Federal Court  Cour fédérale

Date: 20140620

Docket: T-1063-13

Citation: 2014 FC 587

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, June 20, 2014

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

RICHARD TIMM

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant is challenging the legality of a Ministerial decision dated May 27, 2013, informing him that his new application for a review of his criminal conviction would not be proceeding to the investigation stage. Essentially, the applicant contends that the decision is unreasonable and contrary to section 7 of the *Canadian Charter of Rights and Freedoms, the Constitution Act being Schedule B to the Canada Act 1982 (U.K.)*, 1982, c.11 (Charter).

[2] In 1995, the applicant was convicted of the first degree murders of his adoptive parents. His appeal from the verdict was dismissed by both the Quebec Court of Appeal and by the Supreme Court of Canada. Any person who has been convicted of an offence under a federal act or regulation, and who considers themself to be a victim of a miscarriage of justice may, under section 696.1 of the *Criminal Code*, RSC 1985, c C-46 (Code), apply to the Minister of Justice (Minister) for a review in accordance with the regulations.

[3] In July 2001, the applicant submitted a first application for review to the Minister under section 4 of the *Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice*, SOR/2002-416 (Regulations). The application for review was dismissed on an interlocutory basis on October 22, 2009, and in a decisive manner on October 21, 2010. The applicant's application for judicial review of the interlocutory decision was dismissed by the Court on March 30, 2011, while on May 2, 2012, the application for judicial review of the Minister's final decision met the same fate: *Timm v Canada (Attorney General of Canada)*, 2012 FC 505, [2010] FCJ No 556; affirmed by 2010 FCA 282, [2010] FCJ No 1398; leave to appeal to the Supreme Court of Canada refused [2012] SCCA No 502.

[4] Still unsatisfied, on May 2, 2013, the applicant submitted a second application for review of his conviction to the Minister. By letter dated May 27, 2013, the applicant was informed that the Minister would not be conducting a new preliminary assessment, given that the applicant had not adduced any new evidence or facts. The applicant interpreted this latest refusal as a negative decision on the Minister's part and asked the Court to make various declaratory conclusions. Although such decisions are discretionary in nature, the Minister is obliged to act fairly and

cannot act in an arbitrary manner, or disregard fundamental rights or Charter values, when determining whether an investigation into a possible miscarriage of justice is warranted: *Daoulov v Canada (Attorney General)*, 2009 FCA 12, 388 NR 54. On the merits, a Ministerial decision is reviewable on a reasonableness standard.

[5] There is no dispute with regard to applicable law. According to the provisions of the Regulations, the Minister must conduct a preliminary assessment of the file based on the factual evidence adduced by the applicant (para 3(*b*)). Following the preliminary assessment, the Minister must conduct an investigation in respect of the application if the Minister determines that there may be a reasonable basis to conclude that a miscarriage of justice likely occurred (para 4(1)(*a*)). If, on the other hand, the Minister is satisfied that there is no reasonable basis to conclude that a miscarriage of a justice likely occurred, the minister must notify the applicant that no investigation will be conducted (ss. 4(2)). The applicant then has one year in which to provide further information in support of the application (ss. 4(3)). If further information is provided by the applicant, the Minister will conduct a new preliminary investigation in light of the new information (para 4(5)). However, if the applicant informs the Minister that no further information will be provided (para 5(2)), or if the applicant fails to provide such information within one year, the Minister may then issue a final decision which will definitively dispose of the application for review of the criminal conviction, pursuant to section 696.4 of the Code. This is what transpired on October 21, 2010.

[6] It is now time to examine the reasonableness of the second Ministerial refusal dated May 27, 2013. There is no need here to repeat the arguments of the parties, which are well developed

in their respective memoranda and to which I gave thorough consideration in light of the oral submissions made at the hearing. In this case, intervention is unwarranted. In substance, I agree with counsel for the respondent's argument that the Ministerial decision not to proceed with a new preliminary investigation is in every respect reasonable. To begin with, the applicant had ample opportunity, in the year following the first preliminary assessment, to provide the Minister with additional information. Further, the Minister's conclusion that the applicant, in 2013, had failed to provide any new facts that would warrant a new preliminary assessment, undoubtedly falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 para 47.

