Federal Court Cour fédérale

Date: 20180226

Docket: T-981-17

Citation: 2018 FC 217

Ottawa, Ontario, February 26, 2018

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

MARK BARR

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Wireless devices, computers and Internet technology are important if not indispensable in today's world. The issue in this application is whether the Parole Board of Canada [the Board] was unreasonable in banning the Applicant from owning, using, or possessing a computer, or any technological device that would allow him to access the Internet and from possessing or using wireless telecommunication devices.

I. Overview

[2] This is an application for judicial review under section 18.1 of the Federal Courts Act, RSC 1985, c F-7, of a decision of the Board concerning the terms of a Long-Term Supervision Certificate dated May 29, 2017 issued following the Applicant's release from custody on or about May 29, 2017. The Board imposed a number of conditions on the Applicant and re-imposed special conditions not to own, use or possess a computer, as defined in section 342.1 of the Criminal Code, RSC 1985, c C-46, or any technological device, that would allow the Applicant to access the Internet and that he refrain from possessing or using wireless telecommunication devices, which also includes tablets or any other wi-fi capable device [the Special Conditions]. The said conditions had originally been imposed by the Board on August 4, 2015, following the Applicant's repeated breaches of a Long-Term Supervision Order [LTSO].

[3] In his Notice of Application filed on June 28, 2017, the Applicant asserted that the Board's conditions respecting the LTSO violated the common law duty to act fairly, as well as section 7 of the C*anadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], specifically the requirement that a person must not be deprived of his liberty except in accordance with the principles of fundamental justice. The Applicant withdrew his *Charter* arguments at the hearing of this application. However, the Applicant maintains that the decision should be set aside on the grounds that the Board imposed conditions that were neither reasonable nor necessary and relied on erroneous and incomplete information that was irrelevant, prejudicial, and incorrect.

[4] For the reasons that follow, I am unable to conclude that the Board's decision to re-impose the Special Conditions was unreasonable. While the conditions may seem draconian given the usefulness and ubiquity of such technology, the decision falls within the range of reasonable outcomes and was sufficiently justified, transparent, and intelligible. The application is therefore dismissed with costs.

II. Facts

[5] The Applicant did not file any affidavit in support of the application. All of the facts upon which the parties rely are contained in the 1038-page tribunal record.

[6] The Applicant is subject to a LTSO for a duration of ten years, which expires on February 4, 2025. The LTSO was imposed after the Applicant was convicted of Sexual Assault with a Weapon, Sexual Assault Causing Bodily Harm, Forcible Confinement, and Break and Enter. In 1998, the Applicant threatened to kill his 23-year-old female victim, who was unknown to him, while holding a knife to her throat as he repeatedly sexually assaulted and beat her in her home.

[7] The Applicant was sentenced to 8 years and 8 months in custody, which commenced on May 11, 2006, followed by a 10-year period of long-term supervision. The sentencing judge ordered the Applicant to serve half of his sentence before his full parole eligibility and abide by a twenty-year term under the *Sex Offender Information Registration Act*, SC 2004, c 10.

[8] The Applicant had previously been convicted of two other, separate sexual assaults against 16-year-old girls, both committed while he was unlawfully at large from provincial custody on a temporary absence, and both of which attracted penitentiary terms of imprisonment. His criminal history is described as persistent, varied, and marked by an escalation in offence severity over time, including violent sexual offences.

[9] In February 2012, the Applicant was released on statutory release [SR] with a condition that he reside in Hamilton, Ontario. The Board also imposed the following conditions: avoid female children under 18 years, abstain from alcohol and drugs, report intimate sexual and non-sexual relationships with females, disclose financial information, and not be in a position of trust over any female.

[10] The Applicant's SR was revoked twice by the Board for the use of crack cocaine. The SR was suspended by the Correctional Service of Canada [CSC] until June 23, 2014, when the Applicant was again released on SR with a residency condition, and the conditions that had been imposed by the Board in 2012. Two new conditions were imposed: that he avoid drinking establishments and refrain from associating with those persons who may be involved in criminal activity.

[11] On June 16, 2014, the Board rendered a decision regarding the imposition of special conditions on the Applicant's LTSO, which was scheduled to commence at the end of his SR period on January 10, 2015. The Board included a number of special conditions to the Applicant's LTSO. These included, *inter alia*, that the Applicant not be in the presence of any

females under the age of 18 except in certain, supervised circumstances; that he report all relationships with women to his parole supervisor; and not be in a position of trust over any female. The Board did not impose any restrictions on the Applicant's Internet or computer usage at that time.

