Federal Court Cour fédérale

Date: 20160608

Docket: T-1824-15

Citation: 2016 FC 638

Montréal, Quebec, June 8, 2016

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

DR. V.I. FABRIKANT

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA (CORRECTIONAL SERVICE CANADA)

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Appeal Division of the Parole Board of Canada [the Appeal Division], dated July 24, 2015, which confirmed a decision by the Parole Board of Canada [the Board] to refuse the Applicant's request for either an Unescorted Temporary Absence [UTA] or an Escorted Temporary Absence [ETA].

[2] The Applicant was declared a vexatious litigant by this Court in 2000, and cannot commence a new application without first applying for leave to apply for judicial review pursuant to subsection 40(3) of the *Federal Courts Rules*. Leave was granted by Justice Martineau on October 14, 2015.

[3] The Applicant has been incarcerated in a federal penitentiary since 1992.

[4] In 2014, he requested either an UTA or an ETA to visit his family. These absences may be authorized by the Board if it is the opinion that the conditions in sections 17.1(1) (for ETAs) or 116 (for UTAs) of the *Corrections and Conditional Release Act*, SC 1992, c 20, are met. These require amongst other criteria that an offender must not, by reoffending, present an undue risk to society and that it must be desirable for the offender to be absent from the penitentiary.

[5] The Board denied the Applicant's request on February 26, 2015, on the basis that he represented an undue risk to society. It acknowledged that he had been authorized medical ETAs in the past, but was concerned with several elements of his file including: after several years of incarceration, he is still classified as a medium-security inmate; his Case Management Team [CMT] assessed him as having a high risk of recidivism; he has been unable to establish a trusting relationship with his CMT, and he has not addressed his criminal contributing factors since the beginning of his incarceration. With regards to the ETA, specifically, the Board found that it was not linked to the objectives of his correctional plan and it would be an undue risk due the stress and destabilizers to which the Applicant would be exposed.

[6] On July 24, 2015, the Appeal Division confirmed the Board's decision not to authorize a UTA or an ETA.

[7] The sole issue in the present case is to decide whether these decisions were reasonable. Counsel for the Applicant at the hearing abandoned other grounds raised in the Application.

[8] The Federal Court of Appeal has held that the Appeal Division has a limited scope for granting appeals. Where the Appeal Division has confirmed a decision of the Board, the Court must first analyze the lawfulness of the Board's decision (*Cartier v Canada (Attorney General)*, 2002 FCA 384 at para 10; *Collins v Canada (Attorney General)*, 2014 FC 439 at para 36). As Justice Barnes recently noted, "[i]f the Court believes that the Board's decision is lawful, there is no need to review the Appeal Division's decision. The Court's review of the Board's decision is not carried out under a higher standard of review than that of the Appeal Division" (*Ye v Canada (Attorney General)*, 2016 FC 35 at para 8 (citing *Aney v Canada (Attorney General)*, 2005 FC 182 at para 29)).

[9] Sections 17.1(1) and 116 allow the Board to authorize temporary absences when four conditions are cumulatively met. The provisions read as follows:

Temporary absences may be approved — exception	**Permission de sortir avec escorte — exception**
17.1(1) The Parole Board of Canada may authorize the temporary absence of an inmate who is serving a sentence of imprisonment for life imposed as a minimum punishment and is eligible for	17.1(1) La Commission des libérations conditionnelles du Canada peut autoriser un délinquant qui purge une peine minimale d'emprisonnement à perpétuité et est admissible à la semi-liberté à sortir si celui-ci

day parole if the inmate is escorted by a staff member or other person authorized by the institutional head and the Parole Board of Canada is of the opinion that

est escorté d'une personne — agent ou autre — habilitée à cet effet par le directeur du pénitencier lorsqu'elle est d'avis :

(a) the inmate will not, by reoffending, present an undue risk to society during an absence authorized under this section;

a) qu'une récidive du délinquant pendant la sortie ne présentera pas un risque inacceptable pour la société;

