurisdiction.

[4] In this case, the basis of the appeal was that the decision was based on erroneous or incomplete information, a failure to observe a principle of fundamental justice and a failure to exercise its jurisdiction.

THE FACTS

[5] Mr. Steele had been in a minimum security prison for some years. Things were going well. He was allowed out on unescorted absences and had stayed out of trouble. His caseworkers were pleased with him and, overall, psychological assessments were favourable. He was hoping to be paroled.

[6] Then in September 2009 he, and another inmate, were accused of sexually assaulting another inmate, and later a second inmate. Mr. Steele was transferred to a medium security institution. His grievance of that decision has yet to come to a conclusion.

[7] By the time he applied for parole, another psychological assessment was issued by a different psychologist. It is at variance with earlier reports. Although the assessment is said not to take into account the allegations of sexual assault, nevertheless they are referenced. The psychiatrist also stated: "We should note that our impressions are quite significantly different from the impression of the vast majority of professionals who have reviewed the case." Thus, this psychologist, unlike the others, was of the view that Mr. Steele presented a moderate to high risk of violent recidivism. Again the psychologist noted: "We are aware that in a number of aspects our assessment and our clinical understanding are remarkably different from the viewpoints of other professionals." Although the recommendation of Correctional Services Canada to the National Parole Board was that parole be denied, they took issue with the report of the last psychologist, as to the risk of recidivism involving violence. However, they said they were much more concerned about the charges of sexual assault because:

We do not have all the information we might need to make a full and informed recommendation concerning the risk in the community. We feel that this information is crucial in making a decision. Thus, we have no choice but to recommend that the subject not be granted any form of release at this stage. These allegations are very serious and must be settled before a decision can be reached regarding any form of release.

It was also stated:

Mr. Steele had a positive attitude until the allegations of sexual assault and he was making good progress in all areas of his Correctional Plan. Since his detention and even now, he is focussing all of his energy on preparing his defence and gathering proof of his innocence. He is currently undergoing psychological counselling at Cowansville Institution to vent the overwhelming stress brought on by his current situation. He said he is innocent and affirmed that he will prove it.

[8] In order to get to the bottom of the accusations against him, Mr. Steele applied in the Quebec Superior Court for a writ of *habeas corpus*. This resulted in Jean-Yves Bergeron, the warden of Sainte-Anne-des-Plaines Penitentiary, providing a detailed affidavit with respect to the accusations, which accusations were deemed reliable, notwithstanding that Mr. Steele had continued to deny any involvement in the matter. One of the accusers laid criminal charges but later said he would not testify and so the Sûreté du Québec dropped its investigation. The second alleged victim never laid a complaint.

[9] The National Parole Board interviewed Mr. Steele at considerable length. He continued to deny any involvement, and took great exception to the allegations against him. He said:

Look, I'm heterosexual. I've never, in all my years in jail, had an experience with a man, and let alone to be compelling to another individual in a sexual way.

[10] He recounted that he knew the cousin of one of the alleged victims who told him: "I'm sure you didn't do this, Ray." The chairman of the Board then said: "So, it's a set-up?" Answer: "Yes, sir." Mr. Steele claims to have an alibi which he set out in chapter and verse. The alibi, if true, would seem to mean that it was impossible for him to have buggered the victims in a shower facility.

[11] According to Mr. Steele, and I agree, the key paragraph in the Board's decision is the following:

With respect to the allegations of sexual assaults, the Board considers that they are serious, rather surprising, yet certainly preoccupying. The Board remains confident that all the efforts will be made to sort out these allegations as clearly and completely as possible, and that the results of any further investigation will be fully shared. At the same time, the Board also finds it interesting that you were not able to explain why, throughout your history, you always seem to end up and be involved in nebulous situations.

The Board noted that Mr. Steele's case management team was very concerned about the allegations of sexual assault: "...because it does not have all of the information needed to make a full and informed recommendation regarding the risk in the community." Therefore, the recommendation was that he not be granted any form of release at that time.