[12] After the Applicant was released on SR on June 23, 2014, he remained in the community for approximately two months before his release was suspended for breaching his condition to avoid children under the age of 18. The Applicant had, through a dating website, met a woman who had children, including two daughters aged 13 and 16. Despite being cautioned by his parole officer that he was not to be at the house when the girls were at home, the Applicant was found on the porch while the children were inside the house. The Children's Aid Society recommended that the Applicant's access to the Internet be restricted so that he could not easily "troll" for relationships. The Applicant's Case Management Team [CMT] endorsed this recommendation and also suggested that the same change be made to the Applicant's LTSO conditions.

[13] The Applicant's SR was revoked by the Board on November 14, 2014 for the violation of the condition to avoid certain persons, namely children. On November 25, 2014, the Board concurred with the CMT's recommendation and added the following conditions to the Applicant's LTSO: "not to own, use or possess a computer, as defined in s. 342.1 of the Criminal Code, or any technological device, that would allow you unsupervised access to the internet."

[14] On November 28, 2014, the Applicant was released on SR in Ottawa. He reached his warrant-expiry date on January 10, 2015 and began his long-term supervision. Five days later, the Applicant's long-term supervision was suspended by the CSC when he was found to be in possession of a cell phone with an Internet browser and wi-fi connection capacity. He confessed to using the phone to communicate with his ex-girlfriend, the woman he met online, despite his parole officer's instruction that he should not contact her. The Applicant's parole officer recommended that additional conditions regarding the use and access to cellphone and telecommunication devices be added to the Applicant's LTSO. She expressed that these conditions would better allow her to monitor the Applicant's related communication on cellular phones, email, and social utility sites to ensure he respected his condition regarding his relationships with females.

[15] Upon the Applicant's request, the Board conducted an oral hearing into the Applicant's alleged breaches of the conditions of his long-term supervision. The Board issued a decision on April 1, 2015, finding that the Applicant could be managed in the community, cancelling the Applicant's long-term supervision suspension. However, the Board also concluded that further conditions were reasonable and necessary to manage the Applicant's risk to society during his long-term supervision. The Board altered the conditions of his LTSO to include additional conditions that increased the Applicant's need for supervision and monitoring of cellular activity, and maintained his existing Internet-access restrictions.

[16] On May 12, 2015, the Applicant's long-term supervision was again suspended by CSC for his breach of the LTSO conditions, as had been amended in April 2015. The Applicant had

accessed the Internet while using the computer at an employment centre and sent a message to his former female parole officer through the networking website LinkedIn. The Board determined that the Applicant had manipulated the computer at the centre to allow him to remotely access the Internet, lied about who was supervising him, and failed to disclose the conditions and requirements of his supervision. On June 26, 2015, the Applicant was again found in breach of this condition when he was found in possession of a cellphone with wi-fi access capacity.

[17] On August 4, 2015, the Board removed the Applicant's previous restrictions regarding supervised and monitored computer, cellular, and Internet use and replaced them with the following conditions: "[r]efrain from owning, possessing or using wireless telecommunications devices (this involves cellular phone technology, tablets and wi-fi capable devices); and not to own, use or possess a computer."

[18] The Applicant was released to a community correctional centre in Kingston on November 24, 2015, and then transferred to Hamilton on December 1, 2015. Since his transfer to Hamilton, the Applicant maintained employment and completed a sex-offender program. A program report dated June 9, 2016, noted positive gains were made and no further intervention was recommended. The Applicant engaged in psychological counselling and was compliant with the rules and regulations of his Community Residential Facility [CRF] and the conditions of his release.

[19] On June 20, 2016, the Applicant was late for his CRF's 23h00 curfew and was considered "whereabouts unknown". The Applicant called the CRF at 23h07 from a pay phone reporting that he was at an undisclosed hospital with neck pain sustained due to a workplace injury. However, CRF staff called the local hospitals to confirm this, with no results. It was agreed to give him until midnight to contact the CRF, however he failed to do this. CRF made another attempt to confirm he was in hospital but, again, with no results. At 10h07 on June 21, 2016, the Applicant called the CRF claiming that he was feeling better and admitted that he had used drugs. He was taken into police custody shortly after. At his post-suspension interview, the Applicant denied any use of alcohol or drugs. He stated that he intended to commit suicide by a heroin overdose; however, he claimed that he did not receive the drug, stating he was "ripped off".