(b) it is desirable for the inmate to be absent from the penitentiary for administrative reasons, community service, family contact, including parental responsibilities, personal development for rehabilitative purposes or compassionate reasons;

b) que cela est souhaitable pour des raisons administratives, de compassion ou en vue d'un service à la collectivité ou du perfectionnement personnel lié à la réadaptation du délinquant, ou encore pour lui permettre d'établir ou d'entretenir des rapports familiaux, notamment en ce qui touche ses responsabilités parentales;

(c) the inmate's behaviour while under sentence does not preclude authorizing the absence; and

c) que la conduite du détenu pendant la détention ne justifie pas un refus;

(d) a structured plan for the absence has been prepared.

d) qu'un projet structuré de sortie a été établi.

The temporary absence may be for a period of not more than 15 days.

La permission est accordée pour une période maximale de quinze jours.

Conditions for authorization

Motifs de l'octroi

116(1) The Board may authorize the unescorted temporary absence of an offender referred to in paragraph 107(1)(e) where, in the opinion of the Board,

116(1) La Commission peut autoriser le délinquant visé à l'alinéa 107(1)e) à sortir sans escorte lorsque, à son avis, les conditions suivantes sont remplies :

(a) the offender will not, by reoffending, present an undue risk to society during the absence;	a) une récidive du délinquant pendant la sortie ne présentera pas un risque inacceptable pour la société;
(b) it is desirable for the offender to be absent from penitentiary for medical, administrative, community service, family contact, personal development for rehabilitative purposes, or compassionate reasons, including parental responsibilities;	b) elle l'estime souhaitable pour des raisons médicales, administratives, de compassion ou en vue d'un service à la collectivité, ou du perfectionnement personnel lié à la réadaptation du délinquant, ou pour lui permettre d'établir ou d'entretenir des rapports familiaux notamment en ce qui touche ses responsabilités parentales;
(c) the offender's behaviour while under sentence does not preclude authorizing the absence; and	c) sa conduite pendant la détention ne justifie pas un refus;
(d) a structured plan for the absence has been prepared.	d) un projet de sortie structuré a été établi.

[10] The Appeal Division and the Board both considered relevant factors to conclude that the proposed temporary absences did not meet the factors set out at paragraph *a*), *b*) and *d*) of sections 17.1(1) and 116 of the CCRA. More particularly, the Board found that:

> "Considering all the above elements, the Board concurs with your CMT's opinion and is not authorizing ETA and UTA as it considers that you will, by reoffending, present an undue risk for society, during the absence. To come to that conclusion, the Board takes into consideration all the above elements, the fact that you have not addressed your contributing factors, that you still have a medium-security level, that the risk of recidivism in a violent crime is assessed as high by your CMT, that your risk factors are still present and that you have not been able to establish a trusting relationship with your CMT.

> Despite the fact that you were authorized ETA for medical reasons in the past, the Board also concurs with your CMT and does not authorize ETA for family contacts considering that is also not desirable mainly because it is not linked to the objectives set out in your correctional plan. Moreover, the risk would be undue with the stress linked to your social reinsertion and the exposure to number of destabilizers such as being in contact with your family after so many years, your public image, the media's pressure and your non compliance with remediation attempts."

[11] The Applicant has not identified errors of fact so much as statements by the Board that he disagrees with. For the most part, the Applicant is claiming he is not a risk to his family and that this should be obvious given his age and the fact he has had several uneventful ETAs in the past. He is asking for this Court to substitute its opinion for that of the Board and Appeal Division instead of demonstrating how those decisions were unreasonable. I find that the Board and Appeal Division made findings of fact which were supported by the evidence on the record and the decisions fall within the range of possible, acceptable and defensible outcomes.

[12] For these reasons, the application for judicial review is dismissed without costs.

JUDGMENT

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

"Danièle Tremblay-Lamer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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