[12] Mr. Steele's submission is that the decision to deny him parole turns on the sexual allegations against him. Counsel for the respondent insisted that this was simply one factor in the overall assessment. Given the record, I cannot say, with any confidence, that without the sexual assault allegations the result would have been the same.

[13] The Board made no effort to sort out the allegations against Mr. Steele, apparently being content to have the matter work its way through the grievance process, and made no effort whatsoever to check out his alibi. Indeed, during the hearing it noted that the allegations appeared to be serious, but on the other hand his explanations could also make sense: “So, right now, there – you know, it could be either way. So, I guess – and, yes, it is certainly unfortunate, but...”

DECISION

[14] This judicial review shall be granted. While the records maintained by Corrections Canada are undoubtedly an important factor for the Board to take into consideration in deciding whether or not to grant parole, it is the Board, not Corrections Canada, which must make the decision. The Board decided to defer until a final decision on the grievance process. To this day, no decision has been made. If one did not know better, one would think the plan is to have Mr. Steele die of old age before a decision is made. Mr. Steele grieved his involuntary transfer 2 December 2009. His receipt of his grievance was acknowledged the same day. Corrections Canada stated: “We expect to finalize the response to your presentation by 2009/12/23.” That day it wrote to say that due to the current increase in volume of complaints/grievances, it would not be able to meet the established timeframe: “We apologize for this delay. We are putting measures into action to remedy this situation and we are aiming to provide you a response by 2010/02/09.” The same letter was repeated time and time again. On 27 October 2010, Corrections Canada said it was aiming to provide him with a response by 5 January 2011. Fourteen more months have gone by without a decision.

[15] Parliament charged the Board with the responsibility of taking “into consideration all available information that is relevant to a case...” In acting as it did, the Board did not take into consideration Mr. Steele’s alibi. This is clearly a case of justice delayed being justice denied. The decision was unreasonable, as was the decision of the Appeal Division to uphold it.

[16] The cornerstones of the case law are the decision of the Supreme Court in *Mooring v Canada (National Parole Board)*, [1996] 1 SCR 75, [1996] SCJ No 10 (QL), and the decision of the Federal Court of Appeal in *R v Zarzour*, 196 FTR 320, [2000] FCJ No 2070 (QL). It was pointed out in *Mooring* that the Parole Board does not hear and assess evidence, but rather acts on information. It has no right to exclude relevant evidence. At paragraph 36, Mr. Justice Sopinka said: “In the parole context, the Parole Board must ensure that the information upon which it acts is reliable and persuasive.” In *Zarzour*, Mr. Justice Létourneau stated at paragraph 27:

It is clear from the *Mooring* decision, *supra*, that the Board must act in accordance with the principles of fairness. This obligation appears in paragraph 101(f) of the Act. Thus, in assessing risk to society, the Board, while not subject to the rigidity of the rules of evidence applicable to the courts, has a duty to examine all the available reliable information. The reliability of information is a function of its accuracy. The Board need not consider relevant information that is inaccurate and therefore unreliable. But in so far as it wishes to use information that is relevant to the matter at hand, it must satisfy itself of its accuracy and its persuasive value, or it will fail in its duty to act fairly...

[17] In this case, the Board did not satisfy itself as to the accuracy and the persuasive value of the complaints of sexual aggression and the alibi. It failed in its duty to act fairly. It failed to exercise its jurisdiction.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. This application for judicial review is allowed.
2. The decision of the National Parole Board of Canada, dated 11 June 2010, and the decision of the Appeal Division, dated 2 February 2011, which upheld the original decision, are both quashed.
3. The matter is referred back to another panel of the National Parole Board for reconsideration in accordance with these reasons.
4. The whole with costs.

“Sean Harrington”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-380-11

STYLE OF CAUSE: STEELE v AGC

PLACE OF HEARING: MONTREAL, QUEBEC

DATE OF HEARING: MARCH 28, 2012

**REASONS FOR ORDER
AND ORDER:** HARRINGTON J.

DATED: APRIL 2, 2012

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