[20] In a decision dated September 8, 2016, the Board concluded that the Applicant's behaviour represented a continued pattern of violation of the conditions of his long-term supervision, that he had breached a condition of his release, and also that his actions placed him in a situation where he had associated with individuals involved in criminal activity. According to a psychological report dated July 12, 2016, the Applicant was assessed as a moderate risk for violent re-offending and high for sexual recidivism.

[21] The Board was satisfied that no appropriate program of supervision had been established that would adequately protect society from the risk of him re-offending. Consequently, the Board recommended that an information be laid charging the Applicant with an offence under section 753.3 of the *Criminal Code*.

[22] The Applicant was charged with breaching the conditions of his LTSO and remained in custody. On May 2, 2017, he was convicted of the breach of his LTSO and sentenced to 27 days in custody. In a “procedural safeguard declaration” signed by the Applicant on May 11, 2017, he waived his right to make written representations to the Board regarding information being considered by the decision-making authority. When the Applicant completed his sentence and was released on May 29, 2017, there were no changes to his LTSO. The same conditions that had been imposed by the decision of the Board dated August 4, 2015 were simply continued.

[23] On June 28, 2017, the Applicant brought the present application seeking judicial review of the imposition of the Special Conditions.

III. Standard of Review

[24] The parties agree that the applicable standard of review for decisions of the Board that are an exercise of its discretion is reasonableness. Under section 134.1 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA], the Board has the power to impose special conditions of supervision according to the risk of recidivism particular to each case. Subsection 134.1(2) requires the Board to establish conditions that it considers “reasonable and necessary” in order to protect society and to facilitate the successful reintegration into society of the offender.

[25] The broad wording of subsection 134.1(2) was intended to leave the Board with broad discretion. Given that the Applicant has not alleged any procedural unfairness, I agree that the

Board's decision is to be assessed against a reasonableness standard, which mandates deference: *Lalo v Canada (Attorney General)*, 2013 FC 1113 at para 16 [*Lalo*].

IV. Issue to be Determined

[26] This case is complicated by the fact that there was no hearing conducted by the Board or any actual decision issued by the Board on May 29, 2017 regarding the Applicant's long-term supervision. The Board simply issued the Certificate on that date recommencing the Applicant's long-term supervision with the same conditions that had been imposed on August 4, 2015.

[27] The Certificate itself has not been produced by the parties and is not found in the tribunal record. Moreover, there is no indication that the Applicant challenged the Special Conditions when they were initially imposed or ever applied to the Board to vary the conditions. Notwithstanding, the Respondent did not raise any objections regarding the timeliness of the application or the jurisdiction of this Court to entertain the proceeding.

[28] The sole issue to be determined is whether the re-imposition of the conditions restricting the Applicant's use and possession of telecommunication devices was unreasonable and should be set aside.

V. Analysis

[29] When reviewing a decision on the standard of reasonableness, the analysis is concerned "with the existence of justification, transparency and intelligibility within the decision-making

process”, and the administrative decision-maker’s findings should not be disturbed as long as the decision “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]). In conducting a reasonableness review, it is not the role of the Court to reweigh the evidence or the relative importance given by the decision-maker to any relevant factor (see *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 99). As long as the decision-maker’s reasons allow the reviewing court to understand why it made its decision and permit the court to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria of “justification, transparency and intelligibility” are met (see *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 15-16 [*Newfoundland Nurses*]).

[30] The Applicant submits that the Board’s “decision” was unreasonable in that the Board failed to consider all relevant and reliable information related to the Applicant’s risk to society and his offences before imposing the conditions restricting his use and ownership of telecommunication devices and access to the Internet. This includes the fact that “the Applicant’s offences have nothing to do with accessing victims through technological devices.” The Applicant submits that the fact that he has been convicted under the *Criminal Code* for a breach of conditions is in no way a rational or legal argument in support of the condition itself.

[31] The Applicant submits that there must be a rational and direct link between the condition imposed by the Board and the risk of criminal behaviour sought to be minimized. He maintains

that that “the PBC [the Board] cannot simply speculate about possible risks to public safety nor draw tenuous conclusions regarding conditions and criminal behaviour”.