[7] I concur with the respondent's counsel that in his second review application, the applicant adduced no new evidence or facts. Incidentally, I am not bound by the decisions of Prothonotaires Tabib and Morneau, who dismissed two motions to strike made by the Minister. I am reviewing the Minister's decision on a reasonableness standard, while they were obliged to apply the more rigourous test of Rule 221 of the *Federal Courts Rules*, SOR/98-106: *Grenier v Canada (Revenue Agency)*, 2014 FC 504. We are now at the merits of the application for review. I have the benefit of having studied all of the evidence in the record and of having considered all of the legal and factual arguments of the parties in light of past decisions. It is clear that the applicant, by means of his second review application, is attempting to present in a new light allegations that were already made in his first application for review or restate the same points that have already been decided by the Court. Whether one considers the question of absence of reasonable grounds to conclude that a miscarriage of justice likely occurred through the lens of *res judicata* (including the concept of *issue estoppel*) or abuse of process, the matter is now

closed, barring any new facts or evidence, of which there is none. Incidentally, it is too late for the applicant to submit arguments that might have been made against the contents, findings and recommendations found in the 2009 report by the Criminal Conviction Review Group (CCRG).

[8] It should be noted that in 2009, Isabel J. Schurman, the Minister's representative and Kerry Scullion, Director / General Counsel at the CCRG, conducted a thorough and detailed analysis. The following were considered in the preliminary assessment: the entire criminal record before the Superior Court and the Court of Appeal, the exhibits, as well as all relevant documentation on the disappearance of the hacksaw, the filing of the exhibits and the incriminating statements. Moreover, my colleague on the Court, Justice Harrington, had already found the report to be reasonable. At paragraph 48 of his decision (*Timm v Canada (Attorney General of Canada)*, 2012 FC 505, [2010] FCJ No 556), he writes: "Although Mr. Timm does not share the CCRG's opinion on the assessment and the interpretation of the evidence and attempts to present his own analysis, he has not demonstrated that the preliminary assessment completed by Ms. Schurman and Mr. Scullion was unreasonable." In addition, the Minister had the legal opinion written by Jean-Marc Labrosse, a former Ontario Court of Appeal judge. If we consider, for example, whether or not there existed a "written incriminating statement" that might have been used to obtain a search warrant or the apparent disappearance of the hacksaw, at the risk of repeating myself, there are no new facts or evidence that would warrant setting aside the Minister's decision refusing the applicant, once again, in 2013.

[9] Lest we forget, the Minister's power is one of exception and prerogative. It is extraordinary in nature and the Court, in a judicial review, must take pains not to substitute itself

for the Minister. The applicant at the hearing before me spoke of [TRANSLATION] "something (that had been) wrongly decided". He acknowledged that the Minister and the judges who had previously reviewed the matter had acted in good faith. Nevertheless, they were misled, argued the applicant. According to him, it was the police officers who were at fault, and then it was the CCRG, which did [TRANSLATION] "shoddy" work. A serious injustice had therefore occurred. The problem is that the facts about which the applicant complains were not discovered in 2013. They had been brought, or could have been brought, to the attention of the CCRG and the Minister in a timely manner well before 2013. To this day, according to the applicant, there continue to be [TRANSLATION] "questions without answers". This may be regrettable, but it is not, in and of itself, evidence of a [TRANSLATION] "miscarriage of justice". There must be some end to litigation.

[10] The Minister did not act in a capricious or arbitrary manner. Despite the comment, which is somewhat surprising at first glance, cited by the applicant from the letter, dated May 27, 2013, from Mr. Larocque ([TRANSLATION] "only one piece of evidence in support of a conviction will be adduced as evidence and annotated by the Crown"), I am not satisfied that the alleged error would be determinative. Moreover, the impact of *R v Taillefer*; *R v Duguay*, 2003 SCC 70, [2003] 3 SCR 307, argued once again by the applicant today, had already been considered in 2009. The CCRG, despite [TRANSLATION] "numerous irregularities in the conduct of the police in the applicant's file", concluded that [TRANSLATION] "all of the allegations of fabrication of evidence and conspiracy had been made during the trial or appeal. There is no piece of evidence, new or old, to support the allegations of fabrication of evidence in this matter". It is not enough to claim the violation of a constitutional right to convince the Minister to reassess an application

for review. There have to be reasonable grounds on which to conclude that a miscarriage of justice may have occurred. The Minister decided otherwise, and I must respect his decision, as the Minister's refusal has not been shown to be unreasonable by the applicant.

[11] For these reasons, the application for judicial review is dismissed, with costs.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed with costs.

"Luc Martineau"

Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1063-13
STYLE OF CAUSE:	RICHARD TIMM v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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REASONS FOR JUDGMENT AND JUDGMENT:	MARTINEAU J.
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APPEARANCES:

Richard Timm	FOR THE APPLICANT ON HIS OWN BEHALF
Jacques Savary	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Richard Timm Montréal, Quebec	FOR THE APPLICANT ON HIS OWN BEHALF
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT