Federal Court of Appeal | Cour d'appel fédérale

Date: 20150519

Docket: A-396-13

Citation: 2015 FCA 127

CORAM: **NOËL C.J.**
DAWSON J.A.
TRUDEL J.A.

BETWEEN:

PAUL FISHER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on January 28, 2015.

Judgment delivered at Ottawa, Ontario, on May 19, 2015.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NOËL C.J.
TRUDEL J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The appellant, Paul Fisher, was released from prison on full parole in 1983. On September 24, 1991, the National Parole Board granted Mr. Fisher parole reduced status. This status relieved him of certain terms and conditions imposed upon him on his release from prison. The effect was that the only conditions imposed on Mr. Fisher's continued release were that he

report once per year in writing, or by phone or in person to the Vancouver Central Parole Office and that he notify that office whenever he changed his residential address.

[2] On February 19, 1996, the Parole Board of Canada made a decision that persons on parole reduced status were required to report to their parole supervisor as instructed by the parole supervisor (Decision). The effect of the Decision was that Mr. Fisher was required to meet face-to-face with his parole supervisor at least every three months. This was, and remains, the lowest possible reporting requirement authorized by Commissioner's Directive 715-1 relating to community supervision.

[3] As a result of the Decision, Mr. Fisher has been reporting to his parole supervisor every three months since 1996.

[4] In 2012, Mr. Fisher brought an application for judicial review of the Decision, seeking a remedy under subsection 24(1) of the *Canadian Charter of Rights and Freedoms*. Amongst other relief, he sought a declaration that rights guaranteed to him by section 7 of the Charter had been, and continue to be, infringed, and an order quashing all conditions currently in place upon him, other than those in place prior to the Decision.

[5] For reasons cited as 2013 FC 1108 a judge of the Federal Court dismissed the application with costs. While the Judge concluded that the application was not time-barred, he found that Mr. Fisher had failed to establish a liberty interest that had been curtailed as a result of the Decision.

[6] This is an appeal from the decision of the Federal Court.

I. The Issues

[7] It is now well-settled law that an analysis under section 7 of the Charter requires a two-step analysis. To trigger the operation of section 7 one must first establish that there has been a deprivation of the right to "life, liberty and security of the person". Second, one must establish that the deprivation is contrary to the principles of fundamental justice. The analysis is contextual; section 7 must be construed in light of the interests it was meant to protect (*R. v. Beare; R. v. Higgins,* [1988] 2 S.C.R. 387, at page 401).

[8] It follows that the issues raised on this appeal are:

i) Was Mr. Fisher deprived of his liberty by the Decision?

ii) If so, was the deprivation of liberty contrary to the principles of fundamental justice?

iii) If so, was the violation justifiable under section 1 of the Charter?

[9] For the reasons that follow, I conclude that Mr. Fisher did establish that he was deprived of his liberty by the Decision. I also conclude, however, that he did not establish that the deprivation of his liberty was contrary to the principles of fundamental justice. It follows that it is not necessary to consider section 1 of the Charter. As a result of these conclusions, I would dismiss the appeal. In the circumstances, I would not award costs.

II. The Facts

[10] In 1972, when he was 15 years old, Mr. Fisher fatally shot his father and stabbed his mother. His mother survived the attack. Mr. Fisher was tried and convicted as an adult and sentenced to life in prison.

[11] While in prison, Mr. Fisher learned how to repair saxophones and how to read, play and write music. Music became, and remains, the focus of his professional and social life. Following his release on full parole, Mr. Fisher has pursued a successful career as a jazz musician.

[12] From the time of his release until the present, Mr. Fisher complied with the law and all of his parole conditions.

[13] At the time he was granted his parole reduced status, his parole supervisor reported that Mr. Fisher "has adjusted beyond all expectations". As his counsel observed, Mr. Fisher's story is "tragic in terms of the terrible crimes he committed, but inspiring in terms of his rehabilitation and reconciliation both with himself and his victims".

[14] It is in this context that Mr. Fisher complains that, since the Decision, he has been continuously resentenced and punished without being given any reason and without having done anything to deserve it. In his affidavit, Mr. Fisher complains about other requirements and conditions imposed upon him since 1996. However, as the Judge correctly noted in his reasons at paragraph 65, those decisions were not before the Federal Court on the application for judicial

review. In any event, as the Judge also noted, the Decision did not authorize the imposition of conditions such as travel restrictions. Any condition or restriction unrelated to the nature and frequency of the reporting requirements would require a basis in law other than the Decision.

III. The Decision

[15] The Decision is not lengthy, and is attached to these reasons in the appendix.

[16] Briefly stated, the Parole Board noted that the Decision followed a revision of its decision-making policies and its mission, and also followed events that had occurred in the community related to offenders on parole reduced status. Some offenders had been involved in further criminal activity; difficulties had been encountered maintaining contact with others.

[17] As a result, the Parole Board concluded it was not possible to adequately monitor the on-going risk presented by offenders in the community on parole reduced status who were required to report, in person or in writing, on only a single occasion each year.

[18] The Decision was therefore viewed by the Parole Board to be reasonable and necessary for the protection of society.

IV. Consideration of the Issues

A. *Was Mr. Fisher deprived of his liberty by the Decision?*

[19] The Judge found that the change effected by the Decision carried with it the "inevitable consequence" that Mr. Fisher would be required to report at least once every three months instead of annually (reasons, at paragraphs 66 and 83). He then went on to consider whether that change affected Mr. Fisher's liberty interest. This was a question of law, reviewable on the standard of correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraph 8).

[20] In my view, for the reasons that follow, the Judge took a more meagre interpretation of the interest protected by section 7 of the Charter than that articulated in the jurisprudence of the Supreme Court of Canada.

[21] In order to consider whether the Decision deprived Mr. Fisher of his liberty, it is first necessary to ascertain the consequences of the Decision upon him. The *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (Act) governs the implementation of a custodial sentence exceeding two years. Under the Act, an "offender" is defined to mean an inmate or a person who, having been sentenced, committed or transferred to a penitentiary is outside of penitentiary by reason of parole or other specified grounds not relevant to this appeal (section 2). Thus, an offender released into the community on parole continues to serve his or her sentence until its expiration (subsection 128(1)). Subject to the Act, an offender released on parole is entitled to remain at large and is not liable to be returned to custody unless the parole is

suspended, cancelled, terminated or revoked (subsection 128(2)). If an offender breaches a condition of parole, the parole may be suspended, the offender may be apprehended and the offender may be recommitted to custody (subsection 135(1)).

[22] Flowing from the Judge's finding that the "inevitable consequence" of the Decision was that Mr. Fisher must report quarterly and not annually, and from the requirement that the report be face-to-face (not in writing or by telephone), there is a further consequence: failure to report could result in the suspension of Mr. Fisher's parole and his re-committal to custody. This consequence, coupled with the increased frequency of the required reporting, is such that the effect of the Decision was to deprive Mr. Fisher of his liberty interest.

[23] This conclusion flows from the following decisions of the Supreme Court:

i) *R. v. Beare; R. v. Higgins*, cited above, where rights guaranteed by section 7 were infringed by provisions that required a person to appear at a specific time and place and obliged the person to go through an identification process on pain of imprisonment for failure to comply (see page 402 of the decision).

ii) *Cunningham v. Canada*, [1993] 2 S.C.R. 143, where legislation which affected the manner in which an offender could serve part of his sentence by curtailing the probability of release on mandatory supervision was found to deprive the offender of liberty (see pages 148 to 150 of the decision).

iii) *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571, where the availability of a term of imprisonment for the offence of simple possession of marijuana was found sufficient to engage section 7 of the Charter (see paragraph 84 of the decision).

[24] Having found that Mr. Fisher established that he has been deprived of liberty, I move to the second step of the section 7 analysis.

B. *Was the deprivation of liberty contrary to the principles of fundamental justice?*

[25] In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at page 512, the Supreme Court stated that the principles of fundamental justice are found in the basic tenets and principles, not only of our judicial process, but also of other components of our legal system. Flowing from this, when the Supreme Court considered whether the dangerous offender provisions of the *Criminal Code* infringed section 7 of the Charter, the majority of the Court found it was necessary to examine the impugned provision in light of "the basic principles of penal policy that have animated legislative and judicial practice" (*R. v. Lyons*, [1987] 2 S.C.R. 309, at page 327).

[26] As noted above, the Act governs the implementation of custodial sentences that exceed two years. Part II of the Act deals with conditional release, detention and long-term supervision. Section 100 of the Act sets out the purpose of conditional release:

100. The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their	100. La mise en liberté sous condition vise à contribuer au maintien d'une société juste, paisible et sûre en favorisant, par la prise de décisions appropriées quant au moment et aux conditions de leur mise en liberté, la réadaptation et la réinsertion sociale

reintegration into the community as law-abiding citizens.	des délinquants en tant que citoyens respectueux des lois.

[27] In the determination of all cases, the protection of society is the paramount consideration for the Parole Board and provincial parole boards (section 100.1 of the Act).

[28] Consistent with the balance found within section 100, the principles of fundamental justice are concerned not only with the interest of the person whose liberty has been affected; fundamental justice requires that a fair balance be struck between the interests of the individual and the protection of society (*Cunningham*, cited above, at page 152).

[29] When considering the balance, the first question is whether, from a substantive point of view, the impugned provision or action strikes the right balance between the individual's interests and society's interests. The next question is whether the nature of the impact of the impugned provision or action violates the Charter. That is, the liberty interest is limited only to the extent that this is shown to be necessary for the protection of the public (*Cunningham*, at pages 152 to 153).

[30] Dealing with the first question, I begin from the observation that a change in the form in which a sentence is served, whether favourable or not, is not itself contrary to any principle of fundamental justice (*Cunningham* at page 152; *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at paragraph 82). In my view, this comment would apply equally to changes in reporting requirements as a condition of release to serve one's sentence in the community.

[31] As for whether the Decision strikes the right balance between the competing interests of an offender and society, society has a clear interest in being protected from criminal activity perpetrated by offenders on parole reduced status serving their sentence in the community. This risk is managed through adequate monitoring of the risk posed by such offenders. Equally, society has an interest in ensuring that those on parole reduced status remain in contact with their parole supervisor. On the other side of the balance is an offender's interest in rehabilitation and reintegration into the community, unhindered by unnecessary restrictions and conditions.

[32] In my view, the Decision, which requires an offender to report to his or her parole supervisor as instructed by the parole supervisor, strikes the right balance between the interests of society and offenders. Once the Parole Board concluded that it was not possible to monitor adequately the ongoing risk posed by offenders in the community on parole reduced status, a decision not challenged by Mr. Fisher, more frequent reporting was required in order to protect society. The Decision strikes an appropriate balance between the interests of offenders and the interests of society by allowing parole supervisors to determine the required reporting frequency for individual offenders based on their individual circumstances.

[33] The next required inquiry asks whether the nature of the change to the reporting requirements violates the Charter. In my view, it does not because the change is directly related to the public interest in monitoring the ongoing risk posed by offenders in the community on parole reduced status. I note as well that the impact of the Decision upon Mr. Fisher and other similarly situated individuals is much less than the impact of the legislation under consideration in *Cunningham* and the policy under review in *Ferndale Institution*.

[34] In oral argument, counsel for Mr. Fisher argued that the Decision was not consistent with fundamental justice because it was arbitrary and overbroad.

[35] In *R. v. Heywood*, [1994] 3 S.C.R. 761, the Supreme Court considered the overbreadth analysis in the context of section 7 of the Charter. The majority of the Court noted, at page 793, that the effect of overbreadth is that in some applications a law is arbitrary or disproportionate.

[36] More recently, in *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735, at paragraph 38, the majority of the Supreme Court stated that overbreadth addresses the potential infringement of fundamental justice where the adverse effect of state action on the individuals subject to the action is "grossly disproportionate" to the state interest the impugned action seeks to protect (emphasis in original).

[37] In my view, Mr. Fisher's argument that the Decision is arbitrary and overbroad must fail for the following reasons.

[38] As the Supreme Court noted in *Ferndale Institution*, at paragraph 83, a change in circumstance affected by a general policy is not, in itself, arbitrary.

[39] As explained above, the Decision struck an appropriate balance between the interests of offenders and society by allowing parole supervisors to determine the reporting frequency for individual offenders based on their individual circumstances. A quarterly reporting requirement

cannot be said to be grossly disproportionate when viewed against the societal interest described above.

[40] For these reasons, I conclude that Mr. Fisher has not met the onus upon him to prove on the evidence that the deprivation of his liberty was contrary to the principles of fundamental justice enshrined in section 7 of the Charter. In light of this conclusion, it is unnecessary to consider section 1 of the Charter, and I decline to do so.

[41] It follows that I would dismiss the appeal. In the circumstances, I would not award costs.

"Eleanor R. Dawson"
J.A.

"I agree.
Marc Noël C.J."

"I agree.
Johanne Trudel J.A."

APPENDIX

Decision

Conditions altered to require compliance with the condition to report to the parole supervisor as instructed by the parole supervisor, as prescribed by subparagraph 161(1)(*a*) of the *Corrections and Conditional Release Regulations.*

Reasons

The Board is taking this action following a revision of its decision-making policies and its mission, and because of events that have occurred in the community related to offenders on "parole reduced status". Difficulties have been encountered in maintaining contact with some offenders, and other offenders have become involved in further criminal activity.

In view of the foregoing, the Board is of the view that it is not possible to monitor adequately the on-going risk presented by offenders in the community who are on "parole reduced" status, given the requirement only to report (in person or in writing) once per year.

Parole and statutory release supervision is the responsibility of the Correctional Service of Canada. Supervision required the management of the released offender in the community and the reporting to the Board, for its review, of any significant change in the level of risk. As such, the Board is convinced that frequency of supervision contact be determined by the parole supervisor. This is stipulated in subparagraph 161(1)(*a*) of the *Correction and Conditional Release Regulations* and governed by general supervision standards established by the Service in consultation with the National Parole Board.

In view of the above, the Board considers it reasonable and necessary for the protection of society to require compliance with the condition prescribed by the regulations – to report to the parole supervisor as instructed by the parole supervisor.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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