Federal Court of Appeal  Cour d'appel fédérale

Date: 20200124

Docket: A-419-18

Citation: 2020 FCA 25

[ENGLISH TRANSLATION]

CORAM: **GAUTHIER J.A.**
RENNIE J.A.
LOCKE J.A.

BETWEEN:

RENFORD FARRIER

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Montreal, Quebec, on January 21, 2020.

Judgment delivered at Ottawa, Ontario, on January 24, 2020.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: RENNIE J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] This is an appeal by Renford Farrier from the decision rendered by Justice Martine St-Louis of the Federal Court (2018 FC 1190) dismissing his application for judicial review of the decision of the Parole Board of Canada's Appeal Division (the Appeal Division). In its decision, the Appeal Division dismissed Mr. Farrier's appeal from the decision of the Parole Board of Canada (the Board) denying him pre-release parole.

[2] Because of technical problems, the Board was unable to record the hearing held before it. According to Mr. Farrier, this failure justified the cancellation of the Board's decision by the Appeal Division for three reasons. First, the Board purportedly committed an error of law because it was legally obliged to record the hearing pursuant to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the Act). Mr. Farrier's interpretation is based particularly on subsections 140(13) and 140.2(1) of the Act. Second, the failure to record the hearing violated paragraph 10 of section 11.1 of the Policy Manual (the Manual) adopted pursuant to subsection 151(2) of the Act. Finally, in this case, the failure to record the hearing constituted a violation of "the principles of fundamental justice". Even though they all arise from the same fact, each of these three issues constitutes a separate ground of appeal under paragraphs 147(1)(a), (b) and (c) of the Act.

[3] The role of this Court on appeal from a decision of the Federal Court on an application for judicial review is to determine whether the Federal Court chose the correct standard of review for each issue before it, and to ensure that it applied it properly. To do so, this Court steps into the shoes of the Federal Court and focuses on the administrative decision (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559 at paragraphs 45 to 47).

[4] The Federal Court applied the standard of reasonableness to the issue of whether the Act requires the Board to record its hearings. It found that the Appeal Division's interpretation, which was based on subsection 143(1) of the Act and on the interpretation of the Federal Court

in *Giroux v. Canada (National Parole Board)*, 89 F.T.R. 307, 1994 CarswellNat 810 (WL Can) [*Giroux*], was reasonable.

[5] The Federal Court has indicated that if there is a breach of the duty of procedural fairness, it must intervene (*Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at paragraph 54, [2019] 1 F.C.R. 121).

[6] It found that in this case Mr. Farrier had not shown the Appeal Division that the lack of a recording deprived him of his grounds of appeal. It refused to consider Mr. Farrier's affidavit, which was new evidence, because the affidavit was not before the Appeal Division. No permission had been requested in this regard.

[7] Like the Appeal Division, the Federal Court did not address the breach of the Manual as a separate issue.

[8] It only pointed out that the Manual does not have the force of law (reasons at paragraph 36) and that even if the Act had expressly provided for the right to a recording, a breach of this procedural duty would not automatically give rise to the right to have the Board's decision cancelled (reasons at paragraph 39). To obtain such a remedy, Mr. Farrier had to demonstrate before the Appeal Division that there was "a serious possibility" of an error in the case or that the lack of a recording deprived him of his grounds of appeal (*Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793 at paragraph 77 [*CUPE*]).

[9] The Federal Court did not, however, have the benefit of the pronouncements of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*]. It therefore did not examine whether the Appeal Division's decision was based on intelligible and rational reasoning (*Vavilov* at paragraphs 81 to 86).

[10] In the summary of its decision, the Appeal Division expressly stated that there were three grounds of appeal (page 2 of the decision): (i) breach of the Board's policy; (ii) legal: error of law; (iii) duty to act fairly: defective recording. Yet in its (one-page) analysis, it only referred to one of these grounds (see the heading under Analysis), that is, duty to act fairly: defective recording. Under this heading, it summarizes Mr. Farrier's argument (letter from his counsel dated January 31, 2018, appeal book pages 47 to 51) that the lack of a recording violated the principles of fundamental justice because it prevented the Appeal Division from determining whether he had waived the 15 days of notice, applicable when new information is produced at the hearing before the Board, and whether the Board had given him the opportunity to postpone the hearing.