[32] In support of his argument, the Applicant relies on the decision of the Ontario Court of Appeal in *R v Brar*, 2016 ONCA 724 [*Brar*], which involved an offender who had lured young people over the Internet. The Court of Appeal canvassed the reasonableness and necessity of prohibitions on technology use by sex offenders subject to court-imposed conditions designed to reduce risk to public safety. At paragraph 24, the Court found that depriving an offender under paragraph 161(1)(d) of the *Criminal Code* of access to the Internet is tantamount to severing that person from an increasingly indispensable component of everyday life.

> [24] In modern life, at least some form of access to the Internet is simply unavoidable for innocent purposes such as accessing services and finding directions. In many homes the telephone operates using the Internet, rather than traditional telephone wires. Simply placing a phone call from one such residence would put the appellant in breach of the s.161(1)(d) order. Further, as Karakatsanis J. stated in *K.R.J.*, at para. 54, “depriving an offender under s. 161(1)(d) of access to the Internet is tantamount to severing that person from an increasingly indispensable component of everyday life”. Internet is used for such commonplace activities as shopping, corresponding with friends and family, transacting business, finding employment, banking, reading the news, watching movies, attending classes and so on.

[33] The Court of Appeal held that there must be a direct relationship between risk and criminal behaviours and the terms of an order made under section 161 of the *Criminal Code*, which concerns the discretion of a sentencing judge to prescribe certain conditions in a probation order for a number of offences, including various sexual offences.

[34] The Applicant submits that the conditions implemented by the Board have made meaningful reintegration into society impossible with its decision to prohibit the Applicant's access to wireless communication devices. The Applicant further submits that reintegration into society is the cornerstone of the mandate of both CSC and the Board, as "it is the means by which public safety is achieved except for the very few most untreatable and hopeless offenders serving life sentences". In support, the Applicant cites section 100 of the CCRA:

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

[35] The Applicant reiterates that there is no rational basis for the Special Conditions imposed by the Board pursuant to the Applicant's LTSO and that they are unnecessary to protect public safety from the risk posed by the Applicant. The Applicant submits that they are too onerous and unfairly limit his ability to reintegrate into society.

[36] The judgment in *Brar* was released on October 5, 2016, after the Special Conditions were imposed on the Applicant. There is no indication that the Applicant raised similar arguments before the Board. In any event, the Applicant's case is distinguishable from that in *Brar*. First, the order under section 161 of the Criminal Code at issue in *Brar* was crafted at the time of sentencing. Second, unlike the Applicant in the present case, Mr. Brar had no prior criminal history. Third, and more importantly, the Ontario Court of Appeal concluded that the sentencing

judge did not seek to tailor the section 161 order to carefully respond to Mr. Brar's specific circumstances, nor to relate the terms of the order to the type of risk Mr. Brar posed. By contrast, the Applicant has shown time and time again through his actions that his risk cannot be mitigated by alternatives that are less restrictive than an outright telecommunications ban.

[37] The Court must show deference for the Board's expertise in imposing conditions under section 134.1 of the CCRA (see *Lalo* at para 16). The Board's decision to impose the Special Conditions currently in force regarding the Applicant's computer and Internet access appears reasonable given the Applicant's index offence, criminal history, risk of re-offending, and his pattern of violating his LTSO and deceiving those charged with his supervision. The Applicant's conditions originally did not include restrictions on access to the Internet. However, the circumstances in which the Applicant finds himself are substantially of his own making.

[38] When the Board first imposed special conditions on the Applicant's LTSO on June 16, 2014, it noted the Applicant's prior criminal history of sexual violence against women and teenaged girls, as well as his moderate-to-high risk of overall recidivism, and his then high risk of violent sexual recidivism.

[39] After the Applicant breached his SR conditions by having contact with the teenaged daughters of his girlfriend, the Applicant provided written submissions to the Board outlining his objections to the Internet restriction, citing employment purposes and family contact as the basis for his need for Internet access. In its November 25, 2014 decision, the Board considered these arguments, as reflected in its reasons, but found that the Applicant could use letter writing and

telephone calls as a means to maintain family ties and that he could access electronic employer information under the supervision of his parole officer during their regular meetings. The Board concluded that the condition did not pose a hardship and that it was reasonable and necessary.

[40] The Board further noted in its reasons that the Applicant used dating sites on his most recent release, seeking out a woman with whom he began a relationship. She was the mother of minor children and, according to file information, the woman told CSC that she ended the relationship when she discovered he was a sex offender. This indicated to the Board that she had been unaware of the true nature of his offences.