[11] The Appeal Division found that this argument was unfounded and explained that the Act does not require the Board to record its proceedings, particularly given the language of subsection 143(1) of the Act and the Federal Court's interpretation in *Giroux*. It also indicated that the new information to which Mr. Farrier referred was not determinative because the Board expressly pointed out that that information had not been confirmed, as the results of the relevant tests were not yet available.

[12] Before *Vavilov* I would probably have found, as did the Federal Court, that, in light of the presumption that the decision-maker considered all of the arguments and the case law before it and after having read the record, the decision was reasonable. The absence of reasons dealing with the first two issues before the Appeal Division was not at the time sufficient to set aside the decision. It was implicit that the Appeal Division did not accept that the Board's interpretation of the Act was erroneous, particularly considering subsection 143(1) of the Act. Under the circumstances, the administrative decision-maker was presumed to have rejected Mr. Farrier's arguments regarding any prejudice caused by the lack of a recording regardless of whether the Act provides for such a recording or whether there was simply a breach of the Manual. Such a finding was one of the possible outcomes given the Supreme Court's decision in *CUPE*, even if that decision was not cited by the Appeal Division.

[13] In *Vavilov*, the Supreme Court clearly indicated that when an administrative decision-maker must make a reasoned decision in writing (this is the case here; see paragraph 143(2)(a) and subsection 146(1) of the Act), the assessment of the reasonableness of the decision must include an assessment of its justification and transparency. As the Supreme Court pointed out, the reasons given by the administrative decision-maker must not be assessed against a standard of perfection. The administrative decision-maker cannot be expected to refer to all of the arguments or details the reviewing judge would have preferred. "Administrative justice" will not always look like "judicial justice" (*Vavilov* at paragraphs 91 to 98).

[14] The sufficiency of reasons is assessed by taking into account the context, including the record, the submissions of the parties, practices and past decisions of the decision-maker

(*Vavilov* at paragraph 94). However, the Supreme Court noted the principle that the exercise of the Appeal Division's power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it (*Vavilov* at paragraph 95).

[15] As I have said, the Appeal Division did not address the lack of a recording as an error of law or a breach of a policy within the meaning of paragraphs 147(1)(b) and (c). As I will explain below, the Appeal Division also did not address, under the heading "Duty to Act Fairly", the second element clearly stated in the written submissions before it and based on its inability to exercise its power to vary the decision under subsection 147(4) of the Act in the absence of a recording. This argument was also not included in the summary of Mr. Farrier's submissions at the start of the brief analysis. Finally, the Appeal Division also did not indicate why it was not necessary to address it.

[16] In this case, the parties did not raise any rules of practice or past decisions of the Appeal Division that would explain how it normally deals with breaches of policies in the Manual (paragraph 147(1)(c)) and under what circumstances it considers that a breach is sufficient to cancel a decision and order a new hearing. The parties did not submit any past decisions of the Board or of the Appeal Division on the interpretation of subsection 140(13) of the Act or paragraph 10 of section 11.1 of the Manual.

[17] These provisions did not exist when *Giroux* was decided. It is therefore clear that these provisions were not considered in that case. I would also note that in that case the relevant

comments from the Federal Court were in *obiter* because, in that case, there was no hearing, thus nothing to record.

[18] No one raised any arguments that shed light on the Appeal Division's reasoning regarding the content of the duty to act fairly in regard to the factors established by the Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*]. This is normally the first step in deciding whether a decision-maker such as the Board breached the duty to act fairly. Naturally, this analysis can be summary because this is an issue of administrative justice. However, it is still important that the decision-maker be fully aware of how it must proceed in this regard before finding that there has not been a breach of this duty. There is nothing to indicate that this was the case here. This is especially true when one considers that *Giroux* was decided before all of the relevant factors were established in *Baker*. Furthermore, as I have already mentioned, the provisions in the Act and the Manual on which Mr. Farrier relies did not exist at the time of *Giroux*.

[19] Having considered all of the relevant elements (see paragraphs 13 and 14 above) and the fact that the key issues or central arguments raised were not addressed (*Vavilov* at paragraph 128), the reasons do not meet the standard of reasonableness described by the Supreme Court in *Vavilov*.

[20] This Court must not simply remedy deficient reasons by providing its own interpretation of the Act and of the effect of the breach of the Manual, as requested by Mr. Farrier. Parliament clearly expressed its intention that the Appeal Division rule on these issues.

[21] However, in *Vavilov*, the Supreme Court also clearly pointed out that a reviewing court has some discretion and latitude in the remedy to be granted (*Vavilov* at paragraph 142). This is particularly relevant in this case because, in my opinion, the appeal before the Appeal Division could not succeed.

[22] Even if, for the purposes of the exercise, I were to assume

(1) that the Act provides for the recording of hearings as argued by Mr. Farrier; or

(2) that there had been a breach of the Board's policy, even if it did not involve a decision not to record the hearing, but a technical problem; or

(3) that the Board's duty to act fairly included the obligation to record the hearing;

Mr. Farrier would not have automatically been entitled to a new hearing.

[23] Mr. Farrier had to establish a serious possibility of an error on the record or that the lack of a recording deprived him of his grounds of appeal in order to justify a new hearing. The rule established in this regard by the Supreme Court in *CUPE* continues to apply. This was not in dispute at the hearing before us. That is why Mr. Farrier raised two elements in this regard in his written submissions before the Appeal Division.

[24] First, as I said, he raised the possibility that he was not given the opportunity to request a postponement pursuant to subsection 141(3) of the Act.

[25] In his submissions before the Appeal Division, Mr. Farrier also raised the issue that the Board's decision did not contain enough detail to allow the Appeal Division to exercise the power to vary a decision by the Board pursuant to paragraph 147(4)(d) of the Act. In particular, he pointed out the lack of detail as to the nature of the management team's submissions at the hearing, which substantially contradicted the written recommendation in the record, and the lack of detail in the support plan and the resources available for his reintegration submitted by his assistant.

[26] With respect to the first point, as I have already indicated, Mr. Farrier did not file any affidavit before the Appeal Division. His written submissions did not contain any assertion that in this case he did not waive the 15 days of notice or his right to request a postponement. He merely stated that the recording did not make it possible to determine whether his rights had been respected. Yet, Mr. Farrier and his assistant were present at the hearing. Mr. Farrier did not provide any explanation as to why he could not make an assertion in this regard.

[27] There is therefore nothing in the Appeal Division's record that would allow the Appeal Division to conclude that there was a serious possibility of an error by the Board in this regard.

[28] With respect to the second argument, I note that Mr. Farrier did not indicate how more details on the support plan or on the verbal recommendation of the management team and its director are relevant to a ground of appeal described in subsection 147(1) of the Act.

[29] I would first point out that at page 5 (paragraph 7) of the Board's decision, the Board summarized in the most positive way possible the management team's testimony and the director's assessment at the hearing. This summary was particularly favourable to Mr. Farrier and the Board clearly took the testimony and the assessment into account. As for the support plan, the Board indicated that it was detailed and identified the resources and volunteers who would be present to support the reintegration. This is not in doubt.

[30] Because Mr. Farrier was not entitled to a simple *de novo* review before the Appeal Division, he had to connect the lack of details to an argument which he could use as a ground of appeal. Allow me to explain using the *CUPE* decision. In that case, the ground of appeal raised was the lack of evidence supporting an essential element of the tribunal's decision (*CUPE*, p. 842 *in fine*). No such error of law or fact is alleged in this case. It cannot simply be argued that the Appeal Division could not vary the decision in the absence of a recording without clearly indicating the basis upon which the Appeal Division might have to exercise this power. In the absence of submissions on an error that would have vitiated the Board's decision and would warrant the exercise of the power to vary it, the Appeal Division simply could not find that there was a serious possibility of an error as set out in *CUPE*.

[31] I therefore find that it would be pointless to refer this case back for reconsideration. I am satisfied that in the absence of evidence or more detailed submissions, there was only one possible conclusion: dismissal of the appeal by the Appeal Division. There is therefore no reason to set aside the decision and allow the appeal.

[32] Although I propose that this case not be referred back for redetermination, it is essential that the Appeal Division take note of the changes arising from *Vavilov*. It is important that the Appeal Division articulate its rationale in its reasons.

[33] The parties did not seek costs, therefore I would award no costs in this appeal.

"Johanne Gauthier"
J.A.

"I concur.
Donald J. Rennie J.A"

"I concur.
George R. Locke J.A"

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-419-18
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REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
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