[41] As previously noted, the Applicant's SR was revoked after he was found to have violated his non-association condition by being at the home when the children were present. The Board noted that the CMT reported that the Applicant did not appear to have an appreciation of the severity of his circumstances and that he continued to demonstrate a lack of consequential thinking and poor problem-solving skills despite having participated in programming. The Board found that this called into question the depth of the Applicant's learned skills as he appeared unable in these circumstances to demonstrate changed behaviour.

[42] Restrictions on the Applicant's access to telecommunications devices and the Internet were not imposed because of the Applicant's use of these technologies in his prior criminal acts, but rather because it was found that the Applicant's prior criminal history and risk of recidivism was such that his interaction with women had to be monitored and restricted. This was initially achieved with special conditions restricting contact with girls under 18 and reporting

relationships with women to his parole officer. However, because the Applicant had shown a propensity to use the Internet to meet women, and then minimized the nature and severity of these breaches, the Board found, on November 25, 2014, that it was necessary that the Applicant only access computers and the Internet when supervised. He was still permitted to own a cellular telephone as long as it did not have the capacity to access the Internet.

[43] However, during the Applicant's subsequent releases into the community, he repeatedly breached his computer and Internet restrictions, by contacting the woman he had met online and by possessing a cellphone with Internet capacity that he had previously lied about. On May 12, 2015, the Applicant's long-term supervision was again suspended when he was found to have manipulated a computer at an employment centre, lying to those supervising him, by installing software that supports remote access to the Internet. As part of this non-compliant access, the Applicant sent a message to a former female parole officer requesting that she add him as a contact on the social media network LinkedIn.

[44] The conditions imposed by the August 4, 2015 decision of the Board were well supported by the CSC's recommendations. Various parole officers have commented on the challenges he poses and his deception. Of particular concern is the fact that the Applicant was noted to be "rather tech savvy and more aware of emerging technological trends and gadgets than those who are tasked with supervising him." It was also noted that the Applicant "presents well and is reasonably adept at manipulation, in fact Ottawa CRF staff have indicated that after Mr. Barr has been caught in a deception, they believed him fully when he first lied."

[45] It is a well-recognized principle of administrative law that a decision-maker is presumed to have weighed and considered all the evidence presented to it unless the contrary is shown (see *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 538 (FCA) (QL) at para 1). The Applicant has not advanced any argument or pointed to any evidence that would rebut this presumption. Even if the Board had failed to mention a particular piece of evidence, it does not mean that it was ignored and a decision-maker is not required to refer to each and every piece of evidence supporting its conclusions (see *Newfoundland Nurses* at para 16).

[46] The Applicant waived his right to make written submissions to the Board before his release from custody in May 2017 and has not adduced any evidence that directly contradicts a finding of fact by the Board that led to the re-imposition of the conditions currently in force.

[47] Counsel for the Applicant argued at the hearing of the application that the Special Conditions were too onerous and unfairly limit the Applicant's ability to reintegrate into society. It is well-established, however, that a judicial review is meant to be a review of a decision, not a *de novo* hearing to be undertaken by a court.

[48] Under subsection 134.1(4) of the CCRA, an offender may ask the Board to remove or vary the application of any condition it has prescribed (see *R v Bird*, 2017 SKCA 32 at para 52). The proper course of action for the Applicant, if he was dissatisfied with the conditions of his LTSO, was to apply to the Board under subsection 134.1(4) of the CCRA to remove or vary the application of a condition. The Applicant could then apply for judicial review, if still dissatisfied, on a proper record.

VI. Conclusion

[49] For the above reasons, I conclude that the Board's issuance of a Long-Term Supervision Certificate re-imposing restrictions on the Applicant's use, possession, and ownership of computers and telecommunication devices, falls within a range of possible, acceptable outcomes defensible in respect of the facts and law. The "decision" is consistent with the purposes of the applicable legislation and regulations governing the conditional release and long-term supervision of offenders, namely to protect the public and to rehabilitate offenders in order to reintegrate them into society.

[50] The application is accordingly dismissed. Costs of the application are hereby fixed in the amount of $200.00, inclusive of disbursements and taxes, as agreed by the parties, and shall be paid by the Applicant.

JUDGMENT in T-981-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. Costs of the application, hereby fixed in the amount of $200.00, inclusive of disbursements and taxes, shall be paid by the Applicant to the Respondent.

"Roger R. Lafrenière"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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